THE AUSTRALIAN JANUS: THE FACE OF THE REFUGEE CONVENTION OR THE UNACCEPTABLE FACE OF THE MIGRATION ACT?

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The ancient Italian God, Janus, who was, after all, the guardian of doors and gates, seems a suitable symbol for Australia's migration policy towards refugee aspirants. Janus is usually represented with faces on the front and back of his head. The Australian Janus shows a smiling face, embodied in the Refugee Convention (the 1951 UN Convention Relating to the Status of Refugees), to the international community whilst the frowning face, at the back of his head, presents a refugee claimant with a series of formidable legislative obstacles under the *Migration Act 1958* if he or she is to win the sanctuary of a protection visa.

The "Albatross" case exemplifies the conflict between our national and international posture, but whatever deficiencies there are in our domestic legislative policy I think we should be conscious of the progress made in the last couple of decades in the field of "human rights" law and the potential this progress has for the future of our domestic law. Human rights law seems to me to be a re-emergence of a natural law philosophy. I wish to explore the influence of natural law upon municipal legislation; to discuss how judges have sometimes used natural law to negate the effect of domestic legislation that adversely affects human rights and how this use of natural law may be enjoying an English renaissance; and then to examine briefly the Refugee Convention and its interaction with the *Migration Act* provisions as demonstrated in the "Albatross" case before concluding with some comments on judicial review.

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The effect of international treaties upon Australian common law

The influx of refugees to Australia in recent years has brought about a renewed interest in setting the boundaries for the role of international law shaped by treaty and convention in defining the development of the common law of Australia. In *Minister for Immigration, Local Government and Ethnic Affairs v Teoh* Mason CJ and Deane J said:

> Apart from influencing the construction of a statute or subordinate legislation, an international convention may play a part in the development by the courts of the common law. The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law.[1]

In so saying, there was a definitive statement advancing Australian law from the position that treaties might act as an aid to construction of statutory law, recognised in *Lim's case*.[2] Yet Their Honours' recognition that international law would shape and develop the common law seems a subdued echo of Blackstone, the English conservative 18th century judge who declared:

> .....the law of nations (wherever any question arises which is properly the subject of its jurisdiction) is here adopted in its full extent by the common law, and is held to be part of the law of the land. And those Acts of Parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions are not to be considered as introductive of any new rule but merely as declaratory of the old fundamental constitutions of the kingdom, without which it must cease to be part of the civilised world.....[3]

Yet modest though the advance taken by the High Court may have been, the influence of international treaties and conventions in shaping municipal law has been marked. In *Teoh's case*, the Court found that the delegate's power to deport required him to give consideration to the United Nations Convention on the Rights of the Child. The *Mabo* (No. 2) decision invoked international conventions governing the rights of indigenous persons[4] and the *Dietrich* decision[5] compelling States to fund representation of indigent persons facing serious charges bears the impress of Article 14 of the International Covenant on Civil and Political Rights to which Australia is a party.

When the sources of international law are explored one sees there are indeed quite strong historical precedents in natural law for judges to protect the individual against the power of the State.

The impact of natural law upon international law

The basis of international law is in part natural law. Aristotle, speaking of natural law, observed that the laws of nature are immutable and have the same validity everywhere "as fire burns both here and in Persia". Natural law was contrasted with human justice which is variable from place to place and "like corn and wine measures, larger in wholesale and smaller in retail markets". Cicero in defending Milo, characterised natural law as "the law which was never written and which we were never taught, which we never learned by reading, but which was drawn from nature herself, and in which we have never been instructed, but for which we were made, which was never created by man's institutions, but which is inborn in us."

Thomas Aquinas saw it as that part of eternal law which man can apprehend with his unaided reason, but which, because it flows from God's reason and not from that of man, can neither be created nor changed by man whether by reason or by will. Specific principles were formulated by Seneca and set out in the Roman law. So it is that a man must be heard before he is condemned and that a person should not be judge in his or her cause.

