INTERNATIONAL CONVENTIONS AND ADMINISTRATIVE LAW

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When Kirby J leaves the High Court part of his legacy will be a willingness to draw on international instruments, especially those embodying human rights and fundamental freedoms, as a source of guidance in developing Australian domestic law. In relation to the general law, he sought to ensure that it developed in harmony with basic human rights principles.[1] In relation to statute law, he sought to involve a presumption (ultimately sourced to the general law) that Parliament would not intend to depart from human rights principles and its statutes should be construed, so far as possible, to avoid results which would contravene such principles.[2] He was not entirely a lone voice in these exercises, although he pressed more consistently and strenuously for such outcomes. Even in areas of constitutional construction, he sought to apply a similar principle.[3]

These are broad issues which I do not intend to address today. But they form a backdrop to any discussion of the influence of international conventions on domestic administrative law. In other words, one does not need to incorporate international conventions directly into domestic law to give them effect. They can operate indirectly and more subtly. That they will do so in a country with political and judicial cultures largely reflective of basic human rights is to be expected. Nor should it be forgotten that we have enacted as part of our domestic law, jurisdiction by

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1 See, eg, *Tofilau v The Queen* [2007] HCA 396, 231 CLR 396 at [148], [215]; *Young v Registrar, Court of Appeal* (1993) 32 NSWLR 262 at 276-280.

2 See, eg, *Coleman v Power* [2004] HCA 39; 220 CLR 1 at [240]-[249]; *Attorney-General (WA) v Marquet* [2005] HCA 67; 217 CLR 545 at [172]-[186].

3 See, eg, *Bennett v Commonwealth* [2007] HCA 18; 231 CLR 91 at [143]-[149]; *Al-Kateb v Godwin* [2004] HCA 37; 219 CLR 562 at [152]-[193]; *Kartinyeri v Commonwealth* [1998] HCA 22; 195 CLR 337 at [166]-[167].

jurisdiction, the major anti-discrimination conventions relating to race, women and disability. Again any assessment of their impact is a question for another day, but is it likely that the following statement would have obtained broad support in the High Court absent the *Racial Discrimination Act* 1975 (Cth)?

> "Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights[4] brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration."

That, as you will recognize was Brennan J in *Mabo v Queensland [No. 2]*[5] in 1992.

One objection to reference to international instruments is that they are often formulated in imprecise, exhortatory or aspirational language. This is a matter of some significance constitutionally. The power of the Parliament under s 51(xxix) of the Constitution is limited to legislation which implements or carries into effect the provisions of a treaty and does not permit the subject matter of the treaty to be a matter for legislation.[6] Another concern is that treaties take judges into areas of discourse with which they are ill-equipped to deal. A third is that the concerns of the international community may arise in a different milieu from the concerns of our community. To an extent, our thinking on these topics has been influenced by a decade of defensive reactions to complaints brought before the UN Committee on the Elimination of Racial Discrimination, particularly in relation to treatment of Indigenous Australians and the detention of asylum-seekers.

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4 See Communication 78/1980 in *Selected Decisions of the Human Rights Committee under the Optional Protocol*, vol 2, p 23.

5 [1992] HCA 23; 175 CLR 1 at 42.

6 See, eg, the discussion by Gibbs CJ (in dissent) in *Commonwealth v Tasmania* (*The Tasmanian Dam Case*) [1983] HCA 21; 158 CLR 1 at 90.

But these negative elements must be kept in perspective. There is no doubt that our belated recognition of native title was influenced by our ratification in 1975 of the *International Convention on the Elimination of All Forms of Racial Discrimination*. The enactment by the Commonwealth of the *Racial Discrimination Act* in 1975 invalidated further alienation of land subject to native title. To accommodate these results within the general law required a major shift in the level of sophistication at which analysis of the concept of property was undertaken.[7]

