TEOH, AND INVALIDITY IN ADMINISTRATIVE LAW

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The joint judgment of Mason CJ and Deane J in *Minister for Immigration and Ethnic Affairs v Teoh* opens with the remark that "This appeal ... raises an important question concerning the relationship between international law and Australian law".[1] That was so, but of equal importance is that the judgments would define the criteria for the validity of administrative decision making in the domestic Australian sphere. My analysis focuses on the criteria for validity defined by the High Court, and whether the Court discharged the task of definition as well as it might have done. For the most part I am critical of the judgments.

I shall start by emphasising the importance of this judicial function, of defining the criteria for the validity of administrative decision making.

Questions of legal validity arise before courts in many contexts. In the constitutional arena, for example, courts must define the criteria for the validity of Commonwealth and State legislation. The judgments of courts on this issue are primarily addressed to the dozen or so specialist constitutional lawyers in Australia who advise Commonwealth, State and Territory governments on the validity of the few hundred Acts that are enacted each year.

Court judgments on the validity of administrative decisions are directed to a quite different audience, that includes many thousands of non-specialist decision makers around Australia who make several million decisions each year. For a decision maker to break the criteria defined by courts, and make an invalid decision, can be a serious matter. An invalid decision is deemed in most cases to be a non-existent decision, that cannot provide a lawful foundation for related administrative action.[2] To declare a decision invalid may have a ripple effect on a great many administrative steps, and may require that history be disentangled or rewritten.[3] There may even be a tortious right of action (for example, in assault, false imprisonment, or conversion) where a coercive administrative action is later found to be invalid.[4]

It is important therefore, for many reasons, that the criteria for lawful decision making should themselves meet certain standards. We could expect, for example, that -

- the criteria are sensible, and compliance is feasible;
- there is a coherent public law justification for the criteria; and
- the criteria are relatively clear, certain, and ascertainable.

Before I examine whether the High Court in *Teoh* met those standards, I would preface my analysis with the comparatively positive assessment that

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the High Court at least met the standards better than the Federal Court judgments in *Teoh* did![5] The joint judgment of Mason CJ and Deane J was rightly critical of some features of the Federal Court judgments. They criticised, for example, an assumption made by the Federal Court that an administrative decision must conform to the principles of an international convention. They rejected also the finding that procedural fairness required the decision maker to initiate inquiries and obtain reports on the future welfare of Mr Teoh's children. By implication too the High Court did not accept some sweeping statements made in the Federal Court, for example, that it is an error of law for the administration to fail to carry out its duty to effect good administration.[6]

I turn now to discuss whether the criteria for lawful decision making defined by the High Court met the standards which I defined earlier.

Standard 1: that the criteria are sensible, and compliance is feasible

I have no difficulty with the central proposition of the majority, that ratification of an international convention is a serious act, which signifies at base an intention to make that treaty a relevant consideration that can influence decision making in Australia. My criticism rather is of the leap forward from that proposition, to the conclusion that all Australians have a legitimate expectation that administrative decisions will thereafter be made in conformity to the convention, and that this imposes a correlative obligation upon each decision maker to notify a person whenever a decision will be inconsistent with a convention.

An obligation of that breadth will be demanding in its nature, and unpredictable in its effect. The history of the *Teoh* case illustrates that point in a compelling way. The history started, in a sense, with *Kioa v West*,[7] in which the High Court had itself rejected the proposition that natural justice imposed a general obligation upon administrators to consider human rights obligations that bound Australia. In *Teoh*, the UN *Convention on the Rights of the Child* had not been raised at the time of the initial decision, before the Immigration Review Panel, before the delegate of the Minister, during the trial before French J, or in the notice of appeal to the Full Federal Court. As Mr Justice Toohey commented, "It seems to have surfaced during the hearing of the appeal to the Full Court".[8]

That remark arguably dramatises the impracticability of a legal standard which says that an administrative official bears a legal onus of drawing to the attention of the citizen the substance of each international convention that is arguably relevant to the statutory discretion being exercised. Does that mean, for example, that every decision made in recent years by a judge to imprison a father or mother was invalid because the judge did not, during sentencing, draw to the attention of the accused that incarceration might separate parent and child in a way that would offend the *Convention on the Rights of the Child*? Would invalidity likewise attach to many taxation decisions that have depleted family assets?

