



FACULTY OF LAW
University of Lund

William Alexander

In breach of the ‘overarching principle.’ Judicial oversight of administrative decisions as a prerequisite for effective implementation of non-refoulement: Australia in focus.

Master thesis
20 points

Autumn 2002

Supervisor: Göran Melander

International Human Rights Law

Contents

SUMMARY	1
PREFACE	2
ABBREVIATIONS	3
1 SCOPE	4
2 PURPOSE	7
3 AUSTRALIAN GOVERNMENT POLICY WITHIN AN HISTORICAL CONTEXT	9
4 JUDICIAL REVIEW AS OPINIO JURIS – STATE ADHERENCE THROUGH OBLIGATION	11
5 THE PROHIBITION OF NON - REFOULEMENT – BEYOND THE REFUGEE CONVENTION	14
6 THE SCOPE AND APPLICATION OF THE RIGHT TO A FAIR HEARING UNDER INTERNATIONAL LAW	18
Non-discrimination and equality before the law	18
Judicial review: providing a right to an effective remedy	20
The application of the ‘overarching principle’ and the prohibition of <i>refoulement</i>	21
The scope of article 14 of the ICCPR - Resolving perceptions of ambiguity, under the Vienna Convention of the Law of Treaties	22
State practice and the applicability of article 14 to administrative matters	24
Interpretation of article 14 extended by analogy	26
Non-discrimination – defining the Broader context	26
7 THE DOMESTIC CONTEXT	28
Scope of comparative analysis	28
The Rule of Law and judicial review	29

Judicial review of refugee determination – Australia in focus	31
The inadequacy of unchecked administrative tribunals	31
The superiority of Judicial Reasoning	33
The jurisdiction of the Australian High court and Federal Court defined	34
The practice of judicial self restraint	35
<i>Abebe and Eshetu</i> – <i>opinio juris</i> without jurisdiction	36
In the absence of a bill of rights	37
A Constitutional prescription – the Canadian model	38
The current scope of judicial review under the <i>Migration Act</i>	40
The Administrative Decisions Judicial Review Act and the codification of natural justice / procedural fairness as <i>opinio juris</i>	41
Naturalism v Positivism - Implementation in deficit	43
CONCLUSION	47
TABLE OF CASES	49
INTERNATIONAL INSTRUMENTS	50
BIBLIOGRAPHY	51

Summary

In Australia, effective implementation of *non-refoulement* is assessed with reference to conformity to an ‘overarching principle’ of international law defined in the following terms: government decisions that potentially result in restrictions or violations of human rights including persecution, torture, loss of life and liberty, must always be subject to broad and effective judicial oversight. Thus, in the absence of judicial review effective implementation can not be ensured.

The right to adequate and effective judicial oversight, as a prerequisite for *non-refoulement*, is discussed with reference to, and supported by all four sources of international law including; ‘conventions,’ ‘international custom,’ ‘general principles of law recognised by civilised nations’ and ‘judicial decisions and the teachings of the most highly qualified publicists.’ At the outset, however, Article 14 of the International Covenant on Civil and Political Rights will be presented as an adequate codification of the ‘overarching principle’ to include administrative matters, and reinforced by the prohibition of discrimination. The psychological commitment of all three streams of Australian government (the Executive, the Legislature, and the Judiciary) to the ‘overarching principle’ is examined in support of the customary international law. As a prerequisite for the effective implementation of *non-refoulement*, substantive conformity to the ‘overarching principle,’ it is argued, can be determined with reference to the extent to which asylum seekers are discriminated against by virtue of their denial of the right to effective judicial review, in relation to the rest of the Australian community.

With Australia in focus, uncertainties relating to uniformity of State practice will be dispelled with reference to judicial power. Constitutional limits, as the case law will illustrate, renders the judiciary hamstrung in its ability to adjudicate on *non-refoulement*. In the face of legislative restrictions to their jurisdiction, it is nevertheless encouraging that Australian superior courts have, contrary to Constitutional convention, endeavoured to voice their frustration about a limited human rights jurisdiction. Expressions of judicial frustration are thus regarded as indicative of a psychological commitment, *opinio juris*, to the overarching principle and human rights *per se*. Judicial power, in Australia, in the absence of an entrenched bill of rights, will be further assessed in relation to the Canadian experience. It is concluded, the immediate obligation to depart from discriminative application of the ‘overarching principle’ in relation to the implementation of *non-refoulement*, it will be established, rests clearly on the shoulders of the Executive and Legislature.

Preface

Australia's treatment of asylum seekers in recent years has received much attention from the world's media, and for good reason. The current Liberal (conservative) government's treatment of asylum seekers has been nothing short of deplorable. Such policies include, but are not limited to, indefinite arbitrary detention of asylum seekers, denied access to basic welfare rights and, as is the focus of this paper, inadequate and discriminative access to the administration of justice eventuating in violations of the peremptory norm of *non-refoulement*. Although all such issues are of profound significance, the methodology of this paper was premised on the necessity to prioritise human rights violations and focus on the effective implementation of *non-refoulement*.

Furthermore, it must be said that this thesis does not discover anything new. Rather, by stating the obvious, I have endeavoured to examine domestic non-compliance to the peremptory norm of *non-refoulement*. In doing so, the methodology employed, it should be acknowledged, owes much to the encouraging words of Professor Rahmatulla Khan, without whom the conceptualisation of the 'overarching principle' would most probably not have eventuated. Thanks go also to Professor Göran Melander, for his supervision, and to Brian Burdekin for his thoughts on refugee issues in the international context.

Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ADJR	Australian Administrative Appeals Judicial Review Act
CRC	Convention on the Rights of the Child
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
HRC	United Nations Human Rights Committee
ICJ	International Court of Justice
RRT	Australian Refugee Review Tribunal
VCLT	Vienna Convention on the Law of Treaties
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees

1 Scope

With Australia in focus, the purpose of this paper is to examine the domestic implementation of the broadly codified ‘overarching principle’ (hereafter referred) of the right to broad and effective judicial oversight of all matters involving potential violations of human rights. Moreover, the ‘overarching principle,’ regardless of any prevailing perceptions of ambiguity, extends to decisions beyond criminal matters to include the implementation of *non-refoulement*. Furthermore, it is argued that it is not only obligatory for States to provide adequate judicial review over administrative decision-making processes supposedly implementing *non-refoulement* obligations under the 1951 Convention Relating to the Status of Refugees (Refugee Convention), but similar obligations arise also under; the International Covenant of Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC) and the Convention against Torture (CAT). With support from the sources of international law, at the outset, the ‘overarching principle’ pursuant to Article 38 of the Statute of the International Court of Justice, will be held as an adequately codified right to a fair trial under Article 14 of the ICCPR.¹

The necessity to support a proper interpretation of Article 14 of the ICCPR, moreover, it should be emphasised, arises from the necessity to counteract widespread and discriminative state implementation of the ‘overarching principle’ worldwide. For as long as the outsider/insider dichotomy prevails as an unwarranted justification for a discriminative application of the right to a fair hearing, to the exclusion of asylum seekers and so-called illegal immigrants, there remains the need to re-emphasise State obligations to citizens and non-citizens alike. This, after all, is exactly what the legal and democratic principle of ‘equality before the law’ and complementary prohibition of non-discrimination demands.²

As a prelude to the peremptory norm of non-discrimination, Article 1 of the Universal Declaration of Human Rights, states that “[a]ll human beings are born equal in dignity and rights. They are endowed with reason and conscience and

¹ As both Art 14 of the ICCPR and Art 6 of the ECHR are in substance fundamentally similar, it is therefore unproblematic to utilise ECtHR jurisprudence as a supplement in support of Human Rights Committee jurisprudence.

² The principle of equality may be regarded as both a fundamental principle ‘imbuing and inspiring the concept of human rights’ and a cornerstone of modern democracy. See, Manfred Nowak, U.N. *Covenant on Civil and Political Rights: CCPR Commentary*, N.P.Engel, 1993, pp 458-459; In the Anglo- American legal tradition, the importance of the separation of judicial power is premised on the need for equality before the law. See Wade & Forsyth, *Administrative Law: Eighth Edition*, Oxford University press, 2000, p21-23

should act toward one another in a spirit of brotherhood.”³ In light of discriminative policies based on the rationale of an insider/outsider dichotomy,⁴ sovereignty based arguments cannot be regarded as a legitimate justification for systemic violations of the peremptory norm of non-discrimination, especially considering the violations ultimately lead to a consequential violation of *non-refoulement*. Thus, especially in light of what is potentially at stake for the applicant, under no circumstances can it be legitimate to exclude non-citizens from the ‘right to a fair hearing.’ Pursuant to Article 14, ‘all persons’ are ‘equal before the courts and tribunals’ in matters determining ‘rights and obligations in a suit at law.’

At the outset, a universal and non-discriminative application of Article 14 must be emphasised.⁵ To further establish a purposive interpretation of Article 14, and in accordance with the Vienna Convention on the Law of Treaties (VCLT), the discussion will inevitably support the ‘overarching principle’ as customary international law. While the implementation of *non-refoulement* in Australia, will provide a benchmark of analysis, material evidence will be drawn from other domestic jurisdictions to support the customary elements of ‘widespread uniformity of practice’ and ‘*opinio juris*.’

Reference will also be made to ‘general principles of the civilised nations.’ Indeed, both individually and collectively, all four sources of international law under Article 38 of the ICJ Statute may be utilised to support the ‘overarching principle.’ Moreover, by way of interaction, each sub-section of Art 38 will thus serve to support the other.⁶ Hence, the process of treaty interpretation against a contextual backdrop made up of, and supported by, all four sources of international law, will include: ‘... (a) international conventions, ... (b) international custom, ... (c) general principles of law recognised by civilised nations... [and] (d) judicial decisions and the teachings of the most highly qualified publicists...’

As a vital safeguard against *non-refoulement*, judicial review, in Australia, prevails formally albeit in a restrictive sense in spite of comprehensive and

³ The normative validity of Art 1 is supported by classical predecessor texts in the Western tradition. See Tore Lindholm on Art 1. in, *The Universal Declaration of Human Rights – A Common Standard of Achievement*, Gudmundur Alfredsson & Asbjorn Eide (eds), Martinus Hijhoff Publishers, The Hague, 1999, p 41

⁴ The term is conceptualised in David Biale, Michael Galchinsky, and Susannah Heschel, editors *Insider/Outsider - American Jews and Multiculturalism*, the University of California Press, 1998

⁵ Art 2 ICCPR ensures ‘all individuals’ with the territory of the nation-state are protected without distinction ‘of any kind.’

⁶ Article 38 of the ICCPR constitutes the most legitimate list of sources of international law. Moreover there is nothing to suggest that the list is fundamentally hierarchical. Whist treaties and custom may hold equal weight, general principle can serve as a gap filler. See, Peter Malamczuk, Akehurst’s – *Modern Introduction to International Law*, 7th revised edition, Routledge, London, 1997, pp 36, 56-57

systemic legislative efforts undermining its effectiveness. As will be discussed below, in support of the customary element of *opinio juris*, the Federal Court of Australia's limited jurisdiction over refugee determination is indicative the state's psychological commitment to project the image that justice is being done. Amongst other things, it is this 'state practice' of setting up elaborate, although defective, refugee determination systems, coupled with a degree of formal adherence to the rule of law, that supports the 'overarching principle' as customary international law. Moreover, with few exceptions, the same can be said of determination systems in Canada, the United Kingdom, the United States, and through out much of the developed world.

Hence the failure to provide asylum seekers with access to adequate judicial review does not constitute legitimate state practice. Rather this differential treatment of asylum seekers, illuminated within the context of a functional democratic state subject to rule of law, is indicative of a wide spread uniformity of discriminative conduct. It must be emphasised, therefore, such treatment asylum seekers is discriminative conduct, not by omission but by a positive act, perpetuated through inadequate and widespread implementation. Thus, the discriminative conduct should not merely be seen as a facilitator of *non-refoulement*, but indeed, a violation of a peremptory norm systemically perpetuated by legislative means.

2 Purpose

Throughout the international community there prevails serious and widespread violations of the peremptory norms of international human rights law. As discrimination continues to permeate societies in an array of forms, similarly, claims by governments that deny violations of the prohibition of torture should be taken with a grain of salt. Alarming, the codified right to a fair hearing is violated by way of a discriminative application to asylum seekers and those seeking protection against *refoulement per se*. Apart from the broad base codification of the prohibition of discrimination by a plethora of international instruments,⁷ Article 6 of the Universal Declaration of Human Rights (UDHR)⁸ codifies the principle of non-discrimination in the following terms:

All are equal before the law and are entitled without discrimination to equal protection against any discrimination in violation of this declaration and against any incitement to such discrimination'

To evaluate widespread discrimination, it is therefore necessary therefore to counter sovereignty based arguments that would seek to justify departure from the obligation to provide all human beings, residing within the domestic jurisdiction of States, subject to the appropriate application of the derogation clause,⁹ the right to a fair and public hearing before an independent court. Considering that violations of the right to a hearing, in relation to the implementation of *non-refoulement*, are inseparable and interrelated to potential restrictions to human rights of the most serious kind (ranging from mere persecution to violations of the rights to life); it is vital that all human beings within the jurisdiction of the state are protected through a non-discriminative implementation of Article 14 of the

⁷ International instruments that codify the prohibition of discrimination include: Art. 2 *International Covenant on Economic, Social and Cultural Rights* (1966); Arts. 2 and 6 of the *ICCPR*; *the Convention on the elimination of all forms of Discrimination Against Women* (1979); *International Convention on the Elimination of All Forms of Racial Discrimination* (1965); Art. 2 of *the Convention on the Rights of the Child* (1989); Art. 1 of *the Convention Relating to the Status of Refugees* (1951); and *the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1975)

⁸ As a declaration of the General Assembly of the United Nations, the *Universal Declaration of Human Rights* may be regarded as customary international law to the extent that it is regarded as an expression of a consensus of the international community.