Concomitantly, with the controversial mandatory detention of some asylum-seekers, the federal courts were flooded with cases under the *Convention relating to the Status of Refugees*. When, during the 1980-1990s, the *Migration Act* 1958 (Cth) was recast to limit the need for discretionary decision-making, the Commonwealth could not ignore its international obligations under the *Refugees Convention*. It was (and is) bound to allow entry to persons who have a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion …".[8] Administrative officers and, on review, judicial officers, have spent much time in the last two decades seeking to understand and apply these ideas to the actions of foreign states. They have had to consider whether women are a particular social group in all or some countries; whether the Chinese 'one-child policy' was persecution on a relevant ground;[9] whether the level of protection afforded to women against domestic violence in Pakistan was capable of constituting a form of persecution.[10] These, as well as cases under anti-discrimination laws based on other conventions, have familiarized the courts (to an extent) with the discourse of international human rights principles.

In *Roach v Electoral Commissioner*[11] the High Court was asked to determine the constitutional validity of a Commonwealth law precluding any person serving a sentence of full-time imprisonment from voting in a Commonwealth election. The Constitution merely required that members of Parliament be "chosen by the

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7 See *Yanner v Eaton* [1999] HCA 53, 69; 201 CLR 351.
8 Art 1(A)(2)
9 See *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4; 190 CLR 225; *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* [2000] HCA 19; 201 CLR 203.
10 *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14; 210 CLR 1.
11 [2007] HCA 43; 81 ALJR 1830.

people".[12] Although, as Gleeson CJ noted, Australia achieved 'universal suffrage' by legislative action,[13] his Honour considered that such a requirement was now constitutionally entrenched. However, that requirement could admit of minor exceptions. The question raised was whether the expansion of the previous exception with respect to prisoners serving sentences of three years or more could validly be expanded to cover all people in full-time imprisonment. The way his Honour approached the question in terms of principle is instructive.

> "It is difficult to accept that Parliament could now disenfranchise people on the ground of adherence to a particular religion. It could not, as it were, reverse Catholic emancipation. Ordinarily there would be no rational connection between religious faith and exclusion from that aspect of community membership involved in participation, by voting, in the electoral process. It is easy to multiply examples of possible forms of disenfranchisement that would be identified readily as inconsistent with choice by the people, but other possible examples might be more doubtful. An arbitrary exception would be inconsistent with choice by the people. There would need to be some rationale for the exception; the definition of the excluded class or group would need to have a rational connection with the identification of community membership or with the capacity to exercise free choice."[14]

A similar approach may be gleaned from the joint reasons of Gummow, Kirby and Crennan JJ.[15]

Of course *Roach* was not concerned with the operation of any international instrument: rather it demonstrated how the language of international human rights analysis has been absorbed and is being applied by a majority of the Court.

By that, I do not mean either that the influence is always direct or determinative; but in *Roach* it was expressly acknowledged by reference to related developments in Canada in *Sauvé v Canada (Chief Electoral Officer)*[16] and, across the Atlantic, in *Hirst v United Kingdom (No. 2)*,[17] a decision of the European Court of Human Rights. As the joint reasons noted:

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[12] Constitution, ss 7, 24.
[13] At [6].
[14] At [8].
[15] At [100]-[102].
[16] [2002] 3 SCR 519.
[17] (2006) 42 EHRR 41.

> "The question respecting the three year provision that is presented by the constitutional jurisprudence of this Court differs from that which would arise at Ottawa or Strasbourg. It is whether the 2004 Act is appropriate and adapted to serve an end consistent or compatible with the maintenance of the prescribed system of representative government. The end is the placing of a civil disability upon those serving a sentence of three years or longer for an offence, the disability to continue whilst that sentence is being served."[18]

Nor are the courts' experiences of international instruments limited to human rights conventions. The areas in which the courts have had to consider the operation of treaties having effect under domestic law are legion.[19] They include the *Chicago Convention on International Civil Aviation*,[20] and implementation of recommendations of the International Labour Organization (the ILO). They also include environmental conventions, such as those relating to protection of world heritage and endangered species.[21] One area, involving post-war agreements with respect to German assets led to an intriguing case, *Bluett v Fadden*[22] in which McLelland J considered the operation of the obscure provision of the Constitution, s 75(i), which confers original jurisdiction on the High Court in respect of matters "arising under any Treaty". For reasons which need not trouble us tonight, s 38 of the *Judiciary Act* 1903 (Cth) made the jurisdiction of the High Court exclusive in respect of "matters arising directly under any Treaty". If you are an internationalist, like Kirby J, you may enjoy his Honour's excurses into this intriguing, but little considered, aspect of constitutional law in *Re East; Ex parte Nguyen*[23] and the subsequent analysis by Mark Leeming

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[18] At [101].

