
The use of administrative law to enforce human rights

Janina Boughey*

In the absence of specific or adequate laws designed to enable individuals to enforce their human rights, it is inevitable that human rights claims will be made through other, established legal avenues. Some academics have suggested that administrative law is particularly susceptible to its principles being used to pursue human rights claims because of the similarity between the underlying principles of administrative and human rights law. This article considers the success of such attempts, some conceptual limitations of using administrative law to advance human rights in certain circumstances, the impacts of using administrative law principles to achieve human rights on the "integrity" of administrative law and the effect of statutory rights protections on this process.

INTRODUCTION

In the absence of specific causes of action designed to allow individuals to enforce their human rights, it is inevitable that the growing rights discourse will infiltrate other areas of the law, and that individuals will attempt to use established legal principles to enforce what are essentially human rights claims.¹ There are examples of this in every area of law, from criminal law² to constitutional³ and tort law.⁴

Administrative law may be particularly susceptible to its mechanisms and causes of action being used to enforce human rights, given its many similarities to human rights law. Both administrative law and human rights law are principally concerned with ensuring that public power is exercised fairly.⁵ They also share underlying values of "autonomy, dignity, respect, status and security".⁶ Therefore administrative law mechanisms have been used to enforce human rights in many common law jurisdictions.

The first part of this article considers examples of administrative law principles that have developed to protect human rights from Australia, Canada, New Zealand and the UK. However, the use of administrative law principles to enforce human rights has had mixed success. Governments, lawyers and academics have criticised the use of administrative law principles to enforce rights as "judicial activism"⁷ and ignoring the separation of powers.⁸

The second part of this article examines some of the conceptual limitations which may prevent administrative law from being a suitable, or sufficient, legal vehicle through which to protect human

* B Ec(Soc Sci); LLB (Hons I) USyd; LLM Candidate ANU.

¹ Saul B "Australian Administrative Law: The Human Rights Dimension" in Groves M and Lee HP (eds) *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, Melbourne, 2007) p 50.

² *Dietrich v The Queen* (1992) 177 CLR 292, concerning whether a defendant has a right to representation in criminal matters.

³ *McGinty v Western Australia* (1996) 186 CLR 140, regarding whether the right to vote implies that votes are of equal value.

⁴ *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, concerning whether Australian law recognises a tort of invasion of privacy.

⁵ Saul, n 1, p 52.

⁶ Oliver D, "The Underlying Values of Public and Private Law" in Taggart M (ed), *The Province of Administrative Law* (Hart, Oxford, 1999) p 223.

⁷ Handsley E, "Legal Fictions and Confusion as Strategies for Protecting Human Rights: A Dissenting View on Teoh's Case" (1997) 2 *Newcastle Law Review* 56.

⁸ McMillan J, "Judicial Restraint and Activism in Administrative Law" (2002) 30 *Fed L Rev* 336.



rights. Practical examples are used to demonstrate how these limitations have prevented administrative law from being capable of redressing some of the most flagrant abuses of human rights.

The third section of the article concludes by considering the interaction between legislative human rights protections and administrative law. It is argued that legislative rights protection is necessary to provide certainty in statutory interpretation, and to prevent potential impingement on important constitutional principles such as the separation between judicial and legislative power.

The focus of this article is on Australian administrative law, however examples from other common law jurisdictions are used to both illustrate the inherent susceptibility of administrative law to being used as a vehicle for human rights claims, and to compare the differences in the development of administrative law between Australia and jurisdictions with broader legislative rights protections.

1. USE OF ADMINISTRATIVE LAW PRINCIPLES TO ENFORCE HUMAN RIGHTS

Perhaps the most obvious way in which administrative law has been used to enforce human rights in Australia in recent years is for challenging refugee decisions. However, there are numerous other examples of ultra vires and procedural fairness principles developing to protect specific rights abuses from around the common law world. The development of particular doctrines, such as the legitimate expectations or public law estoppel doctrine in Australia, the UK and New Zealand, and the separate ultra vires ground of discrimination in Canada, are clear examples of administrative law being used to fill perceived gaps in human rights protection.

This section outlines the broad nature of administrative law and examines the scope for using administrative law principles to adopt human rights standards into the common law. Then a number of examples and doctrinal developments in administrative law that reflect its ability to enforce human rights are considered.

Operation of administrative law

Administrative law has its foundation in some of the most fundamental principles of the rule of law.⁹ As (then) Justice French stated:

The dominant requirement of the rule of law in Australia is that the exercise of official power, whether legislative, executive or judicial, be supported by constitutional authority or a law made under such authority.¹⁰

The separation of powers, which has been held to be implied in the Australian *Constitution*,¹¹ vests the judiciary with the authority to determine the limits of each branch of government's power. The Executive is responsible for the "execution and maintenance of th[e] Constitution, and of the laws of the Commonwealth" (s 61). Its powers are thus defined by the legislation that it maintains and executes (both primary and delegated). This legislation often grants broad discretions to the Executive, which are delegated to administrative decision-makers. In performing judicial review, courts are concerned with ensuring that a decision-maker has acted in accordance with all of the rules that the Parliament intended to apply to that decision.¹² This requires courts to consider both the jurisdiction of, and use of discretion by, decision-makers. There are a number of avenues in that process in which it is possible for courts to ensure that government decision-makers are acting in accordance with human rights standards.