Nor is it easy to see what practical purpose will be served by requiring a decision maker to convene a hearing on the possible relevance of a convention that the decision maker is not obliged to follow. As Justice McHugh concluded in dissent, "It seems a strange, almost comic, consequence if procedural fairness requires a decision-maker to inform the person affected that he or she does not intend to apply a rule that the decision-maker cannot be required to apply, has not been asked or given an undertaking to apply, and of which

the person affected by the decision has no knowledge".[9] To proceed along that path is to elevate form above substance.

The doctrine of natural justice did not hitherto impose such a demanding obligation. The traditional thrust of the doctrine was to require that a person be given an adequate opportunity to be heard on the issues on which a decision maker proposed to decide. It was not the responsibility of the adjudicator or decision maker to provide legal or administrative assistance to a person in shaping their argument, by drawing that person's attention to every relevant statutory criterion or common law presumption. Equally, it was enough that a decision maker disclosed in broad outline the case to be met by the person; it was not required in administrative inquiries - in the familiar words of Lord Denning - that the decision maker quote chapter and verse on every relevant issue of fact.[10]

The concept of legitimate expectation likewise served a limited purpose, of ensuring that a person would have the opportunity of being heard before an adverse decision was made inconsistently with the expectation. That is, the concept defined the circumstances in which a hearing would be conducted, rather than the nature or content of that hearing.

To adhere to the traditional formulation of natural justice would not undermine the persuasive relevance of international conventions. It is well-established that a decision maker should give realistic and genuine consideration to the merits of a person's case, including relevant issues raised in a submission by the person.[11] An international convention can thus be raised in argument by an aggrieved person. There is also scope, within existing boundaries, for requiring that a decision maker should consider human rights considerations that are relevant to a decision.[12] By that I mean that consideration should be given to broad values, like freedom of speech, liberty of the individual, and protection of the family unit. The *Human Rights and Equal Opportunity Commission Act 1986* (Cth), which contains a Schedule defining many of those fundamental freedoms, provides at the same time a justification for treating them as relevant matters that should be considered in broad terms in administrative decision making. Merit review tribunals can also be relied upon to draw attention to international conventions that have a special bearing on the merits of particular categories of decision.

Another aspect of *Teoh* is also pertinent to an evaluation of whether the legal standard enunciated by the Court is sensible and feasible. The statutory discretion that was being exercised in that case (to refuse resident status) was cast in broad statutory language.[13] Accordingly there was scope for the decision maker to consider and apply a Departmental Instruction Manual, stating that a person seeking Australian resident status should meet a test of good character, and that conviction in Australia of a serious criminal offence would normally defeat that condition. The Manual was a publicly-available expression of government policy, that had been endorsed and defended by Ministers. It is surprising, in those circumstances, that the Manual did not take precedence over the Convention, which could claim no higher status than being an alternative expression of government policy. Standard principles of construction would suggest that the specific policy, that had been integrated with the *Migration Act* and addressed to a domestic Australian audience, would take precedence over a general statement of policy that was adopted principally as a statement of intention communicated to foreign governments.

The diminished importance given by the Court to government policy has been a

feature of other recent cases as well. Two cases that stand out are *Mok* and *Phillips*,[14] which reflect a view that adherence to government policy by a decision maker may constitute a form of institutional bias that offends natural justice. That view fits oddly in a system of democratic political choice in which it is expected that an incoming government selected by the people has a set of policies that it will be biased in favour of implementing.