The medieval idea that the whole civilised world ought to obey common laws was dispelled in the 17th century with the emergence of the new nation states. Speaking in 1951 Lord Radcliffe explained this development:

> When in time the medieval sense of community gave way before the rise of national states and Europe became a quarrelsome family of sovereign powers, international law had, as it were, to be invented in order to provide some structure upon which to build their relations with each other, and the law of nature is one of the founding fathers of international law. It is not spoken of now, in this country, as one of the elements of our own legal system. That is because men are broken in to looking to parliament as the sole source of new or altered law and we take our existing law from a complicated network of past statutes, precedents and decided cases.[6]

The emergence of the nation states saw the introduction of some of these natural law principles into the constitutions of the revolutionary states of North America and France. Thomas Jefferson in the Declaration of Independence 1776 said that "men are endowed by their creator

with certain unalienable rights, that among these are life, liberty and the pursuit of happiness".

Eleven years later, the American Constitution came to be framed in the same spirit. Through the work of Rousseau and Paine (who was a friend of Jefferson), the members of the French National Assembly in 1789 adopted a "Declaration of the Rights of Men and of Citizens". Although its authorship is uncertain, it is generally attributed to Thomas Paine. It includes such principles as these: "no man should be accused, arrested or held in confinement except in cases determined by the law and according to the form which it has prescribed"; that "no man ought to be molested on account of his opinions....."; that "the unrestricted communication of thoughts and opinions being one of the most precious rights of man, every citizen may speak and write freely provided that he is responsible for the abuse of this liberty in cases determined by the law"; and that "men are born and will always continue, free and equal in respect of their rights".[7]

The historical role of natural law in Australian and English jurisprudence

Many of the new Commonwealth constitutions contain chapters on human rights. The Australian Constitution, being rather older than most, does not. As Mr Gageler points out, the framers of the Australian Constitution drew upon a tradition of British and Colonial constitutional development with which they were well familiar. The Constitution was not framed in a time of social unrest and not drafted against a background of a popular view of oppressive government such as was the case in France, the United States,[8] and at least to some degree, in those British colonies which took the road to independence after World War II.

The inevitable consequence for Australia and English judicial systems in failing to declare expansive human rights provisions such as those in France, Germany, Canada and the United States has been that these systems have not enjoyed the liberating and moderating influence that natural law principles enshrined in a constitution may provide. The recognition of international law as a legitimate guide to the development of the common law opens the door to a small degree to the liberating influence but not enough to allow the citadel of narrowly confined statutory law to be taken.

But there was a time when natural law was claimed as a higher law. The English Law Lord, Lord Radcliffe, speaking in 1960, explained how there was a time when natural law, vague and misty though its outlines now seem, was thought of as an appropriate set of references for the lawyer:

> To the medieval doctor the law of nature was by no means a set of principles inscribed in air. He had his sources, identifiable ones, against which he could set the municipal law he challenged. There was the law of God, recorded in Holy Writ, and a source of reference for argument in our law courts certainly until the 18th century. There was the Digest, the Civil Code of the Roman Empire, whose accumulated wisdom and width of reference spoke virtually for jus gentium itself. The lawyer of today has no comparable working tools and so lacks a standard of reference of sufficient authority. There are those who hope to find such a standard in a wider appreciation of comparative law or, again, in a lively adherence to the 12 year old Universal Declaration of Human Rights of the United Nations General Assembly.[9]

Lord Radcliffe then quotes the eighteenth century Blackstone's view of a higher law:

> This Law of Nature being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding all over the globe, in all countries and at all times; no human laws are of any validity, if contrary to this; and such of them as are valid

> derive all their force and all their authority mediately or intermediately from the original.[10]

The Americans, more deferential to common law principles in general and Blackstone in particular, have squared the circle by aligning international and municipal law by the device of making international conventions to which they subscribe self executing and so binding upon their municipal courts.

But the doctrine of parliamentary sovereignty inculcated so effectively by Professor Dicey in the last century continues to dominate English law, and to only a slightly lesser extent, the constitutionally endowed Australian judicial landscape. The problem is of course that the doctrine of parliamentary sovereignty ceases to be satisfactory when parliament does not adequately protect the citizens' rights. The absence of an all-pervasive equity, which can mitigate the rigour of parliamentary law, is an age-old problem. It confronted Thomas More, Chancellor of England under Henry VIII, brought to trial and execution because he would not accept the King's new claim to headship of the church. The King's claim was passed into law. More said he was the King's servant, but God's first. His trial records More putting the question to his informer, Robert Rich,

> I will put you this case. Suppose the parliament should make a law that God should not be God, would you then, Master Rich, say that God were not God?