Common law principles of ultra vires and procedural fairness have developed to assist the courts in determining the scope of the powers granted by Parliament to the Executive. These predominantly involve principles of statutory interpretation and common law presumptions as to the intention of the legislature. For example, often there will be multiple possible interpretations of the law, and therefore

⁹ Fallon RH, "The Rule of Law as a Concept in Constitutional Discourse", (1997) 97 *Columbia Law Review* 1.

¹⁰ French R, "Administrative Law in Australia: Themes and values" in Groves and Lee, n 1, p 15.

¹¹ *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529.

¹² Bayne P, "The Human Rights Act 2004 (ACT) and Administrative Law: A Preliminary View" (2007) 52 *AIAL Forum* 3, citing *Walton v Gardiner* (1993) 177 CLR 378.



multiple ways of determining what a decision-maker was empowered to do.¹³ Courts will then look to sources extrinsic to the specific legislation in question, to determine which interpretation is correct.¹⁴ In the case of ambiguity, so far as the language of a statute permits, Australian courts will interpret legislative provisions consistently with fundamental rights.¹⁵ If a decision-maker makes a decision which relies on an interpretation of legislation contrary to basic rights and freedoms in order for them to have decision-making power, that decision will be ultra vires.¹⁶

Courts have also developed rules for decision-makers in the exercise of their discretion, based on a requirement that decision-makers follow fair and transparent processes, and do not make decisions based on personal whim. The principles of procedural fairness are essentially a construct by which courts can determine whether decision-makers have exercised the discretion granted to them by the Parliament, in the way Parliament intended.¹⁷ That intention is presumed to be that power should be exercised fairly and transparently.¹⁸ This “culture” of justification permeates both administrative law and human rights law.¹⁹

Human rights law too, can be seen to draw many of its fundamental principles from the rule of law. For example, the presumption of innocence²⁰ and right to equality,²¹ both have strong links to the Diceyan model of the rule of law.²² Administrative law principles have even been adopted in key human rights instruments, for example the right not to be arbitrarily arrested or detained²³ is derived from the common law writ of habeas corpus.

Therefore, due to these considerable similarities and overlaps between the two areas of law, there is a significant scope for administrative law to be used to enforce human rights standards, particularly where there is no other way for rights to be enforced.

Refugee cases and Australian administrative law

As a party to the 1951 *Convention relating to the Status of Refugees* (Refugees Convention),²⁴ Australia is obligated to:

- recognise as a refugee a person who fits the international definition;
- provide protection for asylum seekers;
- protect refugees without discrimination (Art 3);
- ensure refugees and asylum seekers are not returned to a country where they could face persecution or the threat of persecution on the five refugee grounds (Arts 32, 33);
- not penalise refugees for entering the country “illegally” (Art 31); and
- expel refugees only in exceptional circumstances to protect national security or public order (Art 32).

¹³ *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at [103]-[105] (Kirby J).

¹⁴ Bayne, n 12 at 4.

¹⁵ *Potter v Minahan* (1908) 7 CLR 277 at 304 (O'Connor J).

¹⁶ Bayne, n 12 at 4.

¹⁷ *FAI v Winneke* (1982) 151 CLR 342 at 360 (Mason J); *Kioa v West* (1985) 159 CLR 550 at 585 (Mason J).

¹⁸ *Kioa v West* (1985) 159 CLR 550.

¹⁹ Saul, n 1, p 52.

²⁰ *International Covenant on Civil and Political Rights*, Art 14

²¹ *International Covenant on Civil and Political Rights*, Art 2.

²² Dicey A, *Introduction to the Study of the Law of the Constitution* (10th ed, MacMillan, London, 1959) pp 187ff.

²³ *International Covenant on Civil and Political Rights*, Art 9.

²⁴ And the 1967 Protocol relating to the Status of Refugees.



Mary Crock argues that the implementation of the Refugees Convention and Protocol into the *Migration Act 1958* (Cth) does not fully meet Australia's obligations under international law.²⁵ The Act does not directly import the definition or "refugee" from the Refugees Convention, but instead makes Australia's domestic definition dependent on its obligations under international law. Because Australia's view is that its obligations under international law are ultimately defined by Australia's interpretation of international instruments, this leaves significant scope for political decisions to be made as to the nature of Australia's international obligations. Crock argues that this was intentional, that the government deliberately gave significant discretion to immigration decision-makers so that flexible policies could be applied. This, she argues, is because migration, and in particular refugee, decision-making is inherently political. This has proven problematic for judicial review, which is premised on the principle that administrative decision-making should not be based on political considerations, but on the fair and equitable application of the law to the factual circumstances of an individual.

The courts, however, have used the flexible language of the Act to protect human rights by expanding the scope of Australia's protection obligations beyond the government's preferred definition, and possibly, beyond the initial reach of the Refugees Convention itself. For example, in *Minister for Immigration & Multicultural Affairs & Indigenous Affairs v Khawar* (2002) 210 CLR 1, the High Court found that a state is not required to be an agent of persecution, but that persecution by non-state and private actors could fall within the Refugees Convention definition of "refugee" if the state condones, tolerates or refuses to protect the individual from it. That case involved a woman who was the victim of domestic violence. Ms Khawar argued that the police not only failed to protect her from the violence, but that it was tolerated and condoned by them. Thus, the deliberate ambiguities in Australian refugee law, and the wide discretions given to decision-makers in this area, have provided opportunities for administrative law to be used to fill the gaps in human rights protection in Australian refugee law.