Standard 2: that there is a coherent public law justification for the criteria

Two aspects of this standard warrant discussion. First, *Teoh* concerned an action brought under the *Administrative Decisions (Judicial Review) Act*. Thus, in a technical and legalistic sense, any criterion of invalidity defined by the Court must expound one of the 18 statutory criteria of invalidity defined by Parliament in s 5 of the *ADJR Act*. And yet s 5 is not mentioned in any of the judgments in the context of defining the legal criteria to govern administrative decision making.

This may seem a pedantic or churlish criticism, but there is more to it. The foundation principle of public law is that decisions of government must have a lawful foundation. This principle has been at the heart of many recent decisions, including the *Gunns* woodchip decision,[15] in which Sackville J condemned the administration for not conforming to the environmental impact legislation; and the decisions in *Coco* and *Ridgeway*,[16] in which the High Court condemned law enforcement action that lacked explicit statutory support.

It would help to emphasise that point if in cases like *Teoh* the judgment of the Court was itself referable to the statutory framework under which the decision was being reviewed. It is in fact difficult to draw a cross-reference between many of the principles in the judgments and the grounds defined in s 5 of the *ADJR Act*. Some comments, indeed, seem to cut directly across that statutory framework. Justice Gaudron, for example, thought that the Convention was of subsidiary significance, and that the case could be decided on two alternative bases: firstly, that there is a common law right, springing from citizenship, to treat the interests of children as a primary consideration in decisions which affect their individual welfare, with a corresponding obligation on administrators to initiate appropriate inquiries into the effect of a decision on a child; and secondly, that any reasonable person would assume that the bests interests of a child would be taken into account as a matter of course and without any need for the issue to be raised with the decision maker.

In the context of this decision governed by three statutes - the *Migration Act*, the *Citizenship Act*, and the *ADJR Act* - it seems difficult to accept that the outcome is controlled rather by the common law and assumptions about human behaviour and the duties of decision makers.

A second issue to consider, in evaluating whether there is a coherent public law justification for the criteria of invalidity, is the administrative law context in which those criteria are defined and developed in Australia. What I have in mind is that Australia has a comprehensive administrative review system, in which there are alternative ways in which a person may review a decision - by judicial review, my merit review pursuant to a comprehensive framework of tribunals that includes an Immigration Review Tribunal, by administrative investigation conducted by an Ombudsman, or by investigation of anti-discrimination and human rights standards by the different commissioners who together constitute the Human Rights and Equal

Opportunity Commission. That administrative law framework, it is often emphasised, enshrines a distinction between the validity of a decision and the merits of a decision. That entails in turn a recognition of the distinction between administrative behaviour that is defective and administrative behaviour that is unlawful.

One should have no difficulty accepting the proposition that as a matter of good administration all decision makers should be aware of the impact of international conventions which Australia has ratified. If HREOC, the Ombudsman, the AAT, or the IRT were to criticise a department which failed to keep abreast of the national and international influences on decision making, the criticism would be rightly made. Moreover, s 47 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) defines a mechanism by which a convention can be declared under that Act and be applied by the Human Rights Commissioner when investigating complaints against Commonwealth administrative behaviour. Those mechanisms together ensure that ratification of international conventions will not become "a merely platitudinous or ineffectual act", which was the danger warned against by Mason CJ and Deane J.[17]

But to go further and insist that all which is defective is also invalid - with all that a declaration of invalidity entails - is to extend the reach of judicial supervision further than it needs to be stretched in the Australian administrative law system. Arguably the *ratio* of *Teoh* blurs the distinction between matters of law and matters of administration. So too do some particular opinions in the judgment, such as the specific instruction given by Mr Justice Toohey that the decision maker could have made inquiries of the Parkerville Children's Home and the Department of Community Welfare.

Standard 3: that the criteria are relatively clear, certain, and ascertainable

The practical effect of *Teoh* is that the validity of decision making in Australia can be dependent hereafter on the knowledge which individual officials have of the opaque terms of international conventions that may be difficult to identify or locate.