⁹ Whilst Article 6 *ICCPR* permits States to derogate from obligations relating to article 14 (fair trial), this margin of appreciation only applies 'in time of public emergency which threatens the life of the nation'. These, 'measures' that are 'required by the exigencies of the situation' and are not inconsistent with other obligations under international law including discrimination.

ICCPR. Indeed, there can be no justification for inadequate domestic determination systems that fail to protect against *refoulement*.¹⁰

To gain an appreciation of the inadequacy of domestic implementation of *non-refoulement*, one only need compare the checks and balances contained in the *Victorian Crimes Act*¹¹ and the facilitation of criminal procedure under the rule of law, against the pitiful processes regulating refugee and humanitarian applications pursuant to the Australian *Migration Act*. It is worth noting, in full compliance with the ICCPR, criminal procedure in Victoria provides a full gamete of guarantees for accused persons, underpinned by the presumption of innocence and the rule of law. The *Migration Act*, on the other hand, fails to provide any equivalent standards under Article 14 of the ICCPR.

Unlike individuals undergoing criminal prosecution in Australia, asylum seekers do not receive a fair and public hearing by an independent and impartial tribunal. Rather, in the absence of adequate and effective judicial oversight, the determination process operates substantially within the executive stream of government, substantially outside the checks and balances provided under the rule of law. As will be discussed below, the Australian Refugee Review Tribunal (RRT) is not in any sense an independent court. Without judicial mandate, it is but an administrative decision making body, with decision-makers who do not hold tenure to guarantee their independence and who are not required to possess legal qualifications.

Although the refugee determination in Australia is far from exceptional as an exemplification of a relatively unchecked administrative decision-making process, it may be regarded nevertheless as an exemplification of the administration of justice gone bad. Since 1992, both the Labor (left) government and, since 1996 the Liberal (conservative) government have introduced legislative changes that have perpetuated departure from Australia's obligations under Article 14 of the ICCPR and moreover the implementation of *non-refoulement*. As will be discussed below, in the absence of a bill of rights, the High Court, and to a greater extent, the Federal Court remain hamstrung in their ability to counteract this intrusive narrowing of its jurisdiction by the substantial removal of the common law grounds of appeal. Currently, appeals to the Federal Court are limited to the grounds of 'errors of law' and 'bias,' making it near impossible for the vast majority of asylum seekers to access judicial review.¹²

¹⁰ As the cornerstone of the prohibition of torture, *non-refoulement* has now the status of *jus cogens*, from which no derogation is permitted. See *International Journal of refugee law*, Vol 13, Issue 4, pp 533-558

¹¹ Section 464: *Crimes Act 1958* (Vic), provides relatively comprehensive standards to be adhered to by police regarding to collection of evidence.

¹² See *Migration Act 1958* (Cth) Part 8

With the Australian refugee determination system as a model of analysis, it will be argued that a non-discriminative implementation of Article 14 of the ICCPR is integral to the implementation of *non-refoulement*. In support of this thesis, reference will be made to High Court and Federal Court case law and the reasoning of the RRT. Furthermore, as a means to assess the adequacy of unchecked administrative determination within a global context, and in support of the 'overarching principle', the Australian experience will, to some extent, be placed within an international context with reference to other domestic jurisdictions where appropriate.

3 Australian government policy within an historical context

When the founding fathers drafted the Australian Constitution at the turn of the twentieth Century, Australia as a British colony had a long history of both domestic and foreign policy based on discrimination. Beyond genocidal racist domestic policies designed to breed out the indigenous population,¹³ the former colony's migration policies had focused primarily at excluding non-western European immigration.¹⁴

The founding fathers had drafted s117 of the Constitution to remove references to 'equality before the law' and equal application of laws to ensure that prevailing racist colonial legislation would remain constitutionally valid. As it stood, until its amendment in 1967, s51(xxvi) of the Constitution had empowered the Federal Parliament to make laws with respect to: "[t]he people of any race, *other than the aboriginal race in any State*, for whom it is deemed necessary to make special laws". In 1967 the word in italics were deleted.

It was not until the advent of the Whitlam Labor government in 1973, that it could be said the 'White Australia Policy,' at least in an informal sense, had finally come to an end.¹⁵ By 1975, a new migration policy of inclusion and non-discrimination, coinciding with the fall of Saigon, promoted and complemented public sympathy for 'boat people,' who, deserved of compassion, were seen to have bravely reached 'the lucky country'¹⁶ in leaky boats. Political correctness, henceforth, demanded that refugees were treated as new Australians deserved of public care and social tolerance. Those with the courage to reach 'the lucky country' through perilous waters, were deemed worthy of her protection.

¹³ For example, the *Aborigines Protection Act* 1886 (Vic) was designed to facilitate forced assimilation of Aborigines into white society. See Nick O'Neal & Robin Handley, *Retreat From Injustice – Human Rights in Australian Law*, Federation Press, Leichhardt, New South Wales, 1994, p 395; See generally, 'Bringing them home' - *A guide to the findings and recommendations of the National Inquiry into the separation of the Aboriginal and Torres Strait Islander children from their families*, Human Rights and Equal Opportunity Commission 1997

¹⁴ Nick O'Neal & Robin Handley, *op cit*, pp 472-473

¹⁵ In 1901 Alfred Deakin, one of the founding fathers, stated: "The ultimate result is a national determination to make no truce with coloured immigration, to have no traffic with the unclean thing, and to put it down in all its shapes without much regard to cost. Those Chinese, Japanese, or coolies who have come here under the law, in spite of it, are not permitted to increase." See, Nick O'Neal & Robin Handley, *op cit*, pp 472-473

¹⁶ The term originated from the economic prosperity of the 1970's. It was also used in government advertising campaigns to reassure new arrivals.

By the late 1980's, tolerance, compassion and goodwill were dwindling.¹⁷ It seemed that the representative government and its constituency were suffering tolerance fatigue. At the beginning of the 1990's with the economy in serious recession, the migration policy had completed its about face. It had become once again exclusionist. Refugee determination had become viewed by the Federal government as an impediment to effective migration control.¹⁸ Indicative of the new migration policy, in 1994 the *Migration Act* was amended to restrict judicial review by the Federal Court over administrative refugee determination.¹⁹ By 1996 the grounds for judicial review available to asylum seekers were further reduced to 'error of law' and 'bias' thereby making access to the court near impossible for the vast majority of refugees. In 2001 further amendments to the *Migration Act* included the introduction of a privative clause intended to preclude specific categories of individuals from judicial review entirely.²⁰

Disturbingly, the present Australian government has clearly evinced a complete and utter disregard for Australia's obligations under international law, not only through its public statements, but moreover, through further regressive legislative change. The current situation is simply this: Refugees are now treated as illegal aliens, undeserved of the basic and fundamental protection against gross violations of human rights ranging from persecution to torture and murder. As a consequence, the most fundamental of Australia's extra-territorial human rights obligations - the implementation of *non-refoulement* - is now rendered utterly ineffective by virtue of the discriminatory exclusion of asylum seekers from the right to judicial review.

¹⁷ By 1989 it had become public knowledge that asylum seekers were being arbitrarily detained in detention centres in less than adequate conditions. See Andrew Hamilton, "Three Years Land", *Eureka Street*, Vol 3, No 1, Feb 1993, 24-23 and Vol 3, No 2, March 1993, 22-28; O'Neal & Handley, *op cit*, 488

¹⁸ The 1994 amendments were a consequence of the governments view that the judiciary was undermining exclusionist immigration policy through comprehensive judicial review powers. See Mary Crock, *Immigration and Refugee Law in Australia*, 1998, p290-291

¹⁹ *Ibid*

²⁰ In 2001 a privative clause introduced, for example, 'temporary protection visas,' which are not subject to judicial review. See s464 *Migration Act* 1958 (Cth)

4 Judicial review as *opinio juris* – State adherence through obligation

It is significant therefore that the principle of sovereignty is being increasingly cited by governments to justify blatant discrimination against non-citizens, many of whom, pursuant to the Refugee Convention, face a real risk of persecution.²¹ In the light of a general 'overarching principle', focus will be paid to reasons and implications relating to State departure from the obligation of *non-refoulement*. With governments seeking to restrict the rights of asylum seekers, human rights violations of non-citizens are unjustifiably based on the rationale of State sovereignty and the insider/outsider dichotomy. Ironically, however, as states seek to exploit a perceived margin of appreciation regarding the implementation of refugee determination, simultaneously they exhibit a clear reluctance to depart completely from administrative law principles of natural justice that are firmly embedded in liberal traditions of the rule of law and the separation of powers. An upshot of this is that such conformity evidences adherence to the psychological element of *opinio juris* under customary international law. Moreover, a dilemma prevails for governments whose domestic policies embrace the rhetoric of liberal democracy and constitutional legitimacy, but simultaneously, and with a seemingly ruthless rectitude, continue to utilise xenophobic propaganda as a justification for departure from human rights obligations for their own political ends.²²

Such policies are clearly indicative of a dangerous trend immerging though out the developed world. Notably, the conservative governments of Australia and Denmark have exhibited a propensity to exploit the lowest electoral common denominator of xenophobic sentiment through rhetorical scape-goating.²³

²¹ See, Susan Kneebone, *Refugees, Natural Justice and Sovereignty: Fundamental or Substantial Justice*, www.eur.nl/frg/iacl/papers/Kneebone.html, p 1

²² The Australian government has exhibited a propensity for perpetuating the myth of refugees as opportunistic 'queue jumpers'. Australia's Immigration Minister, Phillip Ruddock, has frequently claimed that people arriving in Australia to claim asylum are jumping a queue and unfairly taking the place of other refugees who have to wait in line. He stated, "Every time someone who has the resources to pay people smugglers arrives unlawfully in Australia and is granted refugee status, a place is denied to someone else languishing in the most undesirable circumstances." *World Refugee Day Statement from Minister for Immigration, Phillip Ruddock*, June 20, 2000

²³ In Denmark the DPP evidently exploited the xenophobic sentiment of the electorate shortly after September 11 in its election campaign. "All Western countries have been infiltrated by Muslims, some of whom are polite to us while waiting until there's enough of them to get rid of us." And although the DPP led the rhetorical assault, Denmark's political mainstream soon followed, both in public statements and in campaign advertising. See Sasha Polakow-Suranski, *Fortress Denmark*, 2002, www.project.org/print/v13/10/polakow-suransky.html

Nevertheless, in accordance with the liberal tradition, and in spite of such tactics, the Australian legal system continues to maintain a superficial adherence to the principle of *non-refoulement*. The Australian refugee determination process maintains at its pinnacle, judicial review over administrative decisions, limited albeit by an ‘error of law’. The maintenance of judicial review, therefore, although substantially ineffective, is nonetheless indicative of the State’s obligatory adherence to liberalism and the rule of law. Put simply, governments, regardless of their xenophobic and discriminative tendencies, endeavour to project a superficial impression of adherence to the ‘overarching principle’ albeit through legislative and/or policy based conformity.

In Australia, the legal tradition of maintaining judicial review over administrative decisions is supported by a range of material evidence. From above, the Australian Constitution sets the scope of High Court’s original or residual jurisdiction, which includes ‘all matters ... arising under any treaty...[and]...in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth’²⁴ The High Court thus maintains an entrenched jurisdiction over *non-refoulement* determination made under the *Migration Act* which, with a degree of noted inherent uncertainty, extends to ‘Convention Refugees.’²⁵ This constitutional entrenchment of judicial review over administrative decisions thus serves as both evidence of ‘general principles of law’ and *opinio juris* under customary international law. Thus, whilst the Parliament can (and has) profoundly restricted the delegated jurisdiction of the Federal Court to *errors of law*, its formal jurisdiction nonetheless prevails to further evidence the ‘overarching principle.’ Moreover, although the formal existence and scope of judicial review of refugee determination remains an ineffective implementation of *non-refoulement*, it does however provide material evidence of customary international law.

In spite of the recalcitrant statements by the Minister for Immigration and Multicultural Affairs, Philip Rudduck, regarding Australia’s obligation under the Refugee Convention, the formal availability of judicial review derived from both constitutional entitlement and parliamentary sovereignty, serves to support, at the very least, a clear inference of *opinio juris*. The conduct of the parliament in tolerating a Federal Court jurisdiction over refugee determination, albeit

²⁴ Section 75 of the Constitution of Australia

²⁵ Section 32 (2) states “a criterion for a protection visa is that the applicant...is a non-citizen ...to whom Australia has protection obligations under the Refugee Convention as amended by the Refugees Protocol.” It is reasonable to suggest, however, that section 29 with the words ‘may be given visa’ creates a degree of certainty, which undermines the absolute prohibition of *non-refoulement*. See, Submission to the *Senate Legal and Constitutional References Committee: Enquiry into Australia’s Refugee Determination Program*, Senate Committee, June 1999, pp 50-51

restrictive, ‘is evidence of a belief that this practice is rendered obligatory by the evidence of the rule of law requiring it.’²⁶

Regrettably, however, in the area of refugee determination, the rule of law is squeezed far and beyond its effective limits. Indicative of the discriminative disregard for the human rights of asylum seekers prevailing in Australia, beyond the pale, administrative decisions over refugee determination sit outside the protective shadow of effective judicial oversight, receiving little shade from the burning rays of *refoulement*. Suffice to say, any lack of adjudicative shade may therefore be regarded as determinative of the extent to which ‘the overarching principle’ is breached.

²⁶ *Nicaragua v The United States (Merits) Case* ICJ 1986, 14; Ian Brownlie, *Principles of International Law*, 5th ed, Oxford University Press, Oxford, 1998, p 4

5 The prohibition of non-refoulement – Beyond the Refugee Convention

Throughout the international community there has emerged a consensus of discontent regarding the Refugee Convention and its applicability within a modern context. Much of the criticism is based on the pretext that the Convention is anachronistic, as it was drafted as a remedial measure to deal with the mass-exodus of Europeans during and after World War II. It has been suggested, moreover, that its incompatibility with an era of globalisation characterised by mass refugee outflows or migration.²⁷ UK home secretary, Jack Straw, and the Australian Immigration Minister, Phillip Ruddock, for example, have criticised the Refugee Convention as an irrelevant and unworkable instrument.²⁸ Such views emphasise the importance of controlling of refugee flows over the priority of ‘protection’.