Courts have been reviewing Australian immigration decisions since before federation.²⁶ While there are early examples of courts striking down adverse immigration decisions, generally Australian courts construed the statutory powers of government to exclude, deport and detain aliens in favour of government.²⁷ However, the High Court's decision in *Kioa v West* (1985) 159 CLR 550, signalled a change in Australian courts' approach to immigration decisions, holding that the validity of a deportation decision would depend on whether natural justice had properly been afforded to an applicant. *Kioa* left a great deal of ambiguity in the nature of a decision-maker's duty to afford applicants natural justice. The court did not elaborate on what would be required of a decision-maker in each instance, stating only (at [32]):

What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter, and the rules under which the decision-maker is acting.

The ambiguity in this statement leaves enormous scope for decisions to be challenged and overturned on natural justice grounds. McMillan refers to *Kioa*'s legacy as "a legal obligation of inexact dimension".²⁸ This obligation has allowed thousands of applicants and their counsel to make applications for judicial review based on minor procedural irregularities, in an attempt to have an adverse decision about their refugee status overturned.

²⁵ Crock M, "The Refugee Convention At Fifty: Mid-life crisis or terminal inadequacy? Some comments on the processing of refugee claims in Australia" in Kneebone S (ed), *The Refugees Convention 50 Years On: Globalisation and International Law* (Ashgate, 2003) pp 47-91.

²⁶ Crock M, *Immigration and Refugee Law in Australia* (Federation Press, Sydney, 1998).

²⁷ McMillan, n 8 at 339.

²⁸ McMillan, n 8 at 341.



The increasing number of appeals following the *Kioa* decision led to attempts by the government to legislate a procedural code,²⁹ which it claimed was exhaustive in so far as what was required by way of natural justice. However, the *Kioa* test proved resilient, with the High Court in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 holding that its ambiguous, expansive natural justice requirements continued to apply in its original jurisdiction.

In these and other refugee decisions, the High Court has consistently dealt with legislative attempts to define the boundaries of natural justice by stating that it will not impute a legislative intention to abrogate the rules of natural justice without clear words to that effect. The response of the legislature has been to amend migration laws to include such unequivocal language as the provisions of the Act are “taken to be an exhaustive statement of the requirements of the natural justice hearing rule”.³⁰

Similarly, in the ultra vires context, the concept of what constitutes a jurisdictional error has been expanded in Australian law to avoid the numerous privative clauses that have been used by government to prevent courts from reviewing migration decisions. In *Plaintiff S157/2002 v Commonwealth* [2003] 211 CLR 476, the High Court used innovative reasoning to overcome what was plainly unambiguous language attempting to oust federal courts’ jurisdiction over refugee claims. The High Court held that the provision which stated that a decision “(a) is final and conclusive; and (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account”,³¹ did not apply to the decision in question because the decision-maker had not properly understood their jurisdiction, and a decision effected by jurisdictional error was no decision at all, but instead was a purported decision.

A clue to this type of innovative and expansive reasoning can be found in the comment by McHugh J in *Re Minister for Immigration & Multicultural Affairs; Ex parte Miah* (2001) 179 ALR 238 that the refusal of an application for a protection visa “may put an applicant’s life or liberty at risk and, as a practical matter, will often – perhaps usually- mean that the applicant will be detained in custody pending the review” (at [146]). This concern may be what gave rise to the majority of the High Court continually referring to the “right” of individuals to appeal government decisions, and Kirby J’s observation that the high rate at which the Refugee Review Tribunal upholds first instance decisions “lends still greater emphasis to the importance of ensuring that the initial decision is correct”.³²

Thus, in the context of refugee decision-making in Australia, courts have used administrative law mechanisms to ensure that human rights standards are being upheld. This has been done by interpreting the deliberately ambiguous language of the statute consistently with progressive international human rights standards, and determining that decisions made in reliance of other interpretations are ultra vires. It has also been done by expanding the procedural requirements of administrative law so that minor procedural errors in decision-making will give rise to a right to review, and require the decision to be re-made. The High Court has shown great reluctance to accept legislative attempts to curtail its jurisdiction, and the right of asylum seekers to appeal adverse decisions to it. This provides a good example of how administrative law has been used to protect individual’s substantive rights in the absence of statutory human rights protections.

Discrimination as a ground of ultra vires

Discrimination developed in an administrative law context as an element of unreasonableness.³³ It was indistinguishable from the concept of discretion in decision-making requiring a decision-maker to act according to the rules of natural justice and reason, and not being permitted to make a decision based

²⁹ Migration Reform Act 1992 (Cth).

³⁰ Migration Legislation Amendment (Procedural Fairness) Act 2002 (Cth).

³¹ Migration Legislation Amendment (Judicial Review) Act 2001 (Cth), Sch 1, s 474.

³² *Kioa v West* (1985) 159 CLR 550 at [185].

³³ Gifford DJ, “Discrimination as a ground of ultra vires: Why is Canada ahead of the rest?” (2007) 14 AJ Admin L 202.



on private opinion. In the leading case of *Kruse v Johnson* [1898] 2 QB 91 at 99, Lord Russell CJ stated that bylaws would be unreasonable “for instance [if] they were found to be partial and unequal in their operation as between different classes”.