It is the question that has echoed down the ages. More's penetrating question did not save him from conviction and execution. Lord Radcliffe rather thought that Lord Mansfield, when shaping mercantile law in the late 18th century, was the one who missed the opportunity to introduce an over-arching equity to protect the citizen against oppressive statutory law. But the influence of the international community may yet supply the omission of Lord Mansfield to evolve a "higher law" common law doctrine.

Modern trends in United Kingdom: limitations to parliamentary sovereignty

In 1956 Lord Devlin stated that the common law did not have the strength to hold in check the Executive:

> The common law has now, I think, no longer the strength to provide any satisfactory solution to the problem of keeping the Executive, with all the powers which under modern conditions are needed for the efficient conduct of the realm, under proper control. The responsibility for that now rests with parliament.[11]

But parliament is no longer safeguarding the rights of the individual. The remedy of judicial review may itself be thwarted by legislative policy negating its role.

There is in some English judicial quarters, an atavistic desire to return to Sir Edward Coke's approach. In *Dr Bonham's case*,[12] Lord Coke said:

> When an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void.

A current English High Court Judge, Sir John Laws, has suggested that it is the Constitution, not parliament, which is sovereign and that judges are custodians of the Constitution.

The supremacy of community law enshrined in the *European Communities Act 1972* can lead to the disapplication of domestic statutes. Some community law principles are designed to guarantee human rights against abuse by executive power. In particular, the European Convention on Human Rights is part of the fabric of European community law and has been held to be an aid to construction in the same way as international convention has been used in Australia.

Whilst the European Convention has not gone so far as to be introduced into UK legislation, a bill called the Human Rights Bill was introduced into the House of Lords in 1995 and was passed in a watered down form. It is thought, however, that it is unlikely to be taken up in the Commons and so will not become law. The previous Conservative government at least feared a weakening of parliamentary sovereignty by giving direct control over civil rights to the judges.

In the face of the legislative reluctance to safeguard human rights, some judges such as Lord Woolf, (now the Master of the Rolls), sees an enhanced role for the common law. He said, in the Mann Lecture:

> It is one of the strengths of the common law that it enables the courts to vary the extent of their intervention to reflect current needs and by this means it helps to maintain the delicate balance of a democratic society.

Lord Woolf went on to argue that parliament could not abolish judicial review:

> .....If parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which should be without precedent. Some judges might choose to do so by saying that it was an irrebuttable presumption that parliament could never intend such a result. I myself would consider there were advantages in making it clear that ultimately there are even limits on the supremacy of parliament which it is the courts' inalienable responsibility to identify and uphold. They are limits of the most modest dimensions which I believe any democrat would accept....

Sir John Laws took up this theme when he said:

> The true distinction between judicial and elected power cannot be arrived at by a merely factual account of what the judges do or what governments or parliament.....do. The settlement is dynamic because, as our long history shows, it can change.....As a matter of fundamental principle, it is my opinion that the survival and flowering of a democracy.....requires that those who exercise democratic, political power must have limits set to what they may do: limits which they're not allowed to overstep.....the doctrine of parliamentary sovereignty cannot be vouched by parliamentary legislation; a higher order law confers it and must limit it.

Another English High Court judge, Mr Justice Sedley, has openly acclaimed "a new culture of judicial assertiveness to compensate for and in places repair the dysfunction of the democratic process."[13]

So in England there is a mood amongst some judges to reach back to a Blackstonian role for the common law.