However such alarmist views are less than convincing. For it is not refugee law that is inherently problematic, rather, it is State adherence to refugee law that is in crisis. Such statements, therefore, must be seen for what they are; state-centric attempts to devalue the primary importance of *non-refoulement*, which as a peremptory norm prevails regardless of the perceived vagaries of the Refugee Convention. In her paper entitled: ‘The Problem with the refugee Convention’, Adrienne Millbank suggests that the 14 million dollars annually spent on the RRT (an amount equivalent to the Australia’s annual commitment to UNHCR)²⁹ is indicative of a determination system under pressure. Here it is argued that the inadequacies of refugee determination systems in Australia and the United Kingdom are symptomatic of the inadequacy of the Refugee Convention. This view is however problematic given the broad discretion exercised by states in the implementation of Convention obligations,³⁰ and their evinced propensity for restrictive interpretation. In *Chen Shi Hai v the Minister for Immigration and*

²⁷ Adrienne Millbank, *The problem with the Refugee Convention, Research Paper 5 2000-01*, Parliament of Australia: Department of the Parliament Library.

²⁸ Ibid

²⁹ Ibid

³⁰ In *May* the UN Committee against Torture asked the government not to return a rejected asylum-seeker to Somalia where he risked torture. The government disputed the Committee's authority over the case partly on the grounds that in the absence of a central government in Somalia, there were no officials who could inflict torture. After 27 months in detention, the asylum-seeker was still awaiting a final decision about his status at the end of 1999. *Amnesty International, International Report 2000 – Australia*

Multicultural Affairs,³¹ for example, the High Court held that ‘black children’ born in contravention of China’s ‘one child policy’, contrary to the RRT’s restrictive interpretation, constitute a particular ‘social group’ under the Refugee Convention and, furthermore, would suffer persecution by virtue of that membership. The *ratio decidendi* in *Chen Shi Hai* thus demonstrates the applicability of the Convention definition of ‘refugee’ to a modern context, which was in stark contrast to the restrictive approach of administrative determination³² exhibited by the RRT.

Moreover, it should be emphasised that these elaborate determination systems grant only a small fraction of applicants refugee status.³³ Indeed, it has become clearly apparent that the Convention’s cornerstone of *non-refoulement* has been undermined by the pre-eminence of migration control. Thus domestic refugee policy may properly be regarded as less to do with State obligations under international human rights law, but rather, more to do with governments’ propensity to set a discourse that undermines the legitimate pre-eminence of *non-refoulement*.

As Stated above, the prohibition of *non-refoulement* extends beyond the Refugee Convention. Under the Refugee Convention a ‘refugee’ is an individual who, ‘owing to a 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 [or her] nationality and is unable or, owing to such fear, is unable to avail himself [or herself] to the protection of that country.’³⁴ Although not prescriptive, the Refugee Convention provides a refugee definition devise by which to implement *non-refoulement*. As such, it serves to underpin state obligations to protect individuals from human rights abuses in other states.

The perceived margin of appreciation, it is suggested, owes much to an isolated interpretation of the Refugee Convention arguable at the of the obligation of *non-refoulement* more broadly. For example, James C. Hathaway, amongst others, exhibit a preoccupation with emphasising the pre-eminence of refugee status under the Refugee Convention. Moreover, by placing doubt on the status of *non-refoulement* as customary international law through suggesting a lack of uniformity of practice,³⁵ Hathaway arguably contributes to the promotion of a non-

³¹ [2000] HCA 19 [13 April 2000]; It was reported that the RRT held that the “applicant faces a real chance of persecution because of (in a strict conservative sense) his membership of a particular social group, but not for reasons of membership of that group” because consequences suffered would not “result from any malignity or enmity or adverse intent toward him on part of the authorities”

³² See generally, Heaven Crawley, ‘Reconciling universal human rights and cultural relativism’, in *Refugees and Gender: Law and Process*, Jordan Publishing, Bristol, 2001

³³ In recent years, in Canada 60% of claimants have succeeded, compared with 25% in Australia. See Kneebone, *op cit*, p 1

³⁴ See Art. 1(2) Refugee Convention 1951

³⁵ James C. Hathaway, *The Law of Refugee Status*, Butterworths, Vancouver, 2001, pp 25-27

contextual and restrictive interpretation of the Refugee Convention. It is argued however that regardless of the over-elevated debate, for example surrounding the ambit of the enumerated persecution grounds,³⁶ a purposive interpretation must prevail to reinforce the primary obligation to protect against ‘persecution.’ As their honours demonstrated above in *Chen Shi Hai*, any ambiguity imputed from the enumeration of persecution grounds, may be rectified by a purposive and contextual interpretation carried out in good faith.

In the absence of a prescription for refugee determination, administrative determination systems vary from state to state. Canada provides for example relatively broad grounds for judicial review, whilst in Sweden, with the Aliens Appeals Board as the final appeal forum; there is no prospect of appeal to an independent court.³⁷ It is argued, however, that the legitimate scope of margin of appreciation under international law, does not permit the preclusion of adequate and effective judicial oversight of refugee determination and the implementation of *non-refoulement*. Moreover, the implementation of *non-refoulement* is not solely dependent on the refugee Convention, but, more broadly, extends to the facilitation of *non-refoulement* in conformity with the ‘overarching principle.’

As Article 31 of the VCLT stipulates, ambiguity must be interpreted with reference to the broader context. Thus, in Australia today, implementation of the Refugee Convention is carried out in breach of other codified and customary principles of international law including the right to a fair hearing and non-discrimination. In the light of the increasing propensity of governments to retreat from their responsibilities to refugees, politicised and non-independent tribunals cannot be relied upon to implement obligations reasonably, in good faith and in accordance with international standard and the rule of law. Furthermore, as Justice North of the Federal Court of Australia has emphasised:

In the context where the Executive or Legislature resists the implementation of refugee law in good faith, international refugee jurisprudence true to the object and purpose of the Convention will only emerge if the asylum adjudicators are formally independent and independently minded....³⁸

Moreover, considering the United Nations High Commissioner for Refugees (UNHCR) has expressed the view that the emergence of international refugee jurisprudence remains dependent on national courts and legal systems, logically, without judicial oversight, jurisprudence will continue to remain

³⁶ James C. Hathaway, *The Law of Refugee Status*, Butterworths, Vancouver, 2001, pp 25-27

³⁷ See pamphlet by Migrationverket (Swedish Migration Department), *Immigration controls*, December, 2000

³⁸ Justice A. M. North – ‘The Role of the Judge’, 15 *Georgetown Immigration Law Journal* 479 at 485

underdeveloped,³⁹ thereby hindering the proper interpretation and application of the Convention.

The role of the domestic courts is thus integral to a progressive development of refugee law jurisprudence. Because of their constitutional independence, it is only courts can be relied upon to give priority to the necessity of adherence to human rights. In the English case of *Ex parte Shah*, the Court observed the necessity of expertise and multi-skilled competence:

In this highly specialised field of adjudication, a great deal depends upon the expertise of the Immigration Appeal Tribunal itself. Its adjudication is not a conventional lawyers exercise of applying a legal litmus test to ascertained facts, it is a global appraisal of an individual's past and prospective situation in a particular cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose.⁴⁰

In a similar vein Kirby J. in *Chen Shi Hai* stated:

Whilst the courts of law, tribunals and officials must uphold the law, they must approach the meaning of the law relating to refugees with its humanitarian purpose in mind. The Convention was adopted by the international community, and passed into Australian domestic law, to prevent the repetition of the affronts to humanity that occurred in the middle of the twentieth century and earlier. At that time Australia, like most other like countries, substantially closed its doors against refugees. The Convention and the municipal law giving it affect, are designed to ensure that this mistake is not repeated.⁴¹

As an exemplification of the commitment to the facilitation of human rights, by ensuring that a purposive interpretation of the Refugee convention prevails, their honours exemplify the vitality of judicial independence to ensure the Refugee Convention's 'humanitarian purpose' predominates.

Considering the tension between executive migration policies that historically have been characterised by racism and xenophobia, an undeniable need prevails for judicial oversight to stem the utilitarian excesses that serve to undermine the rule of law in a human rights based democracy. In a country such as Australia where the 'white Australia policy' prevailed until 1972, indeed, the sanctity and mandate of the judiciary must suffice at a time when compassion for refugees is dwindling though out the world. When Islamaphobia is rife, judicial oversight must remain a

³⁹ Erika Feller, The Role of Adjudicators and Judges in International Refugee Protection, in, Selected Papers Presented at the October, 2000 Conference of the International Association of Refugee Law Judges at Bern, Switzerland: The Future of Protection, Justice A. M. North, Federal Court of Australia – 'The Role of the Judge' 15 *Georgetown Immigration Law Journal* 479 at 485

⁴⁰ *R v. Immigration Appeal Tribunal and the Secretary of State fro the Home Department ex parte Shah*, [1997] Imm. A. R. 145, 153

⁴¹ *Ibid*, para 47

prerequisite to insure proper and just implementation of the Refugee Convention, necessarily operative within the context of liberal democracy and the rule of law. There is, after all, nothing exceptional about refugees. The rule of law must apply to all. The modern democratic nation-state is indeed only democratic to the extent that it facilitates the rights of all human beings within its jurisdiction. With independent judicial oversight vital to *non-refoulement* determination, anything less must therefore constitute a regressive adherence to nineteenth century Bentham-style utilitarianism.⁴²

⁴² Jeremy Bentham espoused the notion of utilitarianism, that is, the notion that democracy is functional if the greater good for the greater number is protected.

6 The scope and application of the right to a fair hearing under international law

Non-discrimination and equality before the law

The prohibition of non-discrimination and the principle of equality, as stated above, enjoys a wide spread uniformity of codification both domestically and internationally. Australia, for example, is unexceptional in taking positive measures through the implementation of domestic legislation with the intention of comprehensively prohibiting discrimination through criminal sanctions and other anti-discrimination measures.⁴³

The obligation of the Australian executive and legislature to implement the prohibition of discrimination, exists not merely as a non-derogable principle of international law, but moreover, the common law principle of equality has existed in perpetuity; fundamentally linked to the democratic system and the rule of law. The principle of equality, as Wade and Forsyth explain, is dependent on the existence of an independent judiciary. “The right to carry a dispute with the government before the ordinary courts, manned by judges of the highest independence, is an important element in the Anglo-American concept of the rule of law.”⁴⁴

With regard to international law, Nowak suggests that both interrelated principles (equality and non-discrimination) ‘run like a thread throughout the Covenant of Civil and Political Rights.’⁴⁵ In relation to Article 14 of the ICCPR, according to Nowak :

The right to equality before the court goes beyond equality before the law, referring to the specific application of laws by the judiciary. It is to be read in conjunction with the general prohibition of discrimination under Art 2(1). This means that all persons must be granted, without distinction as to race, religion, sex, property, etc., a right to equal access to a court.⁴⁶

State parties are moreover obliged under Art. 2(1) to ensure, without discrimination, that the rights of the Covenant apply to all individuals within their

⁴³ See generally, *Racial Discrimination Act 1975* (Cth); *Racial Hatred Act 1975* (Cth)

⁴⁴ Wade & Forsyth, *Administrative Law: Eighth Edition*, Oxford University press, 2000 p22

⁴⁵ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary.*, N.P.Engel, 1993, p 239

⁴⁶ *Ibid*

territorial jurisdiction, without exception. Thus, State parties are obliged to ensure that the right to a fair hearing receives a non-discriminative application in the sense that it applies to everyone, citizen and non-citizen alike.

Under Article 26 of the ICCPR, “[A]ll persons are ... entitled without discrimination to equal protection of the law.” This includes, more specifically, an obligation on behalf of the Legislature to ensure that legislative initiatives do not discriminate against any individuals, including refugee applicants.⁴⁷ The inadequacy of judicial oversight over refugee determination under the *Migration Act*, must therefore be regarded as an exemplification of a failure by the Federal Legislature to facilitate the effective right to a fair hearing. However, through ongoing legislative amendments to the *Migration Act* since 1992, both Labor and Liberal governments have initiated deliberate and systematic discrimination against refugee applicants, as the grounds of appeal to the Federal Court have been increasingly narrowed.

The Australian Legislature provides the Federal Court with a general jurisdiction over administrative matters.⁴⁸ The Federal Court’s jurisdiction is therefore defined by common law grounds of which include; error of law, bias, right to a hearing, unreasonableness and irrelevant/relevant considerations. These components that constitute the doctrines of *ultra vires* and natural justice, moreover, are widely regarded as essential to the operation of effective judicial review over administrative decision-making.⁴⁹ This was, after all, the intention of the Federal Parliament in introducing the Administrative Decisions Judicial review Act 1977.⁵⁰

Thus, as a basis to ensure a non-discriminative application of the ‘overarching principle,’ the widely codified norm of ‘equality before the law’⁵¹ ensures protection for all human beings within the territorial jurisdiction of the State. It is here that the absence of an express provision of judicial review for asylum seekers in international law, it is argued, should not preclude the extension of the ‘overarching principle’ to applicants seeking redress against persecution under domestic administrative law. After all, what matters is the potential loss of life and liberty. Whilst the Human Rights Committee’s jurisprudence does not support a right to judicial review in all circumstances,⁵² it has never, however expressly precluded the right to judicial review of administrative determination of *non-refoulement*. To reiterate, in refugee determination matters it should be

⁴⁷ Ibid., p 468

⁴⁸ In 1980 the Administrative Decision Judicial Review Act 1977 extended and defined the existing judicial review powers of the Federal Court; See Crock, *op cit*, p196

⁴⁹ See generally, Douglas & Jones, *op cit*, pp257-297

⁵⁰ See Mary E Crock, *op cit*, p 195

⁵¹ Provide examples of ‘equality before the law’ in treaties (Non-discrimination as Jus Cogens) and broad codification in 5 major treaties

⁵² *L.P. v Finland*, Human Rights Committee Communication No 450/1991: Finland. 26/09/93. CCPR/C/48/D/450/1991. Here the HRC held that there was not absolute right of judicial review over administrative determination of a taxation matter.

considered that it is the potential risk of being sent back to ones country of origin to be subject to persecution, torture or even murder that must be subject to the rule of law, whilst with criminal matters, it is the potential risk to innocent defendants of suffering incarceration or death. As both scenarios are clearly analogous, the necessity of judicial review in such circumstances, and its effective denial thereof, constitutes discrimination with potential horrendous ramifications.