In a discussion of what would constitute unreasonableness, Warrington LJ in *Short v Poole Corp* [1926] Ch 66, gave the example of the dismissal of a teacher because she had red hair. In Canada, prior to the enactment of anti-discrimination legislation, the comments of Lord Russell and Warrington LJ developed into a separate ground of invalidity within administrative law. The ground was predominantly used to challenge zoning and bylaws which purported to give councils the power to make decisions based purely on partiality and favouritism.³⁴

However, there are a few examples of the principle being used to uphold what one would recognise as human rights today. For example, in *Jonas v Gilbert* (1881) 5 SCR 356, the Supreme Court of Canada considered the validity of a bylaw that imposed different licence fees on residents and non-residents. The court held that the council was not entitled to impose different licence fees under the Act and that the “principle of equality and uniformity [is] inherent in the general power to tax, so a power to discriminate must be expressly authorised by law”.³⁵ New Zealand also has a modicum of case law suggesting the potential for development of discrimination as a ground for judicial review. In *Van Gorkom v Attorney General* [1978] 2 NZLR 387, the New Zealand Court of Appeal held that a Minister’s exercise of discretion in relation to granting removal expenses to teachers being transferred was invalid on the grounds that it discriminated between married male teachers and married female teachers.

As Gifford explains, Australia was probably excluded from the development of administrative law in this area because of Dixon CJ’s “attack on unreasonableness as an independent head of invalidity” in the 1930s.³⁶ The development of this doctrine within administrative law may have been halted in Canada and New Zealand because of the introduction of anti-discrimination laws in both jurisdictions. Once anti-discrimination laws were introduced, creating a separate cause of action for discrimination, it would have been easier for persons effected by discrimination to use those laws which are simpler and better adapted to dealing with the specific issues involved in discrimination cases than to have to demonstrate that a law or action was so unreasonable that “no reasonable authority could ever come to it”,³⁷ which is notoriously difficult to prove.³⁸

Legitimate expectation and estoppel

One of the most controversial ways in which administrative law principles have been used to uphold human rights is the doctrine of legitimate expectation, also described as public law estoppel. In Australia, this took the form of the High Court’s decision in *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, which involved a Malaysian man who had come to Australia on a tourist visa and married an Australian citizen. Mr Teoh’s wife had four children, one by a previous marriage and four by Mr Teoh’s deceased brother. Mr Teoh and his wife had three more children together. Mr Teoh applied for permanent residency, after which he was convicted of nine counts of importing and possessing heroin. Mr Teoh claimed that the heroin was for his wife, who was addicted to the drug. Following his conviction, his application for residency was refused and a decision was made to deport him.

Mr Teoh appealed the deportation decision to the Federal Court and then the Full Bench of the Federal Court, where he was successful. The Minister appealed to the High Court. Mr Teoh claimed that in deciding to deport him, the decision-maker had failed to take into account the impact that his deportation would have on his children. The High Court dismissed the Minister’s appeal, and found that the fact that Australia had ratified the UN *Convention on the Rights of the Child* (1991) gave rise

³⁴ See Gifford, n 33.

³⁵ Gifford, n 33 at 203.

³⁶ Gifford, n 33 at 212.

³⁷ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

³⁸ *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 626–629.



to “a positive statement ... to the world and to the Australian people that the executive government and its agencies will act in accordance with it” (at 291). In other words, Mr Teoh had a “legitimate expectation” that the interests of his children would be considered because Australia was a party to the Convention. The expectation required that the decision-maker would inquire as to the effect that Mr Teoh’s deportation would have on his children. If the decision-maker proposed to make a decision inconsistent with Australia’s international obligation, the expanded concept of natural justice would require that Mr Teoh be given the opportunity to present a case on this issue.

McHugh J dissented in the case, arguing that the court was giving greater effect to the international treaties than the government had intended. He also noted the difficulties that bureaucrats would have in taking into account every one of Australia’s international obligations in every decision (at 316-317). The decision attracted significant criticisms from legislators, bureaucrats, Ministers and academics in particular. The issues raised by McHugh J were of concern to government, as was the fact that international instruments contain numerous, conflicting obligations, which administrative decision-makers are not in a position to be negotiating between.³⁹

Others welcomed the decision because it strengthened the role of international law in Australia.⁴⁰ It was argued that the decision would compel government to act in accordance with its international obligations.⁴¹ The Australian government responded by releasing an executive statement that ratification of an international instrument was not to give rise to any expectations on the part of the Australian people. The legal effect of this statement is questionable,⁴² however, it made the government’s position on human rights very clear. Groves argues that the government’s reaction to the decision undermines the importance of the Parliamentary Joint Standing Committee on Treaties to the point of meaninglessness.⁴³

The High Court had the opportunity to reconsider the decision in *Teoh* in the very similar factual circumstances of *Re Minister for Immigration & Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1. That case involved a permanent resident convicted of several drug trafficking and possession offences and was notified that the Minister was considering cancelling his visa. Mr Lam made submissions to the Minister which emphasised the fact that he had two Australian children. He provided statements from his fiancé and his children’s carers about his close relationship with his children, and included the carer’s contact details. The Department wrote to Mr Lam stating that it would take the best interests of his children into account and requesting the contact details of the children’s carer. The Department did not contact the carer, but took into account their letter, and decided to deport Mr Lam.

Mr Lam claimed that the Department’s failure to contact the carer after informing him that they would give rise to a legitimate expectation. The High Court unanimously rejected this argument, and criticised the decision in *Teoh*, but did not overturn it. The court held that the concept of legitimate expectation is of “limited utility” (at [47]) and stressed that there must be a practical element to procedural fairness. Gleeson CJ stated that an applicant must do more than simply point to an expectation that was not met, but must explain how the unmet expectation had caused unfairness in the decision-making process (at [34]).

Although the court did not overturn *Teoh*, *Lam* is a significant departure from it, although how significant it is unclear. The legitimate expectations doctrine continues to be used in Australian law,⁴⁴ although an applicant must clearly show substantive unfairness, unlike in other areas of natural justice.