[19] See Sir Anthony Mason, *'The Influence of International and Transnational Law on Australian Municipal Law'* (1996) 7 Pub L Rev 20.

[20] See *Airlines of New South Wales Pty Ltd v New South Wales [No. 2]* [1965] HCA 3; 113 CLR 54; *Gulf Air Company GSC v Fattouh* [2008] NSWCA 225 (Allsop P, Hodgson and Campbell JJA agreeing).

[21] See, eg, the *Tasmanian Dam Case* (above); *Australian Conservation Foundation v Forestry Commission* (1986) 19 FCR 125; *Re The International Fund for Animal Welfare (Aust) Pty Ltd and Minister for Environment and Heritage* [2005] AATA 1210; 93 ALD 594; *Re The International Fund for Animal Welfare (Aust) Pty Ltd and Minister for Environment and Heritage (No. 2)* [2006] AATA 94; 93 ALD 625 (Asian elephants cases); *Re Nature Conservation Council of New South Wales Inc and Minister for Environment and Water Resources* [2007] AATA 1876; 98 ALD 334 (Grey nurse sharks case).

[22] [1956] SR (NSW) 254.

[23] [1998] HCA 73; 196 CLR 354.

SC, "Federal Treaty Jurisdiction"[24] and the later discussion by Professor Leslie Zines in *Cowen and Zines's, Federal Jurisdiction in Australia.*[25]

To return to topics more closely related to administrative law, Australia is also party to numerous trade-related agreements including WTO-related instruments. For example, the *Customs Act* 1901 (Cth) provides for the imposition of countervailing duties where an importer charges a lower price for goods sold in Australia than the price charged in its home market. These are the so-called "anti-dumping" provisions, which give effect to the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, also known as the GATT Implementation Agreement.[26] Similarly, the *Quarantine Act* 1908 (Cth) imports into Australian law the *WTO Agreement on the Application of Sanitary and Phytosanitary Measures* (commonly known as the SPS Agreement), which may be more widely known than the anti-dumping laws, because the SPS Agreement has potential application to many food imports, including salmon, pork, bananas, apples, pears and so on.[27] These are all the subject matter of administrative decisions and are not infrequently subject to judicial review. Although the principles are translated into domestic law, their proper application by the courts is dependent on a proper understanding of the international agreements to which they give domestic operation.

Despite all this, I would guess that many administrative lawyers who saw the topic of this paper would have thought *'Teoh'*. I will not ask how many of you did, because I suspect many who did will not be here. Nevertheless, I do wish to say something about *Teoh*, and what is widely believed to be its judicial nemesis, *Lam*.

To make sense of these cases it is necessary to say something about the elements of administrative decision-making, from the perspective of a court engaged in judicial review and, hopefully, the decision-maker. The process may be said to involve four elements:

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[24] (1999) 10 Pub L Rev 173.
[25] (2002, 3rd ed) at 27-31.
[26] For an explanation of the operation of the Agreement under Australian domestic law, see *Pilkington (Australia) Ltd v Minister for Justice and Customs* [2002] FCAFC 423; 127 FCR 92.
[27] The application of these principles was discussed by the Full Court of the Federal Court in *Director of Animal and Plant Quarantine v Australian Pork Ltd* [2005] FCAFC 206; 146 FCR 368.

(a) identifying the nature of decision, whether the grant, termination, suspension or variation of a benefit;

(b) the statutory criteria for a particular decision, namely the satisfaction of the decision-maker as to the qualifications required for the benefit;

(c) factors which must, or may be, taken into account and factors which are prohibited considerations, and

(d) procedural requirements relating to the making of the decision.