Judicial review: providing a right to an effective remedy

As customary international law, Article 8 of the UDHR states that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” Here a nexus is created between the right to judicial review as an effective remedy, and the protection of fundamental human rights. This approach is entirely compatible with the theory of the separation of powers, with the independent judiciary as the only adequate bulwark against tyranny, with access to the courts as a vital means to by which to guard against violations of person liberty

Indeed, it is an approach that receives a widespread uniformity of practice by States seeking to conform to democratic liberalism and the rule of law, and as a protector of the vulnerable individuals against the powerful modern state. Moreover, the development administrative law, firmly supports the facilitation of judicial review over administrative determination, especially as a means to facilitate redress for violations of human rights.⁵³ As will be discussed below, in Australia, the advent of the *Administrative Decisions (Judicial Review) Act* exemplified the intention of the Legislature to revolutionise individual access to judicial review. Against this backdrop, subsequent legislative restrictions on grounds of appeal *vis-à-vis* the *Migration Act*, and its subsequent amendment, must be regarded as nothing less than a discriminatory denial of equal access to the vital remedy of judicial review in the most desperate of circumstances.

As a ‘competent authority,’ it is only the judiciary that has the capacity to grant the potentially life saving remedies of habeas corpus, injunction, mandamus and certiorari.⁵⁴ Restrictions to the capacity of the judiciary to grant such remedies in relation to refugee determination, it is argued, are therefore nothing less than a flagrant breach of the *jus cogens* obligation of *non-refoulement* and the inter-related prohibition of torture. Therefore, in light of the above, little lip service should be given to suggestions that international law provides States with a *carte*

⁵³ Hilaire Barnett, *Constitutional And Administrative Law*, Cavendish Publishing, London, 1999 p 801

⁵⁴ *The Constitution of Australia*, s 75: Not also that the ‘Judicature’ has the power of certiorari by implication.

blanche margin of appreciation over *non-refoulement* determination.⁵⁵ Indeed, what constitutes an effective remedy must be viewed in terms of the remedy required, capacity, and for that matter the willingness of the competent authority to grant the appropriate remedy. Notably, in Australia, human rights bodies have repeatedly voiced their concerns over the non-reviewable and non-compellable power of the Minister of Immigration and Multicultural Affairs pursuant to the *Migration Act*.⁵⁶ Australian human rights bodies have voiced concerns in relation to views exemplified by the following statement by the Attorney General's Department:⁵⁷

The government does not need to legislate to regulate its own behaviour. The government can simply undertake not to, and in fact not, refool people. It is where obligations are going to be imposed on citizens that it is likely to be necessary to enact a law so that the government can impose those obligations on people subject to its jurisdiction. Where the obligation is only on government, the government can simply undertake to fulfil that obligation without any law to compel it to do so.⁵⁸

Without adequate judicial review, however, determination of such matters may be regarded as merely an exercise of administrative power 'by law,' outside the protection of the 'rule of law,' in total contravention of the 'overarching principle.'

The application of the 'overarching principle' and the prohibition of *refoulement*

The principle of *non-refoulement* underpins the prohibition of torture by creating an extra-territorial obligation that renders acts of *refoulement* tantamount to positive violations. States that *refoule* (or expel) individuals to be persecuted, *via* a domestic refugee determination process, violate the Refugee Convention, the CAT and the ICCPR to the same degree as the persecutor. Article 7 of the ICCPR provides that '[n]o one shall be subject to torture or to cruel or degrading treatment or punishment'. The Human Rights Committee's jurisprudence articulates this negative obligation by emphasising that placing individuals in another jurisdiction where there is a risk of torture is equivalent to a positive act of torture itself.⁵⁹

⁵⁵ Submission to the Senate Legal and Constitutional and References Committee: Inquiry into the Operation of Australia's Refugee and Humanitarian Program (June 1999) p57. The report suggested that Australia can implement non-refoulement any way it so chooses.

⁵⁶ Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Committee inquiry into Australia's refugee and humanitarian program* (May 1999) p 9

⁵⁷ *Ibid*; Graham Thom, Amnesty International Australia, Report, 2 / August / 2002

⁵⁸ Senate Committee, *op cit.*, p 58: Transcript of evidence, Attorney-General's Department, pp. 221-222

⁵⁹ General Comment 20, paragraph 9

Inadequate implementation, for example, by virtue of poor refugee determination procedures or unchecked humanitarian protection, cannot under any circumstances, justify violations of the prohibition of Torture. As a well-codified peremptory norm of international law, and one that is broadly accepted by scholars as *jus cogens*,⁶⁰ the prohibition of torture, furthermore, operates beyond the scope of the Refugee Convention. Thus, the right of individuals to resist expulsion is not necessarily dependent of satisfying Refugee Convention definition of 'refugee'. More broadly, Article 3 of the CAT provides that '[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being suspected of torture.' In light of the ambit of the prohibition of *refoulement*, the application of the 'overarching principle' must extend beyond mere Convention 'refugee' determination, to include all forms of administrative decision making determining *non-refoulement* including humanitarian discretion vested in government ministers. It must be emphasised that judicial review of all such administrative decisions must be regarded as vital to the effective implementation of *non-refoulement*.

The scope of article 14 of the ICCPR - Resolving perceptions of ambiguity, under the Vienna Convention of the Law of Treaties

At the outset, it should be emphasised that the author does not accept, in spite of prevailing arguments to the contrary,⁶¹ that Article 14 of the ICCPR is inherently ambiguous. Rather it was drafted with the necessary degree of malleability to accommodate a diversity of determination processes and legal traditions.⁶² Any question of ambiguity, therefore, arises from unconscionable efforts of States that would seek to promote a restrictive interpretation of the provision, contrary to good faith.

⁶⁰ Refer CAT and HRC , ECHR jurisprudence regarding implementation; David Kennedy elaborates states that 'the practice of *non-refoulement* has, over the last hundred years, been transformed into the 'principle of *non-refoulement*', which is seen by scholars as a 'fundamental' international legal obligation forming the cornerstone of refugee law. Of course there are exceptions, and state practice, particularly as to *opinio juris* is anything but conclusive. Nevertheless scholars continue to insist that the principle of *non-refoulement* has become binding as a matter of both treaty and customary law if not also as a so-called peremptory norm of *jus cogens*, 'International Refugee Protection', *Human Rights Quarterly*, Volume 8, No.1, 1986, pp 57-65

⁶¹ P. Van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, Kluwer Law International, The Hague, 1998, p 392

⁶² The drafting of Art. 14 occurred regardless of the ideological divisions and differing legal tradition in existence of the cold war period,. See Generally Nowak, *op cit*, pp XIX – XXI, 233-238

The sources of international law contained in article 38 of the Statute of the ICJ not only collectively serves to support the ‘overarching principle’, but also serve to provide a contextual backdrop by which to remedy the perceived ambiguity of article 14. The right to a fair hearing in criminal matters and matters in the ‘determination of rights and obligations at a suit at law’ has been codified by article 14 in the following terms:

‘All persons shall be equal before the courts and tribunals. In the determination of any charge against him, or his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.’

Whilst, article 14 facilitates misconceived perceptions of uncertainty by the words ‘rights and obligations at a suit at law’, jurisprudence of the European Court of Human Rights (ECtHR) concerning article 6 of the European Convention of Human Rights and Fundamental Freedoms, can serve to remedy a lack of HRC jurisprudence concerning article 14. As to the scope of application of the words ‘determination of his rights and obligations’, it may be concluded from ECtHR jurisprudence that the vagueness of the term provides for creative interpretation and judicial policy.⁶³ While a strict literal interpretation may suggest confinement to criminal and civil matters,⁶⁴ such an approach, clearly runs contrary to article 31 of the Vienna Convention on the Law of Treaties (VCLT) which requires:

‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their scope and purpose.’

An autonomous interpretation can moreover be facilitated with reference to the object and purpose of the ‘overarching principle.’⁶⁵ The kinds of rights covered by the right to a fair hearing are indeed not dependent on the structure of respective domestic legal systems. Rather, “the fact that the claim concerned was addressed by national proceedings (i.e. performing administrative or judicial refugee determination), constitutes sufficient grounds for the ‘arguability’ of the existence of the right.”⁶⁶ Thus, given that the right to a fair hearing before an independent court is clearly premised on the necessity to protect individuals against unjustifiable restrictions on life and liberty carried out by the state, it is difficult to see how an autonomous meaning could not be afforded.

⁶³ P. Van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, Kluwer Law International, The Hague, 1998, p 392

⁶⁴ General Comment 13 does not provide guidance to the definition and ambit of the term ‘rights and obligations at a suit at law.’

⁶⁵ The term “rights and obligation” should be given an autonomous meaning. Nowak, *op cit*, pp 242-243

⁶⁶ *Ibid.*, p 394

Article 14 not only provides for the necessity of a tribunal independent from the executive stream of government, but also, facilitates minimum guarantees, underpinning and including the presumption of innocence in criminal matters. Moreover the codification of the principle of equality before the courts, underpins, more broadly, a purposive application of article 14.⁶⁷ As a safe guard of personal liberty the provision exemplifies an expression of international consensus of the right to a fair and independent Tribunal based on the liberal tradition of the separation of powers and the independence of the judiciary. As Nowak points out, “[t]he wording and historical background of Article 14...demonstrates that agreement was reached... on a provision based on *liberal principles of the separation of powers and independence of the judiciary vis-à-vis the executive*.⁶⁸

Moreover, analogy can clearly be drawn from the way criminal prosecutions attract an immediate right to be heard before an independent court pursuant to the vast majority of criminal legislations. As an expression of liberalism, as with criminal matters, the underlying purpose of article 14 impliedly facilitates non-discriminative access to the courts in matters involving potential restrictions to liberty. On this basis, the ‘overarching principle’ requires that administrative decisions that seek to restrict the right to life, liberty and bodily integrity, or result in human rights abuses amounting to persecution, should be subject to effective judicial review.

State practice and the applicability of article 14 to administrative matters

The growth of administrative law is a relatively recent phenomenon. The influence of the judiciary over administrative decision-making remained largely constrained by the somewhat naive assumption that the doctrine of responsible government was sufficient to check misgovernance.⁶⁹ In the common law world, the supremacy of parliament has thus remained the dominant structural characteristic of the modern nation state.⁷⁰

In Australia, it was not until 1976 with the advent of the new Federal Court that judicial review of administrative decision-making at the Federal level was adequately facilitated. Thus, in 1977, with the codification of the common law grounds of appeal pursuant to the *Administrative Decisions Judicial Review*

⁶⁷ Nowak, *op cit*, p 339

⁶⁸ *Ibid*, 237

⁶⁹ See Roger Douglas & Melinda Jones, *Administrative law: Commentary & Materials*, Second Edition, Federation Press, 1996, p 30-31

⁷⁰ See Hillarie Barnett, *Constitutional And Administrative Law*, Cavendish Publishing, London, 1999, 207-259

Act's, a new order in Australian administrative law had emerged providing more comprehensive redress for human rights grievances. Beyond the 'original jurisdiction' of the High Court, refugee determination became reviewable for the first time by the Federal Court. Furthermore, as will be discussed below, broad judicial oversight of refugee matters prevailed until 1993 until the first of the amendments restricting grounds of review under the *Migration Act*.⁷¹

This Australian 'new order' of effective judicial review over administrative decision-making was arguably reflected by the need, not only in Australia, but elsewhere, to protect individuals against an obvious unchecked margin of discretion of government decision-making.⁷² In view of these considerations, it is submitted that the express absence of administrative matters in article 14, should not be interpreted as a deliberate attempt to preclude judicial review of matters effecting human life and liberty. Rather it is indicative of the fact that, when the fair trial provisions of article 10 of the Universal Declaration of Human Rights and article of the 14 ICCPR were drafted,⁷³ judicial review of administrative determination was significantly less prevalent than it is today.⁷⁴

Article 8 of the UDHR as evidence of customary international law provides for "the right to an effective remedy by a competent national tribunal for acts violating the fundamental rights granted ...by the constitution or by law." The Human Rights Committee has indeed held that the "concept of a suit at law or its equivalent in other language tests is based on the nature of the right in question rather than on the status of one of the parties."⁷⁵ Thus, whilst the existence of the 'overarching principle' is not dependent on its adequate codification under international treaties, restrictive interpretations of article 14 should not be permitted to suffice in the face of ample support for a correct and broad interpretation. To suggest that somehow the principle does not extend to administrative law borders on the absurd considering that refugee determination systems throughout the developed world are more or less dependent upon administrative determination processes for the implementation of *non-refoulement*. Administrative law is, after all, in accordance with the liberal tradition, not an exception to the checks and balances of the rule of law. To

⁷¹ Part VIII of the *Migration Act* restricts the range of people who are permitted to seek judicial review in the Federal Court and restricts the ground on which the Federal Court can review 'judicially-reviewable decisions.'