³⁹ Groves M, “Is Teoh’s case still good law?” (2007) 14 AJ Admin L 126 at 128.

⁴⁰ Kirby M, “The impact of International Human Rights Norms: A Law undergoing Evolution” (1995) 25 UWALR 30.

⁴¹ Allars M, “One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government” (1995) 17 Syd LR 204.

⁴² Allars, n 41 at 237-241.

⁴³ Groves, n 39 at 134.

⁴⁴ See, eg *Royal Women’s Hospital v Medical Practitioners Board (Vic)* (2006) 15 VR 22; [2006] VSCA 85.



Perhaps the fact that the court did not go so far as to overturn the legitimate expectation doctrine may indicate that the court is not quite willing to entirely dismiss this means of incorporating rights into Australian administrative law.

Other common law jurisdictions have the similar principle which Taggart likens to public law estoppel.⁴⁵ In *R v East Sussex County Council; Ex parte Reprotech (Pebsham) Ltd* [2003] 1 WLR 348, Lord Hoffmann pointed out the similarities between private law estoppel and the doctrine of legitimate expectations: “There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power” (at [34]). However, he concluded that the two are substantially different in the fact that public authorities must also consider the public interest.

In *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237, the Council had promised that it would provide refugees with permanent accommodation within 18 months. The Council was in the position to fulfil the promise but did not do so. The Court of Appeal found that the Council was required to take the promise into account in its decision-making process and the fact that there was no evidence that it had done so gave rise to legal error in other decisions it had made regarding housing funding. UK courts have been careful to stress that the expectation is procedural and not substantive.⁴⁶

The principle has been the subject of much discussion and debate. Some have criticised it as permitting “judicial activism” arguing, eg, that Parliament never intended that unincorporated treaties would have a legal effect in Australia, and for the court to determine that they have such effect is beyond its constitutional power.⁴⁷ Others have applauded the High Court for accepting the legitimacy of international law in the form of the doctrine.⁴⁸

Regardless of which view is legally correct, and whether it is appropriate for procedural fairness to be used as a mechanism for importing legitimate expectations arising under international law, it is unlikely that the doctrine of legitimate expectations would have developed in this way in Australia if Australia had a Bill of Rights incorporating the principles of the *Convention on the Rights of the Child*. It is likely that such a Bill would have provided for other remedies by which Mr Teoh could have enforced his legitimate expectation. This is evidenced by the fact that the legitimate expectations doctrine has not gained much traction in Canadian law, which has had an extensive *Charter of Rights and Freedoms* since 1982.

2. LIMITATIONS OF ADMINISTRATIVE LAW’S ABILITY TO PROTECT RIGHTS

Administrative law has proven to be a capable vehicle for promoting human rights in many situations. However, there are also circumstances in which the administrative law concepts of procedural fairness and jurisdictional error have failed to protect some of the most fundamental rights. The *Al-Kateb case*⁴⁹ is one such example, and is discussed in detail below. The reasons for these instances of failure can be conceptualised in terms of some of the fundamental theoretical debates about the scope and nature of administrative law.

While administrative law is extremely flexible, it is limited by some fundamental restrictions which have their basis in the rule of law and the constitution. There is certainly scope for challenging the boundaries of these concepts, which include the separation of powers and the distinction between law and merits, however in order to maintain the integrity of administrative law, these boundaries cannot be ignored. This section of the article considers some of the conceptual limitations on the ability of administrative law to protect human rights in all circumstances: the separation of powers, the distinction between law and merits and the difficulty that administrative law has had in regulating private actors, even when exercising public power.

⁴⁵ Taggart M, “Administrative Law” (2003) 1 *New Zealand Law Review* 99.

⁴⁶ Taggart, n 45 at 109.

⁴⁷ Handsley, n 7.

⁴⁸ Allars, n 41 at 204.

⁴⁹ *Al-Kateb v Goodwin* (2004) 219 CLR 562.



Separation of powers / parliamentary supremacy

As discussed above, the Australian *Constitution*, like those in the UK, US, New Zealand and Canada, is premised on the notion that no arm of government has unfettered power.⁵⁰ The Parliament is limited in the content of its legislative power, the scope of which is ultimately determined by the courts. The courts are limited by the fact that if the Parliament enacts a clear and unambiguous law that is within their power, the judiciary cannot object based on its disagreement with the law: “However imprudent, unwise or even unjust Parliament’s actions might appear to a given individual, so long as it stays within the *Constitution*, Parliament can make or unmake whatever laws it likes”.⁵¹ One implication of this is that, in the absence of an overriding statute or constitutional principle that requires government to legislate consistently with human rights, the Parliament may abrogate human rights.⁵² In that situation, if the relevant legislation under which a decision is made is clear and unambiguous, judicial review will not provide an aggrieved individual with an effective remedy.

An example of this is found in the High Court’s decision in *Al-Kateb v Goodwin*. (2004) 219 CLR 562. That case involved a man who was mandatorily detained under the *Migration Act*, which provided that: (a) all non-citizens must be detained (s 189); (b) they must remain in detention until they are removed from Australia or granted a visa (s 196); and (c) a person must be deported as soon as practicable if they ask to be deported, or their final appeals are exhausted and it is determined that they are not entitled to a visa (s 198). The Minister for Immigration decided that Mr Al-Kateb was not entitled to a visa. However, there was no other country that was willing to accept him, and he did not have citizenship of any country. The question before the court was whether Mr Al-Kateb could be detained indefinitely in Australian immigration detention.