This is, of course, purely an heuristic model. The four elements are not mutually exclusive and particular aspects of decision-making may not readily be assigned to a particular element. Thus, it might appropriately be said that a statutory scheme requires a decision-maker to take into account the claims made by an applicant in his or her application. However, in truth that language conceals that there may be two steps in the process, the first being to determine the truth or accuracy of the claims and the second being to address them in the context of the relevant statutory criteria. Failure to address established claims has been described as a failure to accord procedural fairness, although it might better be classified simply as a failure to exercise the power conferred on the decision-maker.[28]

Putting those matters aside, the area we need to consider for present purposes is the potential overlap between the identification of mandatory considerations and the requirements of procedural fairness.

Part of the history of administrative law appears to lie in changing semantic fashions. Procedural fairness, for example, used to be known as natural justice. More important than that change in terminology is the apparent willingness to expand the concept of procedural fairness beyond its primary focus which used to be the provision of an opportunity for an individual likely to be affected adversely by an administrative decision to address matters adverse to his or her interests. Its scope

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[28] *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 77 ALJR 1088, [24]-[25] (Gummow and Callinan JJ), [86]-[88] (Kirby J) and [95] (Hayne J).

has expanded: it now includes the opportunity to address a departure from a reasonable assumption and even the weight of particular factors.

Another phrase which has enjoyed fluctuations in popularity is "legitimate expectations". As Barwick CJ once said, it was easier to understand its literary eloquence than determine its precise meaning. Its purpose, however, was to identify circumstances in which a duty to accord procedural fairness might be owed, where the individual did not have an existing legal right or interest to protect. However, if, as Dixon J explained in *Commonwealth v Welsh*,[29] the term "right" covers any interest which the law recognises and protects, once it is acknowledged, in particular circumstances, procedural fairness is required, it may be appreciated that legitimate expectations do not form a category of their own, but simply an acknowledgment that the law requires procedural fairness absent a pre-existing legal right. In *Haoucher v Minister for Immigration and Ethnic Affairs*[30] McHugh J appeared to adopt the concept of legitimate expectations as a unifying concept identifying the circumstances in which procedural fairness was required. That meant, however, that it covered situations where the duty was imposed as a matter of law, or by way of statutory construction. That rather expanded the ordinary meaning of the phrase which appears to refer to the state of mind of the individual concerned. In *Minister for Immigration and Ethnic Affairs v Teoh*[31] he adopted a different approach, saying that the law had developed to an extent that "there is no need for any doctrine of legitimate expectations".[32]

The doctrine, properly understood, operated where neither the nature of the power nor the statutory conditions for its exercise, automatically imposed an obligation of procedural fairness, but where the executive had adopted a course of conduct, or made express or implied assurances that certain steps would be taken. In *Teoh*, three members of the Court (Mason CJ, Deane J and Toohey J) held that the ratification of an international convention was a "positive statement" which in turn provided "an adequate foundation for a legitimate expectation, absent statutory or

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29 [1947] HCA 14; 74 CLR 245 at 268.
30 [1990] HCA 22; 169 CLR 648 at 678-682.
31 [1995] HCA 20; 183 CLR 273.
32 At 311.

executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention".[33] The convention in question was the *Convention on the Rights of the Child*, ratified by the Commonwealth in 1991, which required that in relation to decisions affecting children the best interests of the children were to be treated as a primary consideration. In determining that Mr Teoh should be deported because of his criminal conduct in Australia, the Minister, while conscious of the effects of deportation on his Australian-born children, did not accord their best interests the status of a primary consideration in deciding to deport their father. Nor did he inform Mr Teoh of his intention to take that course.

McHugh J, in dissent, ridiculed the approach of the majority stating:[34]

> "It seems a strange, almost comic, consequence if procedural fairness requires a decision-maker to inform the person affected that he or she does not intend to apply a rule that the decision-maker cannot be required to apply, has not been asked or given an undertaking to apply, and of which the person affected by the decision has no knowledge."