⁷² Douglas & Jones, *op cit*, p31; V Herman & J Hodge (1978), 'The European Parliament and the decline of legislatures' Thesis', 13 *Politics* 10

⁷³ The drafting of the UDHR took place during three sessions of the Commission on Human Rights held during the period from January 1947 until June 1948. See, Åshild Samnøy, *The origins of the Universal Declarations of Human Rights*, in, *The Universal Declaration of Human Rights – A Common Standard of Achievement*, (Gudmundur Alfredsson and Asbjorn Eide eds) Martinus Nijhoff Publishers, The Hague, 1999., pp5-6. Work began on the on the formulation of minimum procedural guarantees as early as 1948-1949, which formed the basis for the final draft of Art 14 formulated in 1954., Nowak *op cit.*, pp236-237

⁷⁴ Douglas & Jones, *op cit*, pp 28-29

⁷⁵ *Y.L. v Canada*, No. 122/1981, at 9.2. See also Novak *op cit*, p 243

suggest that the underlying purpose of the right to a fair hearing, as a safe guard against ‘tyranny’, does not apply to ‘everyone’ is nothing short of blatant discrimination, especially when life, liberty and security are concerned. Indeed, any interpretation that excludes refugee determination from the ambit of article 14 may be viewed as profoundly incompatible with the prohibition of non-discrimination and the liberal principles on which the provision was based.

Interpretation of art 14 extended by analogy

Interpretation may also be supported, to varying degrees, on the customary international law criteria of ‘widespread state practice’ and *opinio juris*⁷⁶ and supported further by ‘general principles of law’. Moreover article 38 of the ICJ Statute, as an articulation of the sources of international law, should thus support the ‘overarching principle’ at all four levels.⁷⁷ It is however this reciprocal interaction *vis-à-vis* the four sources of article 38 of the ICJ Statute that runs contrary to a restrictive interpretation of Art 14.

It is against this back drop, it is argued, that misconstrued State perceptions of shortfall or ambiguity regarding the extent of codification of the right to a fair and effective hearing under article 14, can be precluded by analogy to matters determining *non-refoulement per se*. This can be achieved with reference to a common purpose to protect individuals against unwarranted restrictions on human rights. *Non-refoulement* determination is, after all, as has been emphasised, analogous to the determination of guilt or innocence in criminal proceedings. Indeed, as the common purpose underlying both types of processes is to guard against possible restrictions and violations of human rights including life and liberty, in both contexts, and in accordance with the liberal democratic tradition, the availability of effective judicial oversight must therefore be regarded as mandatory to any determination process, be it criminal, administrative or otherwise. This would include all such matters that could potentially result in serious restrictions to human rights.

In addition, the right to a fair and public hearing before an independent court should not be confused with rights to appeal. Whilst it is understandable that drawing comparisons with criminal procedure and administrative law can result in some confusion, the question is not whether there is a right to appeal over refugee determination, but rather, whether there is effective access to judicial review by a court within the judicial stream at first instance. In Australia, once the Federal Court has jurisdiction over an administrative matter, appeal processes eventuate

⁷⁶ Art 38 of the ICJ Statute regards general principles of law recognised by civilised nations

⁷⁷ As Brownlie suggests, “these provisions are expressed in term’ of the function of the Court, but they represent the previous practice of arbitral tribunals and Article 38 is generally regarded as a complete statement of the sources of international law. Ian Brownlie, *Principles of International Law*, 5th ed, Oxford University Press, Oxford, 1998 p 3

by virtue of the courts seizure of the matter. This process must be distinguished from criminal and civil matters that attract judicial review at a very early stage in the procedural structure usually close after and subsequent to the initiation of criminal prosecution or civil litigation. The question therefore is not whether there is an avenue for appeal to an independent court, but rather, whether adequate and effective judicial oversight is available *per se*.

Defining the broader context

In General Comment 13 on Article 14, the Human Rights Committee (HRC) refrain from giving guidance as to the scope and purpose of ‘rights and obligations at a suit at law’, except to say that ‘reports of States fail to recognise that article 14 applies not only to ...the determination of criminal charges ... but also to procedures to determine their rights and obligations in a suit at law.’ In the light of poor jurisprudence regarding the ambit of ‘rights and obligations in a suit at law’, a purposive interpretation conducted in good faith should suffice to ensure judicial review over administrative matters do not preclude matters relating to *non-refoulement*.

Moreover, assessing the ambit of the scope and purpose of Article 14 involves a ‘good faith’ interpretation with reference to ‘customary international law’ and supported by ‘general principles of law.’ Norms that make up the broader context must therefore include the non-derogable peremptory norms of non-discrimination and equality under the law. It is here that an interaction exists between the sources of ‘international conventions’ ‘customary international law’ and ‘principles of laws of civilised nations’. Indeed, the two latter sources can serve to rectify any ambiguity in the former. Importantly, reference to article 31 of VCLT serves to short-circuit justifications for prevailing relativist approaches that clearly discriminate against asylum seekers in breach of the ‘overarching principle.’

Fair trial provisions must also provide equal protection to ‘all individuals’ within the jurisdiction of the State regardless of the individual’s civil or political status.⁷⁸ No human being residing within a territorial jurisdiction (citizen and non-citizen alike) should be discriminated against regarding the right to a fair hearing. Furthermore, although article 14 of the ICCPR does not expressly provide for judicial review over all sorts of administrative decisions, it does not necessarily preclude it. Regardless of its limitation, Art 14 provides codified evidence of the general principle as it applies to civil and criminal matters, and in doing so, evidences the obligation to afford adequate and effective judicial oversight to all effected individuals over matters restricting life and liberty. The wide spread growth of general adherence of domestic legal systems to the tradition of general

⁷⁸ Art. 2 ICCPR

principles of natural or fundamental justice in administrative law,⁷⁹ is indicative of such obligatory conduct.

⁷⁹ The Rise of administrative law principle correlates with the growth of the executive government and the modern nation state. See generally, Douglas and Jones, *op cit*, pp 28-54

7 The domestic context

Scope of comparative analysis

With Australia in focus, an examination will suffice with reference to the jurisprudence of the High Court, the Federal Court, and to a lesser extent the administrative reasoning of the Refugee Review Tribunal (RRT). Furthermore, in broader support of the ‘overarching principle,’ comparisons will be made with other jurisdictions in both common law and civil law jurisdictions where necessary. The scope of the ‘overarching principle,’ as supported by ‘customary international law’ and as ‘general principles of law,’ is thus evidenced by interconnecting colorations and common practices identifiable throughout the common law and civil law world. Hence, it is possible to derive material evidence in support the ‘overarching principle’ from various sources.

Comparisons will be made with, but not limited to, Canada, the United Kingdom and Sweden. Although, if word length had permitted, other jurisdictions of both the Roman law and common law traditions might be utilised. More specifically, reference to the Canadian context, will enable a comparative assessment of the operation of the ‘overarching principle’ within the context of Australian constitutionalism and the rule of law. For example, conclusions will be drawn regarding the absence, in Australia, of constitutionally entrenched human rights and how this effects, or, more accurately, limits judicial power. Specifically, the jurisprudence of the superior courts will be examined within the context of the rule of law and the liberal tradition of the separation of powers.

Essentially, the comparative aspect of this paper is made easier by the fact that administrative law regimes dealt with (and for that matter most others) are, to varying degrees throughout developed civil law and common law world, similar in substance if not in form. As H. Patrick Glen rightly suggests, convergence in legal tradition not only exists within common and civil law jurisdictions within the European context, but indeed elsewhere.⁸⁰ Nowhere are such similarities more prevalent than in countries with the separation of judicial power and the rule of law. To understand the basics of Indonesian administrative law, for example (in the context of a civil law jurisdiction in democratic deficit), one could do well to open a book on Australian administrative law (operating within the context of a common law tradition under representative democracy and a comparatively independent judiciary).⁸¹ Notably, principles or practices of judicial review,

⁸⁰ H. Patrick Glenn, *Legal Traditions of the World*, Oxford, Oxford University Press, 2000., p239

⁸¹ The Indonesian legal system is characterised by a strong tradition of administrative law, based on the European tradition.

including procedural fairness and the doctrine of *ultra vires* exemplify such similarities.

The traditional role of the court as the welder and protector of judicial power will thus be examined in the light of ongoing legislative initiatives to restrict judicial oversight over refugee determination. Suffice to say, the purpose of evaluating the powers of judicial review over refugee determination is considered essential to the formulation of a coherent assessment of the strength of the judiciary's adherence to the 'overarching principle' as *opinio juris*. In other words, to determine the judiciary's psychological commitment to the facilitation of broad and effective judicial oversight, and as a prerequisite for the implementation of *non-refoulement*, it is essential that the jurisdictional limits and the legal context in which judicial power is exercised is adequately assessed.

The Rule of Law and judicial review

In accordance with liberalism, the separation of powers as the only known viable means of ensuring the rule of law; and as a bulwark against tyranny, requires that decisions effecting the most fundamental of human rights must, as a matter of priority, be subject to real and effective judicial oversight. As such, this approach is exemplified by the vast majority of criminal processes though out the world. Without judicial review, such decisions would remain outside the ambit of the rule of law, void of check or balance.

Whilst it is beyond the scope of this paper to devise a viable alternative to first instance administrative determination of *non-refoulement*, the inadequacy of judicial review over administrative decision-making must be emphasised. It is against this backdrop that the tension between, firstly, the judiciary as a protector of the rule of law, and secondly, the judiciary as a protector of human rights can be best understood. The independence of the judiciary, as a protector of liberty, is rightly regarded as a prerequisite for ensuring the effective implementation of the rule of law as the ultimate governing structure under which the legislature, the executive and even the judiciary itself is answerable.⁸² Lord Steyn aptly states the necessity that:

⁸² The essence of the rule of law is that of the sovereignty or supremacy of law over man. The rule of law insists that every person – irrespective of rank or status in society – be subject to the law. For the citizen, the rule of law is both prescriptive – dictating the conduct required by law – and protective of citizens – demanding that the government acts according to law. . The concept is of great antiquity and continues to exercise legal and political philosophers today. See Barnett, *op cit.*, p87

the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.⁸³

In accordance with obligations integral to the separation of judicial power and the rule of law, judicial mandate is thus defined by its very purpose. That is, as a constitutional bulwark against the potential tyranny of the legislature and executive, the legitimate mandate of the judiciary, even in the absence of a bill of rights, it is suggested, extends by implication as the guardian of liberty and to the facilitation of human rights. More specifically, the principle of equality before the law can be regarded as integral as an underlying purpose of the democratic system of government.⁸⁴

As a bulwark against tyranny and totalitarianism, the Separation of Powers between the judiciary and the legislature prevails as a fundamental and an unequivocally necessary aspect of the modern democratic state.⁸⁵ As a constitutional structure, the separation of powers not only serves to facilitate the rule of law; it also is fundamental to the protection and implementation of human rights at domestic level.⁸⁶ Indeed, without an independent judiciary, the domestic implementation of human rights remains utterly dependent on the whims of executive and legislative discretion.

Furthermore, the scope judicial power, must therefore be sufficiently broad and effective to enable the judiciary to check legislative and executive power. Adequate judicial oversight of administrative decision-making conforms to the orthodox liberal tradition of the rule of law. Moreover, as a tradition that requires non-discrimination and equality before the law, reflected by wide spread democratic values, liberalism enjoys global acceptance underpinned by the International Bill of Rights,⁸⁷ evidenced by widespread domestic constitutional codification,⁸⁸ and reinforced by the peremptory norm of non-discrimination.⁸⁹ As integral to a modern democratic civil society, superior court jurisprudence, now

⁸³ Sir William Wade, *Administrative Law*: Eighth Edition, Oxford University press, 2000.,p 23: Rv Horseferry Road Magistrates' Court ex p. Bennet [1994] 1 AC 42 at 62

⁸⁴ See generally., Ibid. pp 20-25

⁸⁵ In conformity with the Anglo-American system of government, the Australian Constitutional Model is characterised by a relatively separate judiciary.

⁸⁶ Sir William Wade, *op cit.* p 23

⁸⁷ The International Bill of Rights constitutes the Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

⁸⁸ In most countries where the rule of law predominates, excluding Australia, Human rights are constitutionally entrenched.

⁸⁹ While the UDHR is not a binding instrument, as a resolution of the General assembly of the United Nations constituting broad international consensus, and to the extent of codification by the ICCPR and the ICESCR, it constitutes custom.

more than ever, whether in the United Kingdom, Australia and Canada, emphasises the facilitation of interests and rights of vulnerable groups and individuals including asylum seekers.

As will be examined below, the Australian High Court, in the absence of a constitutional Bill of rights, has exhibited a propensity for applying common law rights even when faced with contrary legislative intention. In the context of modern liberalism, nineteenth century utilitarianism can no longer be regarded as compatible with contemporary notions of good governance. Utterly at odds with the prevalence of fundamental human rights, indeed, the maxim, ‘the greatest good for the greatest number’ has lost all credence within a contemporary democratic paradigm. With respect to the influence that international human rights should have on Australian Constitutionalism, even in the face of poor domestic implementation, Justice Kirby of the High Court of Australia suggests, “that it [is] appropriate for judges to favour the construction which would conform to the principles of universal and fundamental rights rather than an interpretation which would involve a departure from such rights.”⁹⁰

However, in the context of a dualist discourse, and when faced with the inadequacies of poor domestic implementation in the absence of a bill of rights, it remains to be seen whether the Australian High Court will break its traditionalist shackles, and exercise judicial power to the extent that personal liberty demands. But, as will be discussed below, much depends on the judiciary’s preparedness on occasion to step on the sovereign toes of the legislature. Just maybe, if it so chooses, the judiciary may discover the Parliament’s Diceyan skin is tougher than it thinks.⁹¹

Judicial review of refugee determination – Australia in focus

The inadequacy of unchecked administrative tribunals

The inadequacy of domestic administrative refugee determination systems is far-reaching and immeasurable. However, even though the quality of superior court jurisprudence has lacked a consistency of reasoning, and exhibited a propensity for parochialism,⁹² the adherence of independent courts to the administration of justice has, in comparison, thus far been undeniably, and with variable exceptions,

⁹⁰ Justice Kirby, Domestic Implementation of International Human Rights Norms – [1999] AJHR 27; <http://www.austlii.edu.au/journals/AJHR/199927.html>. p 9

⁹¹ Dicey’s theory of parliamentary sovereignty purported that a court of law was not entitled to rule against or question the validity the parliaments enactments. In a constitutional sense, this is a strict form of parliamentary sovereignty., See Barnett, *op cit*, p5

⁹² See generally, Crawley, *op cit*

vastly superior than the politicised reasoning of tribunals⁹³. Clearly administrative tribunals exhibit a parochial tendency to devalue the credibility if applicants prematurely and unreasonably on the basis of apparent inconsistent testimony.⁹⁴ Moreover, as will be illustrated, unchecked decision makers and administrative tribunals have exhibited a propensity for unreasonableness and parochialism.⁹⁵

As an administrative tribunal, the RRT operates as a quasi-inquisitorial body empowered to conduct merits review of refugee applications, under the *Migration Act*, on appeal from an individual decision-maker.⁹⁶ Although refugee issues are legally complex, nevertheless, there is no requirement that RRT members have legal training⁹⁷. Nor is there a right of applicants to be granted legal representation.⁹⁸ Furthermore, members are not independent of the executive in a real sense.