The court considered the language of the *Migration Act* and found it to be unambiguous in the fact that release was not required unless a person met either of the two conditions – that is was granted a visa or deported from Australia. The majority found that it was within the Parliament’s power to legislate with respect to the detention of people who enter Australia without a valid visa. And they held that the primary object of this detention was security and not punishment (which only the courts have decision-making power over). Thus, it was found that Mr Al-Kateb could be detained indefinitely.

Many of the judges expressed great reluctance in their conclusion, with McHugh J describing the outcome as “tragic” (at 581). The decision demonstrates the key limitation of administrative law in being capable of protecting human rights. Ultimately, administrative law is concerned with ensuring the quality of administration. Parliament may enact any laws it likes, within its constitutional powers, which the courts must ensure are administered properly.⁵³ The ambiguous language of many statutes, and the broadly acceptable principles of natural justice, fairness and rationality, allow administrative law to interpret what is “good administration” based on human rights and the rule of law.

Generally, legislators are unwilling to subvert these widely accepted principles. However, should legislators choose to limit what is required by way of natural justice, as the Australian government has in the *Migration Act*, or to unambiguously legislate for a breach of human rights, the courts’ job is to ensure that those laws are administered properly. Fundamentally, administrative law cannot dictate the substance of a law, whereas human rights law can.

⁵⁰ Blackshield T and Williams G, *Constitutional Law and Theory: commentary and materials* (4th ed, Federation Press, 2006) p 20 (quoting Hood Phillips O and Jackson P, *Constitutional and Administrative Law* (7th ed, Sweet & Maxwell, 1987).

⁵¹ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 at 267 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

⁵² Administrative Review Council, *The Scope of Judicial Review*, Report to the Attorney-General, No 47 (April 2006) p 30.

⁵³ Loughton G, *Privative Clauses and the Commonwealth Constitution* (paper presented at the Australian Government Solicitor’s Constitutional Law Forum, Canberra, 23 October 2002), p 3.



The law/merits distinction

Saul argues that the law/merits distinction has limited the development of the notion of proportionality in administrative law.⁵⁴ This has prevented appellants from being able to put forward arguments related to the lack of proportionality in administrative decision-making, which is an accepted notion in human rights law – that any impingement on fundamental rights must be necessary and proportionate.⁵⁵

The concept of proportionality has been used in administrative law in the context of reviewing delegated legislation. The leading case of *Williams v City of Melbourne* (1933) 49 CLR 142 stands for the principle that delegated legislation must be proportionate to the objective sought to be achieved by the principal act.

Some commentators have argued that this principle should be extended into judicial review of administrative action.⁵⁶ Such extension would certainly enable administrative law to accommodate additional rights arguments. In practice, such a concept imported into administrative decisions would mean that decision-makers would be required to consider whether a particular course of action that impinges on an individual's rights, or denies them a benefit, is proportionate to the end sought to be achieved by the legislation and policy, or proportionate to the impact an adverse decision would have on an individual.

In many instances this may overlap with what decision-makers are already duty-bound to consider. However, had proportionality been a ground of review in *Al-Kateb*, it is likely the outcome would have differed. There was no suggestion in that case that Mr Al-Kateb was a threat to Australia, so the impact of his indefinite detention would probably have been seen as a disproportionate reaction to the ends sought to be achieved by Australia's migration legislation.

Bradley Selway⁵⁷ argues that the reason that proportionality has not been successfully adopted as another ground of judicial review is because it would require courts to cross over into merits review. In order to determine if a decision was proportionate or not, a court would be required to consider the factual circumstances of an applicant as well as the policy intentions of legislators. This would in effect be a new decision on the facts.

The law/merits distinction, although imprecise and problematic,⁵⁸ is important to the legitimacy of judicial review. Judicial review is justified by the fact that the separation of powers requires that judges be the final arbiters of what is within the power of each arm of government. The separation of powers also requires that in performing judicial review, courts are not permitted to enter into a consideration of the merits of a decision because to do so would be to exercise administrative power. Therefore, administrative lawyers cannot at the same time declare the importance of the separation of powers as providing for the right to judicial review and declare it as unimportant in the sense that it requires courts to refrain from administrative decision making.

Although it can be argued that other grounds of judicial review, in particular unreasonableness and subjective jurisdictional facts also cross over into merits review,⁵⁹ Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, makes it clear that review of the weighting of considerations, which is precisely what a proportionality test would require, is a significant step beyond testing for manifest unreasonableness, or requiring reasoned fact finding.

⁵⁴ Saul, n 1, p 54.

⁵⁵ *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69.

⁵⁶ Kneebone S, "Proportionality: protection of common law rights or chipping away at the Diceyan edifice" in Pearson L (ed), *Administrative Law: Setting the Pace or Being Left Behind?* (Australian Institute of Administrative Law, Sydney, 1996) p 168.

⁵⁷ Selway B, "The Principle Behind Common Law Judicial Review of Administrative Action: the Search Continues" (2002) 30 Fed L Rev 217 at 224.

⁵⁸ Blackwell J, "A Discussion of the Duty & Jurisdiction of the Courts to Review Administrative Decisions" (2003) 3 *QUT Law and Justice Journal* 1.

⁵⁹ Laws J, "Law and Democracy" (1995) *Public Law* 72 at 79.



Public and private power

Both administrative law and human rights law have struggled with the delineation between public and private power. The origin of both areas of law was in regulating public power, and neither historically applied to private actors.⁶⁰ However, the move to privatisation of essential services and the increased role of corporations in effecting our every day lives has challenged both areas of law.