The Australian experience

The issue of challenge to legislative capacity was taken up by Justice Toohey of the High Court in a 1992 address.[14] After describing processes that might occur if it were presumed that the Australian people did not intend grants of power to the Commonwealth Parliament under the Constitution to extend to invasion of fundamental common law liberties, His Honour said:

> If such an approach to constitutional adjudication were adopted, the courts would over time articulate the content of the limits on power arising from fundamental common law liberties and it would then be a matter for the Australian people whether they wish to amend their constitution to modify those limits. In that sense, an implied "Bill of Rights" might be constructed.

His Honour pointed out that "Parliaments are increasingly seen to be the de facto agents or facilitators of Executive power, rather than bulwarks against it."

His Honour explained how the Australian and English constitutionalists had been more sanguine than their American counterparts about the extent to which

parliamentary sovereignty might jeopardise individual freedom. In the United Kingdom parliament had been the liberating agent from monarchical despotism whereas in the United States the constitution was adopted to act as a safeguard against abuse of plenary power by the United Kingdom parliament. His Honour said that the statements of various judges suggested a revival of natural law jurisprudence that for law to be law it must conform with fundamental principles of justice. Under Australia's federal constitution, Chapter III (setting out the jurisdiction and tenure of the federal judiciary) "precludes the federal parliament from arrogating to itself the exercise of judicial power".

His Honour referred to the traditional approach in *Walsh v Johnson*[15] that the Commonwealth Parliament's capacity to curtail a common law liberty by legislation relating to the subject of its legislative power was unlimited but that it just had to do it unambiguously. He went on to say:

> Yet it might be contended that the courts should take the issue a step higher and conclude that where the people of Australia, in adopting a constitution, conferred power to legislate with respect to various subject matters upon a Commonwealth Parliament, it is to be presumed that they did not intend that those grants of power extend to invasion of fundamental common law liberties.....

An express Bill of Rights seems unlikely bearing in mind the general history of resistance to change by referenda. It would be open to the Commonwealth Parliament to adopt as domestic law many international treaties and conventions setting out human rights if so minded. This might be done simply by Act of Parliament or with more confidence of permanence by inclusion of a provision that such Act would bind subsequent legislative enactments unless parliament expressed itself as revoking provisions of the earlier Act. But aside from the doubt whether any government is likely to introduce such legislation there is the question of whether such legislation would act retrospectively to strike down provisions contained in earlier Acts that curtailed human rights. Given the absence of will by the people of Australia or parliament to protect a citizen or non-citizen's rights through constitutional or other legislative reform, and the recent retreat by the High Court from finding implied powers in the Constitution, much must now turn on the construction that the judiciary will place upon legislation which conflicts with our international posture on human rights.

The Migration Act 1958 and the Albatross detainees[16]

A comparison of Australia's obligations at the international level and those Australia has been prepared to adopt domestically is well illustrated by comparing the Refugee Convention with the *Migration Act 1958*. Australia signed the 1951 Convention relating to the status of refugees and the protocol which amended the Convention in 1967. Article 33 of the Refugee Convention made it an obligation upon contracting parties not to expel, return ("refouler") refugees where life or freedom would be threatened in their own country for convention reasons.

The *Migration Act* does not define a "refugee" or "convention reasons" but they are to be found in the well known definition contained in Article 1A (2) of the Refugee Convention:

> ....owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or, who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Section 36 (2) of the *Migration Act* states:

> A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugee Convention as amended by the Refugees Protocol.

The Minister for Immigration determines whether Australia's protection obligations have been engaged. A senior officer of the Department of Immigration has stated that it is the practice, once protection obligations are engaged, for the Department to provide persons held in detention with relevant application forms or legal assistance.

Under ss 45, 46 and 47 of the *Migration Act*, a non-citizen who wants a visa of a particular class, such as a protection visa, is required to fill out a specified form which needs to be provided by the Department's officers. Alternatively, the necessary form to make due application for a protection visa may be obtained through a lawyer. However, the Department interpret the obligation to provide a detainee with a lawyer to be confined to a literal construction of s 256 of the Act. This states that a person responsible for immigration detention "at the request of the person in immigration detention", should afford him or her all reasonable facilities for obtaining legal advice or taking legal proceedings in relation to immigration detention. The case of *Wu Yu Fang* raised questions about the extent of the obligations upon the Department under the *Migration Act* to provide refugees with forms and legal assistance.