Indicative of poor decision-making, there has been numerous complaints of bias directed at the members.⁹⁹ As appointments are based on term contracts, RRT members may appropriately be regarded as foot servants of the government.¹⁰⁰ In further erosion of RRT independence, the Minister of Immigration and Multicultural Affairs has evened threatened, on occasion, non-renewal of employment contracts if members should decide to depart from a restrictive interpretation of the definition of refugee.¹⁰¹ The poor quality of the RRT's decision-making over the years is therefore undoubtedly consequential to clearly identifiable systemic and fundamental inadequacies. Indeed, the performance and

⁹³ For example, *Minority Bosnians Decision*, Swedish Aliens Appeals Board (AAB) exhibited incompetence regarding Sweden's *non-refoulement* obligations within the context of the European Union, UD98/780/MP; Gregor Noll, 'Formalism v Empiricism: Some reflections on the Dublin Convention on the Occasion of Recent European Case Law,' *Nordic Journal of International Law* 70, pp 166-167.

⁹⁴ See, for example, *Abebe* (1999) 162 ALR 1, Here it is noted that the RRT disbelieved the applicants account of events merely on the basis of inconsistencies, drawing negative inferences from corroborating evidence. The Tribunal refused to consider the applicant's submission as credible in spite of a report from Amnesty International objectively supporting the submission. In denying the appeal, the High Court however commented that that RRT's decision was a decision that could not have been made by a reasonable decision maker.

⁹⁵ See, for example, *Eshetu v Minister of Immigration and Ethnic Affairs* (1997) 142 ALR:

⁹⁶ See generally, ss152-179 *Migration Act* 1958 (Cth)

⁹⁷ The RRT has stated that 29 out of 52 members have law degrees: See Senate Legal and Constitutional References Committee, *Operation of Australia's Refugee and Humanitarian Program*, 20 July 1999, 72

⁹⁸ See ss425 and 427 (6) *Migration Act* 1958 (Cth)

⁹⁹ See Susan Kneebone, 'The Refugee Review Tribunal and the Assessment of Credibility: An inquisitorial role?' (1998) 5 *Australian Journal of Administrative Law* 78

¹⁰⁰ Mary E Crock. Case Note: *Abebe v Commonwealth; Minister v Immigration and Multicultural Affairs v Eshetu*: Of Fortress Australia and Castles in the Air: The High Court and the Judicial Review of Migration Decisions, 24 *Melbourne University Law Review* 190, >lexisnexis@prod.lexisnexis.com, p 14

¹⁰¹ See Mary Crock, *op cit*, p213

reasoning of the RRT is all the more problematic considering its mandate requires conformity to ‘substantial justice’ and the merits of the case.¹⁰²

The superiority of Judicial Reasoning

Australian High Court and Federal Court jurisprudence serves to exemplify this disparity between, what this writer considers to be, real judicial jurisprudence, and the administrative reasoning of Government decision makers and administrative tribunals. In the *Chan case*,¹⁰³ the High Court of Australia held that the concept of ‘well-founded fear’ contains both a subjective and an objective element. In contrast to the RRT, their honours thus took a balanced approach in accordance with UNHCR recommendations, and furthermore purported that objective assessment should be determined on the basis of a ‘real chance’ test.

It is however of some concern, that the High Court of Australia poorly impacts on administrative decision-making process due to an unduly restrictive jurisdiction. Unfortunately for asylum seekers, domestic superior court jurisprudence supporting an eradication of a real or substantial risk of persecution, fails to impact refugee determination though out the administrative determination process. As Heaven Crawley suggests, similarly in the United Kingdom, parochialism permeates the decision- making process from top to bottom.¹⁰⁴

In Sweden, where there is no right of judicial review over refugee determination *per se*, the risk of *refoulement* is stemmed by the provision of residual humanitarian protection fully dependent on the good will of the executive. In spite of recent of parliamentary debate proposing legislative change to provide for judicial review, it is nevertheless markedly problematic that Sweden’s regime of protection against *refoulement* exists entirely within the executive stream of government, utterly dependent on humanitarian goodwill and subject to the whims of political expediency. As Hathaway succinctly puts it, “the purely administrative quality of these substitute classifications (as with Sweden) sometimes places refugee protection at the mercy of the potentially capricious discretion of states.”¹⁰⁵

Over-reliance on residual protection, and under-reliance on codified standards of *non-refoulement*, arguably sets a dangerous precedent that could potentially

¹⁰² Migration Act s 420(2) (b); It should be noted, however, in 1992, an Explanatory Memorandum was introduced that defined the phrase ‘substantial justice and the merits of the case’ as intending to required the tribunal to focus upon the process and not on the issues, See Kneebone, p 12

¹⁰³ *Chan* (1989) 169 CLR 379

¹⁰⁴ See generally, Heaven Crawley, ‘Reconciling universal human rights and cultural relativism’, in *Refugees and Gender: Law and Process*, Jordan Publishing, Bristol, 2001, pp10-12

¹⁰⁵ James C. Hathaway and John A. Dent, *Refugee Rights: Report on a Comparative Survey*, York Lanes Press, Toronto, 1995, PP. 5-17 in B.S. Chindi, *International Refugee Law: A Reader*, Sage Publications, New Delhi, 2000, p 119

undermines the legitimacy of the principle of *non-refoulement*. It is reasonable to suggest that the Swedish approach may also serve to give credence to relativist arguments promoting unjustifiable departure from international legal obligation which reference to widespread practice. Sweden should therefore be cautious of providing unscrupulous governments with the 'green light' to further violate their obligations. Moreover, the Swedish approach operates at a time when Conservative governments in the developed world exhibit a propensity to depart from legal obligations under international human rights treaties. It is therefore worth bearing in mind, in jurisdictions like Australia, where the Refugee Convention provides the only available effective means of protection against *refoulement*, under Australian Domestic law, there is no effective implementation of the obligation of *non-refoulement* under the CAT nor the ICCPR. The only meagre mechanism for humanitarian protection is provided for pursuant to section 417(1) of the *Migration Act* which gives the Minister of Immigration and Multicultural Affairs the discretion to provide protection to applicants who are denied refugee status under the Act. As section 417(1) is not subject to judicial review, those seeking humanitarian protection remain at the mercy of unsympathetic politicians.

The jurisdiction of the Australian High court and Federal Court defined

In light of these considerations, it is necessary to examine, in more detail, the extent of judicial review over refugee determination in Australia. The Australian Constitution, pursuant to Section 75(v), provides the High Court of Australia with 'original jurisdiction' [i]n all matters...(i) arising under any treaty [and]...(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the commonwealth...' As an entrenched constitutional provision, the 'original jurisdiction' cannot be abrogated by the parliament. Although the High Court has the entrenched jurisdiction to exercise judicial review over administrative decisions, its mandate does not however extend beyond the realm of judicial power. Thus, in accordance with the separation of powers set out by the Constitution, the High Court cannot exercise executive power. Rather, its jurisdiction is confined to enforcing the law. As will be illustrated, however, the extent to which the judiciary exhibit a propensity for activism is subject to the fundamental constraints of constitutionalism.

The Federal Court of Australia, on the other hand, does not have a direct constitutional basis. Rather, pursuant to Section 77 of the Constitution, the Federal Court was created in 1976 by an Act of Parliament to alleviate the High Court's unmanageable workload, thereby revolutionising Australian administrative law by providing aggrieved persons with effective access to judicial review. The weaknesses of the Federal Court's jurisdiction, however, is that without an

‘original jurisdiction’ the scope of judicial review remains susceptible to restrictive legislation. Thus, whenever the High Court decides to remit a matter back to the Federal Court,¹⁰⁶ the scope of judicial review is limited by the *Migration Act*.

The practice of judicial self restraint

The High Court of Australia has exhibited willingness to protect its own independence seemingly at all costs.¹⁰⁷ Understandably, and in accordance with the Anglo-legal tradition, the judiciary holds firm in its reluctance to impinge upon the sovereignty of Parliament.¹⁰⁸ Moreover, the High Courts reluctance to spread its jurisdictional wings by either implying rights from the constitution or progressively reading down ousting legislation, must therefore be viewed in terms of their honours adherence a rule of law.

Nevertheless, as such, this reluctance, or arguably inability, to enforce human rights does not undermine *opinio juris* but is rather indicative of the legislatures inability to restrict, in a practical sense at least, the court’s jurisdiction. In the absence of a Bill of Rights, the High court as the repository of judicial power exercises judicial restraint in conformity with its Constitutional mandate. Moreover, such restraint is of course vital to sustaining consistency and continuity of its legitimacy. The High Courts traditional adherence to doctrine of parliamentary sovereignty has not however, in recent years, precluded the exercise of judicial power as an inescapable duty. In *Australian Capital Television Pty LTD v Commonwealth*,¹⁰⁹ the High Court, for the first time, implied the right of political discussion from the Constitution. As a milestone for Australian human rights law, the right of political discussion was held to be a fundamental prerequisite for the facilitation of responsible government under the Constitution. Mason CJ stated that “where the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of the structure.”¹¹⁰ It was thus the indispensability of the freedom of communication to the operation of responsible government and representative democracy that necessitated the protection of the right. The maintenance of an identifiable right vital to the operation of Australian constitutional democracy, it may be argued, has thus established a precedent by which other rights might be implied to necessitate democracy. On the basis of *Australian Capital Television*, it is suggested that their honours are now free to exercise their legitimate jurisdiction to protect other rights integral to the democratic society, for which the Constitution

¹⁰⁶ Section 44 *Judiciary Act* 1903

¹⁰⁷ Even when faced with profound unreasonableness, the High Court and Federal Court will refrain from impinging on clear legislative intention. See *Abede v Commonwealth* and *Minister For Immigration* (1992) 177 CLR 106

¹⁰⁸ See, Crock, *op cit*, pp 214-215

¹⁰⁹ (1992) 177 CLR 106

¹¹⁰ *Ibid*, 135

was designed. It is argued, therefore, this should include the right to adequate and effective judicial review over administrative decisions determining *non-refoulement*.

Together with the doctrine of the responsible government, the independence of a judiciary is integral to democracy. To reiterate, the grand purpose of the judiciary is after all to provide a bulwark against ‘tyranny,’ which must logically include acts of *refoulement*.¹¹¹ It remains to be seen, however, whether the High Court will be willing, if able, to exercise judicial power as a protector of modern constitutional democracy - not merely utilitarian in its underpinning – for the benefit of ‘everyone’ residing within the territorial jurisdiction of the Commonwealth. As will be illustrated below, it is somewhat that the High Court has remained resilient in its refusal to exercise its original jurisdiction as a curial function in the protection of asylum seekers.

Abebe and Eshetu – opinio juris without jurisdiction

The 1999 High Court cases of *Abede v Commonwealth* and *Minister For Immigration*¹¹² and *Multicultural affairs v Eshetu*¹¹³ serve to exemplify the reluctance of the judiciary to exercise its ‘original jurisdiction’ in the face of legislative restrictions to the jurisdiction of the Federal Court when faced with obvious fundamental flaws in the decision-making of the RRT.

In *Abebe*, an application by an Ethiopian Women was denied refugee status on the basis of lacking credibility owing to the inconsistencies between subsequent interviews. Various members of the High Court expressed concern over assumptions made by the RRT that lying was indicative of the bona fides of the applicant. In criticism of the RRT and in appreciation of the plight of refugees, their honours pointed out that lying could also be indicative of the desperation resulting from the fear of being sent back to the country of origin to face persecution.¹¹⁴

Notably, in both cases the RRT received harsh criticism for parochial and unreasonable decision-making, both by the Federal Court and to a lesser extent by the High Court. In the Federal Court at first instance, Hill J stated:

So zealously does the Australian Parliament desire to implement its United Nations treaty obligations to assist refugees, that it has enacted legislation

¹¹¹ Definitions of ‘Tyranny’ include: arbitrary or unrestrained exercise of power; despotic abuse of authority; undue severity or harshness; to exercise absolute power or control cruelly or oppressively, see *Webster’s Encyclopaedic Unabridged Dictionary of the English Language*, Random House, New York, 1994

¹¹² (1999) 162 ALR 1

¹¹³ (1999) 162 ALR 577

¹¹⁴ *Ibid*, p 208

specifically to ensure that it is acceptable for a decision on refugee status to be made by a tribunal which not only denies natural justice to an applicant, but also is, so unreasonable that no reasonable decision-maker could ever make it.¹¹⁵

Regardless of evident concerns regarding the competence of the RRT, the High Court dismissed both appeals on the basis that there was held to be no error of law, therefore declining to exercise a jurisdiction that went beyond the *prime facie* restrictions contained Part 8 of the *Migration Act*. In refusing to exercised it jurisdiction, however, the Court expressed its concern that such legislative restrictions on the Federal Court would inevitably eventuate in an unmanageable appeals under the High Court's 'original jurisdiction.'