Only states are parties to most international human rights law instruments, so that private actors cannot, for the most part, be held to account under international law. However, the main international rights treaties, the *International Covenant on Economic Social and Cultural Rights* (1976) and the *International Covenant on Civil and Political Rights* (1966), both require that states parties protect individuals from abuse of their rights by private actors “in so far as they are amenable to application between private persons or entities”.⁶¹

The above discussion of the *Khawar* decision illustrates where states may be “liable” for failing to protect individuals from rights abuses perpetrated by private actors. International law requires states to take positive steps to prevent and punish private abuses of human rights.⁶² This, Saul argues, means that private actors are indirectly regulated by international human rights law.⁶³

Administrative law has been much less successful in extending its regulation to private actors. The position in Australia following *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 and *Griffith University v Tang* (2005) 221 CLR 99, is that if the government confers the power to make discretionary decisions to a private entity, and there is no legislation requiring that entity to make a decision, or governing the making of the decision, principles of natural justice and of fairness and rationality do not apply. For example, in *Tang*, it was found that because there was no legislation conferring the power to make decisions about conferring university degrees on Griffith University, the university’s decision not to confer a PhD on Ms Tang was not a decision “made under an enactment” and so was not judicially reviewable, not was natural justice required in its making.

This has significant implications for the ability of administrative law to uphold human rights. Decisions which effect people’s basic rights – such as employment, housing and access to premises – are made by private entities every day. Administrative law has proven that it is unable to provide remedies for breaches of these rights within the private sphere.

Therefore, the public/private distinction, along with the separation of powers and law/merits dichotomy mean that administrative law is not capable of protecting human rights in all circumstances. At the same time each of the concepts is fundamental to underpinning the legitimacy of administrative law, and cannot be disregarded by even the most “activist” judge in order to progress human rights.

3. NEED FOR LEGISLATIVE RIGHTS PROTECTION

This section concludes the article by considering the impact that legislative rights protection would have on administrative law in terms of its ability to protect human rights. It does so by first outlining the relevant legislative rights protection models in key jurisdictions. Then the *Al-Kateb* decision is used as an example to demonstrate the impact that such a legislative model of rights protection would have on Australian administrative law.

Approaches taken in other jurisdictions

It is likely that any Commonwealth model of human rights protection would follow the “parliamentary rights model”⁶⁴ that has been adopted in the UK, New Zealand, the ACT and Victoria.⁶⁵ The human

⁶⁰ Saul, n 1, p 55.

⁶¹ UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (26 May 2004, UN Doc CCPR/C/21/Rev1/Add) 13 at para 8.

⁶² *Velasquez Rodriguez case*, Inter-American Court of Human Rights, Ser C, No 4 (1988).

⁶³ Saul, n 1, p 56.

⁶⁴ Hiebert JL, “Parliamentary Bills of Rights: An Alternative Model?” (2006) 69 Mod LR 7.



rights legislation in each of those jurisdictions provides that to the extent possible, all other legislation is to be interpreted to be compatible with human rights.⁶⁶ Should Australia adopt a similar form of legislative rights protection, it is these provisions that are likely to impact on administrative law because of its concern with statutory interpretation in order to determine the limits of the Executive's decision-making power.

The interpretation of these provisions has differed between jurisdictions. UK courts have taken a "more aggressive" approach than New Zealand courts to interpreting provisions consistently with human rights,⁶⁷ with New Zealand courts placing greater emphasis on legislative intent.⁶⁸ The ACT courts have indicated a preference for the UK approach, of requiring a very clear legislative intent to abrogate human rights, and Victoria is also more likely to adopt this approach to statutory interpretation.⁶⁹

The practical effect of the provisions is to remove the requirement of ambiguity for courts to be able to interpret legislative provisions to be compatible with human rights. This, to various extents, expands the situations where courts are able to interpret provisions consistently with human rights by elevating that particular rule of statutory construction. In the UK, even where ordinary rules of statutory construction would dictate that provisions are, or are intended to be discriminatory, if it is possible to read provisions to be compatible with human rights, courts will do so.⁷⁰

For example, in *Ghaidan v Godin-Mendoza* (2004) 2 AC 557, the House of Lords held that the provisions of the *Rent Act 1977* (UK), which gave special protection to the spouse defined as a person living with the original tenant "as his wife or husband" were, on their face, discriminatory. However, the House of Lords found that it was possible to interpret the provision as applying to same-sex partners, and the effect of ss 3 and 4 of the *Human Rights Act 1998* (UK) was that this was the best interpretation.

The New Zealand approach is less aggressive, in part due to the way New Zealand courts have applied s 5 of the *New Zealand Bill of Rights Act*. Section 5 provides that rights and freedoms may be subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". New Zealand courts have considered whether limitations are justifiable prior to examining options for construing legislation consistently with human rights.⁷¹

Likely effect of a human rights Act on Australian administrative law

Regardless of whether Australian courts took the New Zealand or UK approach, the existence of a parliamentary Bill of Rights would likely have reversed the court's decision in *Al-Kateb*. Alice Rolls has examined the application of the UK approach to that decision, and concluded that the outcome would likely have been reversed had the UK *Human Rights Act* been applied.⁷²

The New Zealand approach would probably have the same effect in that decision, as McHugh J in *Al-Kateb* noted the "tragedy" of the court's finding that indefinite administrative detention is possible

⁶⁵ Given that a constitutional Bill or Charter of Rights will not be forming part of the government's human rights consultation: *Evidence to Senate Committee on Legal and Constitutional Affairs, Commonwealth Parliament*, 20 October 2008 (Senator Wong and Philippa Lynch) pp 30-31.