118 Sino-Vietnamese were aboard a boat code-named the "Albatross" when boarded by Australian officials about 100 miles north of Darwin. The boat arrived in Darwin on 13 November 1994 and on 15 November 1994 the Sino-Vietnamese were flown to Port Hedland. On the same day the *Migration Act* was amended to provide that a non-citizen covered by an agreement between Australia and a "Safe Third Country" could not apply for a protection visa. By a Migration Regulation introduced on 27 January 1995 China became a "Safe Third Country", and, as from that date, former residents of Vietnam who had resided in China prior to coming to Australia could no longer apply for protection visas. By further amendment the date for lodgement of applications for protection visas was backdated to 30 December 1994.

The 118 Sino-Vietnamese applicants were all ethnic Chinese. The older ones had all been born in Vietnam and following the border wars between China and Vietnam in 1979 and 1980 were expelled from Vietnam. Many of them claimed that they had not been properly settled when they arrived in China. In particular, they had not been given household registration and thus did not have access to housing, employment and schooling for their children in the same way as indigenous Chinese citizens. Latterly they lived on the beach front in Bei Hai in cardboard shacks until taking passage on board the "Albatross" in late 1994.

On reaching the Port Hedland Detention Centre on 15 November 1994 the applicants were interviewed by immigration officers and largely related the particulars I have described. They were required to fill in "bio data" forms and also compliance "entry" forms. The protection visa application form for persons in detention was not proffered to the applicants. On 23 November a refugee casework officer, Mr Ross McDougall, sought to obtain access to "The Albatross" detainees. The Department informed him that since there had been no request for legal assistance, as defined in s 256 of the *Migration Act*, there was no obligation on the Department to allow Mr McDougall or any other lawyer access to the detainees. In January 1995 the amending legislation was introduced whereby Sino-Vietnamese, such as the applicants, could

not make valid applications for protection visas and in mid-February 1995 after the amendment had been backdated to 30 December 1994, the Centre Manager informed the detainees of this fact.

The applicants sought thereafter judicial review in the Federal Court. The trial judge dismissed the applicants' claims maintaining that the effect of the *Migration Act* was that there was no obligation upon the Department to provide the applicants with the means to apply for protection visas. His Honour also dismissed various claims by the applicants that they had been frustrated in obtaining legal assistance under s 256, and held that there was no obligation to inform the applicants that they could request legal assistance under s 256. His Honour considered that the claims made by the applicants did not amount to an engagement of Australia's protection obligations. In the Full Court of the Federal Court the applicants' claims were again dismissed by a majority of 2-1 (Jenkinson and Nicholson JJ and with Carr J dissenting). However, Nicholson J, who wrote the leading judgment for the majority, found that the applicants had impliedly engaged Australia's protection obligations. His Honour nonetheless concluded:

> This is a case in which parliament has negated the possibility of common law concepts of procedural fairness applying in favour of the non-citizen applicants. Parliament has achieved this by the enactment of ss 45-47 (requiring the existence of a valid application form to make an application) and ss 193 (2) and 198 (4) of the *Migration Act* (negating the requirement that a detainee have access to legal advice or the opportunity to apply for a visa if being removed as soon as reasonably practicable). The inference from the findings of the trial judge is that the representatives of the relevant arm of the Executive were well informed of this and avoided acting so as to place the applicants in the position where they had the means to apply for a protection visa when the course remained open to them prior to its preclusion by legislation. While that Executive conduct does not accord with internationally expressed goals relating to conduct in relation to refugees, the conditions for application of international law, as prescribed by Australian domestic law, are not present to enable international law to control that conduct. Furthermore such conduct was supported by the enactments of the Australian Parliament which, to that extent, evince an intention in relation to non-citizens to negate the application of those internationally commended basic procedural requirements.....[17]