In support of the 'overarching principle', both cases represent a clear willingness of the judiciary to express its concerns over the inadequacies of judicial oversight. The significance of such judicial criticism is all the more obvious considering the High Court traditional refusal, on constitutional grounds, to give advisory opinions, even when the Parliament has attempted to give it such powers.¹¹⁶ Although the Judiciary's refusal to exercise its curial function under s 75 of the Constitution is a matter of concern for advocates of the right to a fair trial, nevertheless, by speaking out against the inadequacies of unchecked and inadequate decision making, their honour provide strong material evidence of 'opinio juris' in support of the overarching principle.

In the absence of a bill of rights

On numerous occasions the courts have exhibited obvious frustration about the inadequacy of judicial oversight over decisions of the RRT. Frustrated by its overly restricted jurisdiction, and its inability to implement international law, in 2000, the Federal Court when declining to exercise jurisdiction beyond an 'error of law' stated:

'The fact that it is the direct parliamentary intention... to pursue the most curious course of ensuring that this Court cannot interfere, even where a decision is so unreasonable that no reasonable decision-maker could reach it, where the decision is based on irrelevant considerations, is affected by ostensible bias or reached even where there is a denial of natural justice is hard to accept in what one would like to think of as a liberal democracy, let alone one which had committed itself to the international obligations to refugees reflected in the United Nations Convention and Protocol relating to the Status of Refugees'¹¹⁷

¹¹⁵ Kneebone, *op cit*, p13

¹¹⁶ Blackshield, *op cit*, p 843

¹¹⁷ *Applicant N 403 of 2000 v Minister fro Immigration and Multicultural Affairs* (2000) FCA 1088, para. 3, at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/2000/1088>

Alternatively, however, it may be argued that the traditional approach of the judiciary to avoid making decisions on the merits, even if the legislature have confined the court jurisdiction to errors of law, is somewhat problematic. In reality, it is not always easy to draw a boundary between merits review and judicial review.¹¹⁸ Judicial analysis of questions of law are, after all, inseparable from their factual context. Thus, if the assessment of the merits is integral the court exercising its legitimate jurisdiction over questions of law, then, so be it. For it is one thing to conform to the doctrine of parliamentary sovereignty, but it is something else for a constitutionally independent court to decline to fulfil its judicial mandate based merely of theoretical concerns related to usurping of legislative power.

It is rather ironic that the High Court limits its legitimate constitutional jurisdiction, in order to achieve absolute conformity to the theory of the separation of powers. After all, the High Court's jurisdiction is dependent on its ability to protect and exercise it jurisdiction, regardless of a degree of unavoidable overlap with the executive and legislative stream of government. It is argued therefore that the obvious remedy to ensure substantial conformity to the 'overarching principle' is arguably the introduction of constitutionally entrenched rights. In the absence of a bill of rights, it seems, unless the judiciary radically revisits its constitutional role as a protector of liberty, judicial oversight will continue to remain susceptible to contrary legislative intention.

A Constitutional prescription – the Canadian model

Although far from perfect, judicial review over refugee determination in Canada is markedly superior to that of Australia. In Canada the initial screening process is carried out by senior administrative officers acting administratively. Pursuant to specific criterion, applicants found not to be admissible are immediately denied access to the determination system and are issued a conditional removal order.¹¹⁹ Whilst there is the right to judicial review of such decisions, applicants can technically be deported while awaiting appeal after seven days.¹²⁰ Nevertheless, the grounds for judicial review under the *Federal Court Act*, are relatively comprehensive and broad sweeping. They require that a decision-maker:

- acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

¹¹⁸ See Roger Douglas & Melinda Jones, *Administrative Law, Commentary and Materials*, 2nd Edition, Federation Press, 1996, p35

¹¹⁹ Canadian Library of Parliament, Parliamentary Research Branch: *Canada's Refugee Determination System*, Margaret Young, July 1993/ Revised 2000

¹²⁰ *Ibid*; Note also, all questions for leave to apply for judicial review are decided by one judge, without personal appearances by the parties, although this may be requested.

- failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- erred in law in making its decision, whether or not the error of law appears on the face of the record;
- based its decision on an erroneous finding of fact that it made a perverse or capricious manner or without regard to the material before it;
- acted, or failed to act, by reason of fraud or perjured evidence; or
- acted in any other way that was contrary to law.

In simple terms, the judicial oversight of the Federal Court of Canada over administrative refugee determination, unlike Australia, extends well beyond the grounds of ‘illegality’ and bias to include a gamete of grounds under the rubric of natural justice.

With the inclusion of entrenched constitutional rights in Canada, the Canadian Supreme Court has now become empowered with the constitutional mandate to override contrary legislative intention restricting judicial oversight of refugee determination. The Canadian Charter of Rights and Freedoms serves to support the ‘overarching principle’ in several ways. It clearly provides coverage to non-citizen owing to its reference to ‘equality to the law’ thereby codifying the common law principle at a constitutional level.¹²¹ Section 7 of the Charter states:

“Everyone has the right to life, liberty and security of the person and the right not be deprived thereof except in accordance with the principles of fundamental justice.”

In the *Singh case*,¹²² the Supreme Court of Canada held that ‘everyone’ refers to every human being present in the territorial jurisdiction of Canada. This meant section 7 would apply to citizens and non-citizens alike. Furthermore by equating ‘fundamental’ justice with ‘natural justice’ their honours rendered the common law components of judicial review (both legally and procedurally) immune from legislative restrictions.

As an exemplification of the superiority of judicial reasoning in the recent Canadian High Court decision of *Suresh v Canada*,¹²³ for example, which determined the applicability of *prime facie* refugee status to an applicant reasonably suspected of terrorist affiliations in his country of origin (Sri Lanka), their honours emphasised:

“...the need to ensure that those legal tools [exclusion clauses] do not undermine values that are fundamental to our democratic society – liberty, the rule of law, and the principles of fundamental justice – values that lie at the heart of the

¹²¹ Section 15 (1)

¹²² *Kneebone, op cit*

¹²³ *Suresh v Canada* [Minister of Citizenship & Immigration] 2002 , Neutral Citation

Canadian constitutional order and the international instruments that Canada has signed.”¹²⁴

Unaffected by the trappings of utilitarianism, their honours acknowledge ‘the principles of fundamental justice’ are to be found in the basic tenets of our legal system’.¹²⁵ Their honours commit to what they believe to be the deeply entrenched ‘Canadian’ values of liberalism, democracy and justice. The fundamental rights of the human being, as fundamental to democratic society, are thereby held beyond reproach. Here, ‘fundamental justice’, beyond its constitutional entrenchment,¹²⁶ is regarded as fundamentally integral to the effective implementation *non-refoulement*. By drawing on the monist school of thought,¹²⁷ their honours allude to an inter-face between international human rights norms and the Canadian legal principles of fundamental justice¹²⁸ thereby reinforcing the implementation of *non-refoulement* as a non-derogable State obligation. In Canada, in stark contrast to Australia, refugee determination is therefore subject a relatively broad scope of judicial oversight and reinforced by an entrenched bill of rights.

The High Court of Australia’s strict conformity to the doctrine of parliamentary sovereignty, on the other hand, in the absence of a constitutionally entrenched bill of right creates a constitutional dilemma, ensuring a deficit of adherence to the ‘overarching principle’. As for the Canadian experience, an entrenched bill of rights protects against the Legislature’s propensity to discriminate against non-citizens in breach of the ‘overarching principle.’

The current scope of judicial review under the Migration Act

The facilitation of refugee determination under administrative law should not undermine the applicability and necessity of judicial review. In a democratic context, even the most utopian liberal ideologies must at some stage give way to the real and unavoidable pressures of limited judicial resources. Nation States, after all, cannot be expected to provide individuals within their jurisdiction with an unrestrained right of judicial review for every sort of conceivable claim.¹²⁹ Today, it is indeed common practice and acceptable that judicial review of administrative

¹²⁴ Ibid, para 4

¹²⁵ Ibid, para 45

¹²⁶ Section 7 of the *Canadian Charter of Rights and Freedoms* purports that adjudication over the right to life, liberty and security of person should be subject to ‘the principles of fundamental justice.’

¹²⁷ The monist theory supposes that international law and national law are simply two components of a single body. See Martin Dixon, *Text Book on International Law*, 3rd ed. Blackstone Press, London, 1990, p 76

¹²⁸ Ibid., para 45 & 61

¹²⁹ There is no unfettered right to judicial review. See Barnett, *op cit*, p 915

decisions be limited to declaring and enforcing the law in most instances.¹³⁰ Nevertheless, the liberal administrative law tradition still requires that adequate effective judicial oversight should suffice.

A determination of the adequacy of judicial oversight is thus unavoidably dependent upon the type of decision under review. In common law countries such as Australia, Canada and the United Kingdom, to varying degrees, it is common practice for the legislature to limit, to varying degrees, the jurisdiction of the courts.¹³¹ The *prime facie* preclusion of merits review from the jurisdiction of the Court has also come to be widely regarded as an acceptable concession necessary to restrict an over burdensome caseload, and to protect the functionality of rule of law. To ensure the functionality of the judicial system, the prioritisation of administrative matters, logically, now prevails so as to ensure a maximum utilisation of judicial resources.

Such considerations must therefore suffice in order to establish the content and scope of a well established general principle, one which, as will be discussed below, is at least impliedly acknowledged if not practiced by the vast majority of nation-states. To reiterate, the application of the ‘overarching principle’ guarantees adequate and effective judicial oversight over decisions that seek to restrict, or potentially result in restrictions to the right to life and liberty, or violate human rights violations amounting to persecution. A prioritisation of matters should therefore suffice concerning human rights in conformity with the ‘overarching principle.’ Within this context, it is argued that refugee determination and decisions determining the prohibition of *refoulement*, *per se*, should attract priority status so as to attract the provision of adequate and effective judicial review. It should be emphasised, for the most part, responsibility lies with the Legislature to ensure that the courts retain adequate jurisdiction to adjudicate on the facilitation and implementation of human rights. Alternatively, the courts are responsible only to the extent that they restrictively exercise their jurisdiction.

The Administrative Decisions Judicial Review Act and the codification of natural justice / procedural fairness as *opinio juris*

The central component of the common law doctrine of natural justice or procedural fairness is the right to be heard. A right to a fair hearing before an independent and impartial body may be regarded as integral to the facilitation of such a right and consistent with the liberal tradition of the rule of law. Without adequate review including merits, reasonableness and natural justice, of which are

¹³⁰ Australian Government Solicitor, Legal Briefing: *Judicial Review of Administrative Decisions*, Number 42, 27 August 1998, www.agps.gov.au/publications/br42.html 2002 - 02 - 19

¹³¹ See, Douglas & Jones, *op cit*, p 3

dependent on the individual's ability to be heard, justice cannot be guaranteed. The provision of natural justice is thus dependent on the capacity of the judiciary to oversee its provision.

As explained above, the ADJR Act was enacted to codify the common law grounds for judicial review and strengthen the jurisdiction of the Federal Court over all kinds of administrative decisions.

The grounds pursuant to Section 5 of the Act include:

- breach of the rules of natural justice;
- procedures not observed required by law;
- the decision maker act out side their jurisdiction;
- improper purpose;
- error of law, whether or not the error appears on the record of the decision;
- no evidence or other material to justify the making of the decision.

It is here that the inadequacy of judicial oversight may then be measured with reference to the extent to which non-citizen fail to receive the essential protection of natural or substantive justice and procedural fairness. Indeed, the extent to which asylum-seekers are denied judicial review beyond a mere 'error of law' pursuant to part 8 of the *Migration Act* is indicative of the extent to which non-citizens are discriminated against in breach of the 'overarching principle.'

Although consensus regarding the extent of application of the common law principle of natural justice remains unsettled, the jurisprudence of both the Australian High Court and the Supreme Court of Canada while adhering *prime facie* to the dualist school of thought and the necessity of domestic implementation of international law, have both exhibited a tendency of utilising the common law principle of non-discrimination, equality and procedural fairness in the absence of parliamentary intention to the contrary. In Australia where the right to a hearing lacks a constitutional basis, the presumption that individuals be afforded rights of natural justice suggests a compromise by the judiciary.¹³² In *Kioa v Minister for Immigration and Ethnic Affairs*, as a high water marks on the applicability of procedural fairness, Mason J states:

The law has now developed to a point where ...there is a duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to a clear manifestation of contrary intention¹³³

The reluctance of the Australian High Court to restrict procedural fairness in the absence of a clear contrary legislative intention, as stated above, is indicative of

¹³² (1985) 159 CLR 550

¹³³ Ibid

the judiciary's adherence to parliamentary sovereignty and the separation of powers. Importantly, both the and the Supreme Court of Canada, and to a lesser extent that High Court of Australia, regard natural justice as equating fundamental justice. Their Honours, for the most part, embrace natural justice as a fundamental principle that does not owe its existence to the legislature.

Adherence to the 'common law implication approach' thus conforms to the natural law school of thought to the extent that paramountcy is given to common law human rights and values. In doing so, their honours provide material evidence supporting *opinion juris* in support of the 'overarching principle.' Given the clear contrary intention constituting discrimination in the denial of natural justice to non-citizens under the *Migration Act*, it would be erroneous to suggest such legislative initiatives constitute a 'wide spread uniformity of practice' under customary international law. In the absence of a bill of rights, the jurisdiction of the judiciary will always remain susceptible to the clear intent of the legislature, even if such legislation is discriminative.