⁶⁶ *Human Rights Act 1998* (UK), ss 3, 4; *New Zealand Bill of Rights Act 1990* (NZ), s 6; *Human Rights Act 2004* (ACT), s 30; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32.

⁶⁷ Butler P, *Australian Bills of Rights: The ACT and Beyond: Lessons From New Zealand* (paper presented at the Australian Bills of Rights: The ACT and Beyond Conference, Australian National University, Canberra, 21 July 2006, <http://www.acthra.anu.edu.au/news/Conference2006.htm>).

⁶⁸ Charlesworth H, "Human Rights and Statutory Interpretation" in Corcoran S and Bottomley S (eds), *Interpreting Statutes* (Federation Press, Sydney, 2005).

⁶⁹ Rolls A, "Avoiding Tragedy: Would the Decision of the High Court in *Al-Kateb* have been any different if Australia had a Bill of Rights Like Victoria" (2007) 18 PLR 119 at 129.

⁷⁰ Charlesworth, n 68, p 114

⁷¹ *Hansen v The Queen* [2007] NZSC 7 at [192] (McGrath J), [92] (Tipping J), [60] (Blanchard J).

⁷² Rolls, n 69 at 130-131 (application of the UK approach).



under Australian law.⁷³ The majority decision in *Al-Kateb* was based on a finding that it is within the Parliament's power to detain unlawful non-citizens indefinitely, and not that doing so is justifiable.

A requirement that legislative provisions be interpreted consistently with human rights insofar as it is possible would necessarily affect the way decision-makers make decisions. A statutory Bill of Rights similar to those discussed above, will increase the threshold for a statutory conferral of administrative power to authorise the infringement of human rights. Thus, the ambit of a decision-maker's discretion will be limited by the requirement that, in the absence of an express legislative authorisation to the contrary, they must "proceed on the basis that the power does not authorise action inconsistent with a right".⁷⁴

If the UK approach is adopted, this may have the practical effect of returning Australian administrative law to the situation following *Teoh*,⁷⁵ where individuals have a "legitimate expectation" that their human rights will be taken into account by decision-makers.

If Australia adopts a national statutory Bill of Rights, it will remain possible for Parliament to authorise decision-makers to make decisions contrary to human rights. However, the default position will be that human rights applies to administrative decisions rather than their application being purely dependent on their being ambiguity in the empowering legislation.

Those against statutory rights protection in Australia argue that rights are already well protected in Australia.⁷⁶ Administrative law is, rightly so, cited as one of the ways in which rights are protected.⁷⁷ However, the above discussion demonstrates that administrative law is not capable of protecting some of the most fundamental of rights, such as the right not to be indefinitely and arbitrarily detained. If Australia were to adopt a Bill of Rights along the lines of those adopted in either the UK or New Zealand, this article has shown that at least some rights abuses would be avoided.

In jurisdictions that possess a Bill of Rights or similar instrument that embodies fundamental rights, the most important values of international instruments may be transmitted via rights jurisprudence, but in the absence of such a domestic device the transmission of fundamental or unwritten values can be controversial.⁷⁸

CONCLUSION

The above discussion demonstrates that good administration does not necessarily require that human rights be upheld. Often the two will overlap, but ultimately administrative law is concerned with ensuring that decision-makers exercise their discretion within the limits of the power conferred on them by the Parliament. As Gleeson CJ said in *Re Minister for Immigration & Multicultural Affairs; Ex parte Fejzullahu* (2000) 171 ALR 341 at [6]:

The rule of law is not maintained by subverting the democratic process. The Constitution, which is the instrument of government of a democratic, and therefore political, society, has not substituted general judicial review for political accountability.

The first part of this article showed that there is substantial scope for the principles of natural justice and ultra vires to incorporate human rights into the administrative decision-making process, principally by courts presuming that Parliament does not intend to impinge on fundamental rights.

However, subject to constitutional limits, the Parliament has the power to limit individual rights, and may in fact intend to do just that, and, so long as that intention is clearly expressed, administrative law mechanisms will be incapable of preventing such abuses.

⁷³ *Al-Kateb v Goodwin* (2004) 219 CLR 562 at 581 (McHugh J).

⁷⁴ Bayne, n 12 at 6.

⁷⁵ *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273.

⁷⁶ See, eg Johns G, *A Bill of Rights: The Ultimate in Participation, or an Immature Stage in our Development?* (Proceedings, 11th Conference of the Samuel Griffith Society, Melbourne, 9-11 July 1999).

⁷⁷ Gilbert & Tobin Centre for Public Law, *Should Australia have a Charter of Human Rights? Arguments for and against*, <http://www.gtcentre.unsw.edu.au/Resources/cohr/arguments/ForandAgainst.asp> (viewed 20 March 2009)

⁷⁸ Groves, n 39 at 142-143.



Administrative law gains its authority from its constitutional and common law origins, and its foundation is the separation between judicial and executive power. In order to retain the legitimacy of judicial review, administrative lawyers must uphold the separation of powers, even when this prevents administrative law mechanisms from being capable of protecting fundamental rights and freedoms. The separation of powers at the same time justifies judicial review as it limits the ability of judges to re-write legislation made within the power of the Parliament. At the same time as allowing judges to be the final arbiters of the law, it allows the Executive and its administrators to be the final arbiters of policy.

Thus, in the absence of an infallibly benevolent Parliament, this article has shown that the only way of ensuring that human rights are enforced in legislative and administrative decision-making is a Bill of Rights that requires both legislators and administrators to uphold fundamental rights.

