5

The Judicial Use of Unincorporated International Conventions in Administrative Law: Back-Doors, Platitudes and Window-Dressing

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I Introduction

> Courts throughout the common law world have, for some time, given effect to international legal obligations (especially human rights norms) by way of administrative law doctrines and techniques. When the source of the international obligations constraining executive discretion is a convention ratified by the executive, but not incorporated by parliament into legislation, traditional alarm bells ring. Such 'backdoor' incorporation seems to amount to executive usurpation of the legislature's monopoly of law-making authority, or to judicial usurpation of the same, or a combination of both.[1]

The above quote, taken from an article jointly written by senior administrative law academics from Canada, the United Kingdom and New Zealand, highlights two important points. First, that judges residing in common law jurisdictions have for some time used and developed the common law in order to give greater effect to ratified but unincorporated treaties.[2] Secondly, it highlights that this trend occurs against the backdrop of the separation of powers and parliamentary supremacy, where the

1 David Dyzenhaus, Murray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 *Oxford University Commonwealth Law Journal* 5, 5.

2 See also Brian Opeskin, 'Constitutional Modelling: The Domestic Effect of International Law in Commonwealth Countries: Part 2' [2001] *Public Law* 97, 105–6.