Conversely, Carr J considered that the applicants were entitled to a degree of procedural fairness by reason of Article 10 (1) of the International Covenant on Civil and Political Rights ("ICCPR") to which Australia is a party. This provides that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". The Human Rights Commission submission had pointed out that in interpreting Article 10 a body of rules known as the "Standard Minimum Rules" applied and that these rules required a detainee to be both informed of his rights (eg the right to legal assistance under s 256 of the *Migration Act*) and to be provided with an appropriate form. His Honour believed that ss 193 and 198 had not negated these requirements. Carr J contended that the appellants had a legitimate expectation that Article 10 of the ICCPR would be observed (referring to *Teoh's case* where the applicant was held to have a legitimate expectation that the delegate would consider the United Nations Convention on the Rights of the Child) before making a deportation order. This meant that the Department should have informed the detainees that a lawyer had expressed an interest in helping them and that they were entitled, if they so requested, under s 256, to reasonable facilities for obtaining legal advice. Finally, His Honour concluded that the appellants should have been given the appropriate form so that they could make application.

The High Court by a majority refused the applicants special leave to appeal. The Court did say that the question whether

there was a positive statutory or common law duty on the part of the respondents to provide visa application forms and to inform the applicants of their right to apply for visas and of the availability of legal advice might be a question of importance worthy of the grant of special leave but the findings of fact and pleadings had not sufficiently raised the question.

This case still leaves open for the future how far courts will read into domestic legislation international obligations, such as those under the Refugee Convention and the ICCPR, which may not be expressly or impliedly negated by domestic legislation.

The safe third country provisions under the Migration Act

In the *Wu Yu Fang case* there was an expressed acknowledgment by the majority both in the judgment of Justice Nicholson and during argument by Justice Jenkinson, that the *Migration Act* is in some respects inconsistent with the obligations that Australia has undertaken to perform. But even where the provisions of the *Migration Act* do not directly clash with obligations undertaken under the Refugee Convention and other international instruments, parts of the Act are contrary to the spirit of the Refugee Convention. This is observable under Subdivision A1 (ss 91A to 91G) which provides that certain non-citizens, who are covered by a comprehensive plan of action approved by the International Conference on Indo-Chinese Refugees and those for whom there is a "Safe Third Country" are not to be allowed to apply for protection visas. It was under this division that the "Albatross" Sino-Vietnamese were prohibited from applying for protection visas. The implementation of the arrangement whereby Sino-Vietnamese are forcibly repatriated to China arose because of a Memorandum of Understanding entered into between Australian and Chinese officials. The Memorandum of Understanding is set out in Schedule 11 to the Migration Regulations and provides for Vietnamese refugees settled in China to be returned under "verification arrangements".[18] The Department of Immigration provides the Chinese Ministry of Civil Affairs with Vietnamese refugee registration forms to "facilitate the verification by the Chinese side". Presumably these are the bio data forms which the "Albatross" detainees were required to fill in. Unless a detainee is able to gain access to a lawyer at the Detention Centre, the determination of whether or not the Vietnamese refugee has been "settled in China" depends upon these verification procedures which involve the Chinese authorities checking the details and indicating whether or not the person has been settled. If the Vietnamese refugee was, for example, a Tienamen Square protester, one wonders whether the Chinese Ministry of Civil Affairs would provide a truthful assessment of whether such a person had been "settled in China".

It seems doubtful that the framers of the Refugee Convention contemplated contracting parties using the Safe Third Country article contained in the Refugee Convention in the way it is used under the *Migration Act*. Under Article 1E of the Refugee Convention it is stated:

> This convention shall not apply to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of nationality of that country.

The country of residence for the applicants in the "Albatross" case was China and the question was whether China extended to them "the rights and obligations which are attached to the possession" of Chinese nationality. This decision, under the Act, is now likely to be made at the political and not the judicial level unless the non-citizen detainee is lucky enough to secure access to legal advice.

The regulations governing applicants from "Safe Third Countries" were introduced in 1994 to prevent "forum shopping" and the first application was to boat people who arrived in Australia from Gulang in Indonesia where they had been refused refugee status. Its next application was to the ethnic Chinese Vietnamese from South China who the government asserted had been "settled" in China despite the claims by many of the boat people to the contrary.[19] The regulations prohibiting application by Sino Vietnamese substitute legislative mandate for individual administrative discretion that is subject to a process of judicial review.