The debate about the use of the phrase to describe an objective state of affairs, without reference to the state of mind of the affected individual, may be put to one side. The more fundamental question is whether requiring the Minister to tell Mr Teoh that he did not intend to treat the best interests of his children as a primary consideration is inconsistent with the view that such a principle was not, in the circumstances, a mandatory consideration which the Minister had to take into account. In some circumstances legislation expressly requires that Commonwealth agencies perform their functions in accordance with Australia's international obligations.[35] Such an inconsistency was raised in *Lam* by McHugh and Gummow JJ in the following passage:[36]

> "However, in the case law a line has been drawn which limits the normative effect of what are unenacted international obligations upon discretionary decision-making under powers conferred by statute and without specification of those obligations. The judgments in *Teoh*

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[33] At 291 and 302.
[34] At 314.
[35] See examples given by Susan Roberts, *'Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh: The High Court Decision and the Government's Reaction To It'* (1995) 2 AJHR 135, 144-145.
[36] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; 214 CLR 1 at [101].

> accepted the established doctrine that such obligations are not mandatory relevant considerations attracting judicial review for jurisdictional error. The curiosity is that, nevertheless, such matters are to be treated, if *Teoh* be taken as establishing any general proposition in this area, as mandatory relevant considerations for that species of judicial review concerned with procedural fairness."

In other words, did *Teoh* give the Convention obligation the status of a quasi-mandatory consideration, that is one which was mandatory unless the affected party was notified that it might not be treated as such?

One may share their Honours' concern that the concepts of relevant and irrelevant considerations become blurred. It is a salutary reminder to refer to relevant considerations as mandatory relevant considerations, failure to address which will constitute legal error. However, in other respects, the debate has an abstract quality. It is like the debate about whether procedural fairness is an obligation derived from the general law or whether it is imposed, in a statutory context, by a process of statutory interpretation. That is an artificial debate because any relevant principle of statutory construction must itself derive from the general law: at least at present, it is not to be found in any Interpretation Act of which I am aware.[37]

Similarly, whether or not the statutory power of deportation is subject to a mandatory obligation to consider (in an appropriate case) the best interests of any children, as a primary consideration, should be seen as a question of statutory construction. General law principles of statutory construction require the courts to prefer a construction in conformity, and not in conflict, with Australia's international obligations.[38] Those principles may also affect the content of the requirements of procedural fairness in a particular case. Thus, in respect of a power of deportation, as in the case of sentencing for a criminal offence, the nature of the power and its purpose demonstrate that the best interests of the individual's children may not constitute a primary consideration, but, at least in relation to deportation, a matter to be taken into account. What procedural fairness would require in such a case will depend on the individual circumstances. However, in a case where it was known

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[37] The obligation to give reasons may fall into a somewhat different category: see *Acts Interpretation Act* 1901 (Cth), s 25D.

[38] See *Teoh* at 287-288 and *Lam* at [100].

that the Minister was considering deportation and where it was equally known that the deportation of one parent would not be in the best interests of the children, it seems unlikely that procedural fairness would have much scope for operation. The Minister would be required to take the interests of the children into account, and if that were not done, there would be a basis for judicial review. Depending on the age and circumstances of the children, there might be a requirement to give their interests significant weight. However the matter is analysed, care should be taken not to throw out the baby with the bath water: as McHugh and Gummow JJ were at pains to emphasise in *Lam*, criticism of the reasoning in *Teoh* "does not necessarily mean that the executive act of ratification is to be dismissed as platitudinous; an international responsibility to the contracting state parties or other international institutions has been created".[39] Their Honours then note a number of respects in which treaties which have not been incorporated into domestic law may nevertheless affect legal relationships.[40]

Both *Teoh* and *Lam* should be welcomed: they have taken the debate in this country as to the status of principles acknowledging international conventions to a new level. The intellectual engagement will be more important than the outcome in particular cases.

[39] At [98].
[40] At [100].