Alternatively, however, according to Susan Kneebone, by emphasising the citizen / non-citizen dichotomy in recognition of a supposed sovereign right of government to exclude aliens arguably makes a demarcation that borders on discrimination.¹³⁴ For Kneebone it is problematic that the Australian High Court in the midst of deep common law human rights tradition alludes to constitution restriction to justify discrimination. Surely discrimination cannot, under any circumstances be justified upon the premise parliamentary sovereignty. Nevertheless, in spite of the High Court's somewhat regressive approach regarding the application of natural justice, and while it is not a justification for discrimination toward non-citizens, their honours' reasoning is to some extent understandable given prevailing jurisdictional constraints, amid a context of representative democracy and a traditional adherence to dualism.

However, within a jurisprudential and constitutional tradition that espouses an uncompromised adherence to the rule of law, the high Court jurisprudence it may be argued exhibits an adherence to non-discrimination in the application of natural justice although subject to the sovereignty of parliament. This approach must nonetheless be regarded, even if unavoidable, as utilitarian in its underpinnings and arguably does not sit well with a human rights based liberal tradition of democracy which the High Court that has in recent decades claimed to adhere to. In all fairness, however for the most part, it is not the High Court that has embraced utilitarianism; but rather, it is the Parliament by way of restrictive legislation.

¹³⁴ Kneebone, *op cit*, p13

Naturalism v Positivism - Implementation in deficit

A fundamental impediment to the implementation of international human rights is the prevalence of dualism.¹³⁵ The reality of dualism is that international law does not become part of domestic law until it is implemented by legislation embodying the substantive content of treaty obligations.¹³⁶ Unquestionably, an inherent ramification of dualism is that it perpetuates a deficit in implementation. Moreover a significant domestic deficit in implementation prevails throughout the international community. In this regard Australia is no exception.

In *Minister of Immigration and Ethnic Affairs v Ah Teoh*, which represents a high watermark regarding the doctrine of ‘legitimate expectations,’ the High Court held that mere ratification of the Convention of the Rights of the Child constitutes a public statement to the whole world.¹³⁷ The effect of the decision was that even without adequate legislative implementation, such a public statement created a ‘legitimate expectation’ that decisions makers would take into account as relevant considerations, respective treaty obligations including the ‘best interests of the child.’ In response to this decision, the Parliament with haste preceded to take measures to oust the High Court’s jurisdiction in such matters by introducing the *Administrative Decisions (Effect of international Instruments) Bill* 1997.¹³⁸

In the midst such legislative measures limiting the ability of court to enforce human rights, the *Teoh* case exemplifies the willingness of the judiciary to utilise common law principle to facilitate human rights. By maintaining natural justice as an initial entitlement, subject only to a clear contrary legislative intention, the judiciary continues to place the onus on the legislature to initiate discriminative restrictions on common law rights. On balance, clearly High Court jurisprudence favouring the common law approach evidences *opinio juris* of the judiciary’s recognition of the common law right to natural justice and effective judicial oversight of administrative decisions effecting human rights.

Within a dualist context, absent of a Bill of Rights, to suggest the Judiciary can extend its judicial wings much more than it has already is questionable. Rather, beyond an ‘original jurisdiction’, without a Bill of Rights the High Court can exercise only a limited human rights jurisdiction that remains subject to legislative intervention. As the cases alluded to above have illustrated, the judiciary has already exhibited considerable ingenuity in the face of anti-human rights legislation. Moreover, it should also always be emphasised, unlike their Canadian counterparts, Australian Courts do not have the advantage of Article 7 of the

¹³⁵ See, Michael Kirby, Domestic Implementation of International Human Rights Norms, [1999] Australian Journal of Human Rights 27, p 1

¹³⁶ Ibid. p 2.

¹³⁷ (1995) 128 ALR 353

¹³⁸ In 2000 the Human Rights Committee stated that the legislation was “incompatible with Australia’s obligations under the Covenant.”

Canadian Charter of Rights and Freedoms to protect the right to natural or 'fundamental justice.' In the absence of an entrenched Bill of Rights, a progressive human right-based approach as exemplified by the *Teoh case*, will always be subsequently in danger of jurisdictional ousting by the parliament. It is encouraging, however, that in spite of inadequate implementation, Justice Kirby has advocated the judiciary's utilisation of unincorporated norms of international law by adhering to the Bangalore Principles to facilitate the unitisation of incorporated norms which state, in effect:

1. International law (including human rights norms) is not, in most common law countries, part of domestic law.
2. Such law does not become part of domestic law until Parliament so enacts or judges (as another source of law-making) declare the norms thereby established to be part of domestic law.
3. The judiciary will not do so automatically, simply because the norm is part of international law or is mentioned in a treaty – even one ratified by their own state
4. But if an issue of uncertainty arises (by a gap in the common law or obscurity in its meaning or ambiguity in a relevant statute), a judge may seek guidance in the general principles of law, as accepted by the community of nations.
5. From this source material, the judge may ascertain and declare what the relevant rule of domestic law is. It is the action of the judge, incorporating the rule of law into domestic law, which takes part of domestic law.

What is especially significant about this approach is that it enables the judiciary to look to international treaties to interpret the scope and purpose of the implementing legislation when dealing with ambiguities. This approach must therefore be regarded as a significant shift from the strict dualism that has traditionally precluded the judiciary, not just in Australia but elsewhere,¹³⁹ from drawing upon unincorporated international human rights norms.

The necessity of effective implementation by domestic legislation to give substantive effect to international law, does not, however, sit well with natural law theory. On the contrary, it arguably serves to provide support for positivism, which is furthermore reflected in determination to the treatment of refugee issues as mere migration control.¹⁴⁰ As such, common law rights of natural justice, as has been illustrated above, are being treated as norms, the legitimate origins of which, lie with their positing by the state. This projection of instrumentalism conforms with the notion that what legislation can give, legislation can take away.¹⁴¹ Within the domestic context, legal rights are therefore viewed as

¹³⁹ See, for example, *R v Secretary of State for the Home Department; Ex parte Bhajan Singh* [1976] 1 QB 198 at 207, as an exemplification of judicial adherence to dualism.

¹⁴⁰ See, Kneebone, *op cit*, p 17- 18

¹⁴¹ Douglas & Jones, *op cit*, p 33

dependent on legislative grants with their availability dependent upon statutory interpretation.¹⁴² From an international lawyer's perspective with natural law tendencies, the deficit between international obligations and domestic implementation can however serve as a useful measuring stick to ascertain actual shortfall of implementation by emphasising that the responsibility for implementation rests, for the most part, firmly on the shoulders of the Legislature.

¹⁴² Ibid.

Conclusion

Vagaries over the scope of codification of the ‘general overarching principle,’ under international law, clearly provides an excuse for widespread discriminative legislation and policies excluding asylum seekers from equal protection under the rule of law. Nevertheless, as a principle carrying the status of *jus cogens*, non-discrimination renders such differential treatment, regardless of any uniformity and generality of state practice, repugnant as a violation of a peremptory norm of international human rights law. Consistent and widespread violations of fundamental human rights cannot, therefore, must be continue to be seen for what they are. It is therefore of profound concern, that regardless of the fundamental ascendancy of international human rights law, States use the principle of sovereignty as a justification to trump their human rights obligations. ‘Refugee law,’ it is suggested, if viewed as a separate area of international law distorts the status of asylum seekers as ‘human beings’ deserved, morally and legally, of the full enjoyment and protection of international human rights law. The principle of equality, it must be emphasised, is not a mere posited practice by the international community. Rather it constitutes the very fabric on which civil society is based. Beyond the limits placed on political participation, it is blatantly discriminative to exclude non-citizens from the coverage of the rule of law, both at domestic and international level. Indeed the right to a fair hearing before an independent court ensures that ‘everyone’ within the territorial jurisdiction of the nation state is treated equally under the rule of law. Thus in the absence of adequate judicial oversight of decisions effecting restrictions and violations of human rights, such guarantees cannot be adequately facilitated.

In sum, refugee and humanitarian determination systems though out the world violate the ‘overarching principle,’ to varying degrees, rendering the prohibition of *refoulement* substantially ineffective for the vast majority of refugee applicants. The degree to which asylum seekers are denied access to adequate refugee determination systems, subject to the rule of law, is therefore indicative of the extent to which States violate the ‘overarching principle’. In developed nations, with the capacity and resources to ensure effective implementation of *non-refoulement*, and where the rule of law predominates, the right to judicial review is being squeezed like an old accordion, with its ability to play the tune of justice, liberal tolerance and inclusion severely stunted by legislative intervention in violation of the most fundamental of human rights.

Table of cases

Abede v Commonwealth and Minister For Immigration and Ethnic Affairs (1992) 177 CLR 10

Applicant N 403 of 2000 v Minister for Immigration and Multicultural Affairs (2000) FCA 1088

Eshetu v Minister of Immigration and Ethnic Affairs (1997) 142 ALR

Kioa v Minister for Immigration and Ethnic Affairs (1985) 159 CLR 550

Minister of Immigration and Ethnic Affairs v Ah Hin Teoh (1995) 128 ALR 353

Nicaragua v The United States (Merits) Case ICJ 1986

R v Horseferry Road Magistrates' Court ex p. Bennet [1994] 1 AC 42

R v. Immigration Appeal Tribunal and the Secretary of State for the Home Department ex parte Shah, [1997] Imm. A. R. 145

R v Secretary of State for the Home Department; Ex parte Bhajan Singh [1976] 1 QB 198

Suresh v Canada [Minister of Citizenship & Immigration] 2002

Y.L. v Canada, No. 122/1981

International Instruments

Universal Declaration of Human Rights (UN, 1948)

European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1951)

Convention Relating to the Status of Refugees (UN, 1951)

International Covenant on the Elimination of All Forms of Racial Discrimination (UN, 1965)

International Covenant on Economic Social And Cultural Rights (UN, 1966)

International Covenant on Political Rights (UN, 1966)

Protocol relating to the Status of Refugees (UN, 1976)

Convention on the Elimination of All Forms of Discrimination against Women (UN, 1979)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN, 1984)

Bibliography

Alfredsson, Gudmundur & Asbjorn Eide (eds), *The Universal Declaration of Human Rights – A Common Standard of Achievement*, , Martinus Hijhoff Publishers, The Hague, 1999

Barnett, H *Constitutional And Administrative Law*, Cavendish Publishing, London, 1999

Biale, David & Michael Galchinsky & Susannah Heschel (eds) *Insider/Outsider - American Jews and Multiculturalism*, the University of California Press, 1998

Blackshield, Tony & George Williams & Brian Fitzgerald, *Australian Constitutional Law & Theory: Commentary & Materials*, Federation Press, Annandale, New South Wales, 1996

Brownlie, Ian, *Principles of International Law*, 5th ed, Oxford University Press, Oxford, 1998

Chindi, B.S. *International Refugee Law: A Reader*, Sage Publications, New Delhi

Crawley, H, 'Reconciling universal human rights and cultural relativism', in *Refugees and Gender: Law and Process*, Jordan Publishing, Bristol, 2001

Crock, M. E, Case Note: *Abebe v Commonwealth; Minister v Immigration and Multicultural Affairs v Eshetu: Of Fortress Australia and Castles in the Air: The High Court and the Judicial Review of Migration Decisions*, 24 Melbourne University Law Review 190, >lexisnexis

Douglas, R & Jones, M, *Administrative law: Commentary & Materials*, Second Edition, Federation Press, 1996

Glenn, H. Patrick, *Legal Traditions of the World*, Oxford, Oxford University Press, 2000

Hamilton, Andrew "Three Years Land", *Eureka Street*, Vol 3, No 1, Feb 1993

Hathaway, J. C. and Dent, J.A. *Refugee Rights: Report on a Comparative Survey*, York Lanes Press, Toronto, 1995

Herman, V & Hodge, J (1978), 'The European Parliament and the decline of legislatures' Thesis', 13 *Politics* 10

Kirby, M, Domestic Implantation of International Human Rights Norms – [1999] AJHR 27; <http://www.austlii.edu.au/journals/AJHR/199927.htm>
@prod.lexisnexis.com

Kneebone, Susan, Refugees, Natural Justice and Sovereignty: Fundamental or Substantial Justice, www.eur.nl/frg/iacl/papers/Kneebone.html

Kneebone, Susan, 'The Refugee Review Tribunal and the Assessment of Credibility: An inquisitorial role?' (1998) 5 *Australian Journal of Administrative Law* 78

Malamczuk, Peter, Akehurst's – *Modern Introduction to International Law*, 7th revised edition, Routledge, London, 1997

Noll, G, Formalism v Empiricism: Some reflections on the Dublin Convention on the Occasion of Recent European Case Law, *Nordic Journal of International Law* 70

Nowak, Manfred U.N. *Covenant on Civil and Political Rights: CCPR Commentary.*, N.P.Engel, 1993

O'Neal, Nick & Robin Handley, *Retreat From Injustice – Human Rights in Australian Law*, Federation Press, Leichhardt, New South Wales, 1994

Van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights.*, Kluwer Law International, The Hague, 1998

Wade, W *Administrative Law: Eighth Edition*, Oxford University press, 2000

Webster's Encyclopaedic Unabridged Dictionary of the English Language, Random House, New York, 1994

Government Publications

Canadian Library of Parliament, Parliamentary Research Branch: Canada's Refugee Determination System, Margaret Young, July 1993/ Revised 2000

Australian Government Solicitor, Legal Briefing: Judicial Review of Administrative Decisions, Number 42, 27 August 1998 www.ags.gov.au/publications/br42.html

Submission to the Senate Legal and Constitutional and References Committee:
Inquiry into the Operation of Australia's Refugee and Humanitarian Program,
June 1999

Human Rights and Equal Opportunity Commission, *Submission to the Senate
Legal and Constitutional Committee inquiry into Australia's refugee and
humanitarian program* (May 1999)

*'Bringing them home' - A guide to the findings and recommendations of the
National Inquiry into the separation of the Aboriginal and Torres Strait
Islander children from their families*, Human Rights and Equal Opportunity
Commission 1997

Submission to the Senate Legal and Constitutional References Committee:
Enquiry into Australia's Refugee Determination Program, Senate Committee

*World Refugee Day Statement from Minister for Immigration, Phillip
Ruddock*, June 20, 2000