Since the decision in *Wu Yu Fang* the Department of Immigration has introduced a Bill stating the Department is not required to provide visa application forms to detainees. There is strong evidence that the hunger strikes and violence that has attended some detainees' presence in centres is a consequence of a system that deprives detainees of rights of access to legal assistance and the means to make claims which are extended as a matter of course to citizens of this country. It is such legislation that debases judicial systems and is reminiscent of the South African apartheid legislation so movingly described in Nelson Mandela's autobiography.[20]

Limitations on the power of judicial review

Where, in what the English Law Lord, Lord Browne-Wilkinson described as "the go go world of judicial review" are we go-going?[21]

In 1993 Justice French spoke of:

> a significant extension of the reach of judicial review to ministerial and gubernatorial decision making. The exercise of prerogative powers may now be called into question and the possibility is open that even decisions of the cabinet could in certain circumstances be justiciable.[22]

But under the *Migration Act* there are legislative limitations upon review. In both the recent High Court cases *Kioa v West*[23] and *Teoh*, the High Court was concerned with the exercise by the Minister's delegate of the discretionary power to deport detainees for which the Act makes provision. But in *Wu Yu Fang's* case the introduction of legislation preventing the Sino-Vietnamese from making valid applications together with the omission to supply the detainees with forms meant that the administrative processes had not advanced to the stage where a delegate was called upon to make a "decision". In *Kioa v West*, Brennan J (as he then was) said that there was no "free standing" common law right to be accorded natural justice, rather observance of it was a "condition attached to the [statutory] power whose exercise it governed".[24] Nicholson J, in *Wu Yu Fang's case* had "some difficulty in identifying [an] administrative decision or exercise of statutory power".[25] Gaudron J and McHugh J, during argument on the special leave application in *Wu Yu Fang's* case, also questioned the absence of statutory provisions to which the detainees application for judicial review could attach.

At the very least, there would appear to be some doubt in the High Court as to the degree to which a "free standing" right to judicial review may arise. The House of Lords, however, has been prepared to hold that executive action is not immune from judicial review merely because it occurred in pursuance of a power derived from the common law, or prerogative, rather than a statutory source (*Council of Civil Service Unions and Others v Minister for the Civil Service*).[26]

In that case a minister proposed to give an instruction under Civil Orders in Council for the immediate variation of the terms and conditions of service of the staff at the Government Communications Headquarters (GCHQ) before there had been consultation with the staff or with the staff's union. It was held that the staff had

a legitimate expectation that unions and employees would be consulted before such instructions were issued. Of course, a liberal approach to intervention does give rise to scathing political comment. Lord Taylor (the former English Chief Justice) referred to this:

> In respect of judicial review, however, recent public and press criticism of the judiciary has moved beyond comment on the decisions reached and focuses increasingly on the legitimacy of the judges taking such decisions at all. If a judge strikes down the decision of a Minister. if a judge is appointed by the Government to investigate a matter of public concern, reports or is thought to be going to report adversely about individuals or groups within his terms of reference, cries are raised that he has got above himself. Phrases like "power hungry" and "frustrated politicians" are entering the commentators' lexicon. The suggestion seems to be that the senior judiciary have decided to mount a bloodless coup and to seize the commanding heights of the constitution.[27]

But if the judges do not protect the individual's rights by judicial review no one else can or will. It may be that judicial review is apt to be described as Mr Michael Beloff, QC sees it:

> I see judicial review coming in like a tide: but like a tide ebbing as well as flowing - even if it comes each time a little further up the beach - and while some obstacles in its path, like sand, can be overridden, others, like rock, will obstinately remain impervious - and all the while cross currents and eddies disturb its progress.[28]

Even if judicial review is "go-going" at the moment in England, in Australia, at least in the area of refugee law, it seems to be at a low ebb.