Critics of the judgment have noted that as many as 920 international conventions have been ratified by Australia. The difficulty of deciding whether a particular convention is relevant to a decision will frequently be compounded by the ambiguous language in which some conventions are expressed. In *Teoh*, for example, the issue arising was whether deportation of Mr Teoh fitted the description of Article 3 of the *U N Convention on the Rights of the Child*, that "*In all actions concerning children*, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". A skilled lawyer could be excused for having decided that deportation of Mr Teoh was not an action concerning his children. (This conclusion would be reinforced by Article 9(4), which specifically addresses the situation in which parents and children are separated by detention, imprisonment and deportation.)

Teoh similarly illustrates that the relevance of a convention will often be an issue of mixed law and fact, to be resolved anew in each individual case. It may not be possible to give straightforward guidance in decision making manuals, which will exacerbate the difficulty faced by administrators who lack legal training. Perpetual uncertainty about how decisions should

be made, or whether they are valid, does little to advance the rule of law.

Important issues of principle are also left unresolved by *Teoh*. When the Commonwealth Executive ratifies an international treaty, is the legitimate expectation which is thereby created confined to Commonwealth decision making, or does it embrace State decision making as well? And, in relation to Commonwealth decision makers, does the expectation apply only to officials in departments who are obliged to implement government policy, or does the expectation apply as well to those who have legal independence from the directions of government ministers, principally the staff of courts, tribunals, and statutory authorities?

Conclusion

The thrust of my criticism can be summed up in a few words. *Teoh* raised difficult questions about international law and behaviour which the High Court had to address. At the same time the Court also had to address questions of Australian administrative law. The focus on one set of questions should not obscure a proper handling of the other set. My argument is that this balance was not maintained.

Endnotes

1 (1995) 128 ALR 353, 355.

2 *Eg Wattmaster Alco Pty Ltd v Button* (1986) 70 ALR 330.

3 *Eg Our Town FM Pty Ltd v Australian Broadcasting Tribunal (No 1)* (1987) 13 ALD 740, *(No 2)* (1987) 77 ALR 601, and *(No 3)* (1987) 77 ALR 609; and K Wheelwright, "Controlling Pathology Expenditure under Medicare - A Failure of Regulation?" (1994) 22 *F L Rev* 92, 110-113.

4 *Eg Cooper v The Board of Works for the Wandsworth District* (1983) 14 CB(NS) 180, 143 ER 414; and *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 167 CLR 637.

5 *Teoh v Minister for Immigration and Ethnic Affairs* (1994) 121 ALR 436.

6 *Id*, p 452 (*per* Lee J).

7 (1985) 159 CLR 550.

8 (1995) 128 ALR 353, 371.

9 (1995) 128 ALR 353, 383.

10 *R v Gaming Board of Great Britain; ex p Benaim and Kaida* [1970] 2 QB 417, 430.

11 *Eg Hindi v Minister for Immigration and Ethnic Affairs* (1988) 91 ALR 586, 597. See also *Singh v Minister for Immigration and Ethnic Affairs* (1985) 9 ALN 13: an official is obliged "to take into consideration all matters relevant to the decision to be made which, at the time the decision is to be made, are before him or her, whether actually ... or constructively".

12 *Eg Chaudhary v Minister for Immigration and Ethnic Affairs* (1994) 121 ALR 315. See also *Barbaro v Minister for Immigration and Ethnic Affairs* (1982) 46 ALR 123 (obligation to consider the impact of a deportation decision on a deportee's family). The decision in *Teoh* complied with an obligation defined in these terms. The decision of the Immigration Review Panel referred to the "very bleak and difficult future" facing Mr Teoh's wife and children.

13 Ss 6(2) and 6A of the *Migration Act* 1958 (Cth).

14 *Mok v Minister for Immigration and Ethnic Affairs (No 1)* (1993) 47 FCR 1, and *Phillips v Department of Immigration and Ethnic Affairs*, (1994) 48 FCR 57.

15 *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 127 ALR 580.

16 *Coco v R* (1994) 120 ALR 415, and *Ridgeway v R* (1995) 129 ALR 41.

17 (1995) 128 ALR 353, 365.