Perhaps in the views expressed by Justice Kirby - there is a beacon of promise in a sea of darkness:

> .....It is not enough that the highest courts of Australia and other Commonwealth countries should sanction the use of international human rights norms in the work of the courts. Nor is it enough that judicial leaders should evince an internationalist attitude in keeping with the eve of a new millennium. It is essential that judicial officers at every level of the hierarchy, and lawyers of every rank, should familiarise themselves with the advancing international jurisprudence of human rights; that the source material for that jurisprudence should be spread through curial decisions, professional activity and legal training; and that a culture of human rights should be developed amongst all lawyers and citizens of the Commonwealth. .....[29]

If the Australian Janus, keeper of the gate of entry, chooses to show a benign face to the international community, whilst denying human rights at home to which we have pleaded our allegiance abroad, then it is for judges as much as politicians to explore ways in which the unacceptable face of the *Migration Act* is exposed and wherever possible a construction placed upon our laws that mirrors the principles to which the Australian government has professed itself bound at the international conference table.

Endnotes

1 *Minister for Immigration, Local Government and Ethnic Affairs v Teoh* (1994-5) 183 CLR 273, p 288.
2 *Chu Khang Lim & Others v Minister for Immigration, Local Government and Ethnic Affairs & Another* (1992) 176 CLR 1.
3 Blackstone, *Commentaries on the Laws of England*, 3rd ed, vol IV, p 62.
4 *Mabo and Others v The State of Queensland (No 2)* (1991-2) 175 CLR 1.
5 *Dietrich v The Queen* (1992) 177 CLR 292.
6 Lord Radcliffe, "The Problem of Power", *Reith Memorial Lectures* (1951) Lecture II, 25.
7 This survey of the influence of natural law owes much to Professor Weeramantry's interesting exposition in *The Law in Crisis* Capemoss, 1975, 185-197.
8 Gagelar. "Foundations of Australian Federalism and the Role of Judicial Review" (1967) 17 *Federal Law Review* 162, 168.
9 Lord Radcliffe, "The Law and its Compass", (1960) *Rosenthal Lectures to North Western University School of Law*, Lecture 1, 32.
10 Lord Radcliffe, above n. 6, 26.
11 Lord Devlin, "The Common Law, Public Policy and the Executive" (1956) 9 *CLC* 1 at p 14.

12 *Dr Bonham's Case* 1610 8 Co Rep 1136.
13 Robert Stevens, *Judges, Politics, Politicians and the Confusing Role of the Judiciary*, p 36.
14 *Australian Law News*, November 1994, 7-11.
15 *Re Walsh and Johnson: ex parte Yates* (1925) 37 CLR 36.
16 *Wu Yu Fang and Others v Minister for Immigration and Ethnic Affairs and Another* (1996) 135 ALR 583.
17 *Ibid*, 636, per Nicholson J.
18 For a case involving the text of the Memorandum of Understanding itself see *Lu Ru Wei and Zhou Xiao Fang v Minister of Immigration and Ethnic Affairs*, unreported, Fed Ct No WAG 80 of 1996, Drummond J.
19 Migration Legislation Amendment Bill (No. 2) Second Reading, Hansard Thursday, 9 February 1995, p 877.
20 Nelson Mandela, *The Long Walk to Freedom*, pp 175 and 195. *The Long Walk to Freedom* refers to the *Population Registration Act* which defined inequality, suppressed Communism, and made persons who published statements by parties such as the ANC liable to prosecution, and the *Bantu Education Act* bringing native education under colonial decree.
21 Michael Beloff, QC, *Judicial Review 2001: A Prophetic Odyssey*.
22 Justice French, "The Rise and Rise of Judicial Review", (1993) 23 UWALR, 120, 121.
23 *Kioa v West* (1985) 159 CLR 550.
24 *Ibid*, 610.
25 *Wu Yu Fang*, 630.
26 *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] 1 AC 374.
27 Stevens, above n. 13, 37.
28 Beloff, above n. 21, 56
29 "The Australian Use of International Human Rights Norms", (1993) 16 (2) UNSWLJ 363, 393.

ERRATUM

An editorial error occurred in the article by Marshall Irwin, entitled "The Role of the Criminal Justice Commission in Criminal Justice Administration" published in (1996) 9 AIAL Forum. The first sentence of the first full paragraph on page 40 should read:

> "If some of these recommendations are accepted, there will be significant changes in the CJC".

The word "no" should not have appeared before the word "significant".