

**THE INTERNATIONAL AND DOMESTIC
LEGALITY OF AUSTRALIA'S MANDATORY
DETENTION OF 'UNLAWFUL NON-CITIZENS'
UNDER THE *MIGRATION ACT 1958* (CTH).**

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To the best of my knowledge and belief, this dissertation contains no material previously published or written by another person, except where due reference is made in the text of the dissertation.

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INTRODUCTION

Australia, with the exception of its indigenous peoples, is a land of recent migrants. Our national anthem proclaims that, “For those who’ve come across the seas, we’ve boundless plains to share.”¹ However, this has never been an unconditional offer. Immigration laws in Australia have often disclosed, “deeply xenophobic hostility,”² towards foreigners.

Fear of the ‘yellow peril’, the supposed hordes of Chinese, “bent on overrunning White Australia and destroying its way of life forever,”³ prompted racially discriminatory immigration restrictions as early as 1855.⁴ One of the first statutes passed after Federation was the *Immigration Restriction Act 1901* (Cth),⁵ which introduced the ‘dictation test’. By effectively precluding non-white immigrants, the test was the means by which the ‘White Australia’ policy was implemented.⁶

Since 1992, Australia’s immigration laws have established a regime of mandatory detention for ‘unlawful non-citizens’.⁷ However, it was in 2001 that immigration issues powerfully captured the public imagination during the *Tampa* ‘crisis’.⁸ The debate about the mandatory detention of ‘unlawful non-citizens’ has dominated headlines in Australia and overseas since then.⁹

¹ *Advance Australia Fair*, national anthem of the Commonwealth of Australia, Second Verse.

² Mary Crock and Ben Saul, *Future Seekers: Refugees and the Law in Australia* (2002), 1.

³ Desmond Manderson, *From Mr Sin to Mr Big: A History of Australian Drug Laws* (1993), 17.

⁴ In the colony of Victoria, *An Act to Make Provision for Certain Immigrants*, 18 Vict. c.39 (1855).

⁵ George Williams, *Human Rights under the Australian Constitution* (1999), 26.

⁶ For discussion of the ‘dictation test’ and ‘White Australia’ policy, see: Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (3rd ed, 2002), 854-5; Mary Crock, *Immigration and Refugee Law in Australia* (1998), 1-19 (including an example of a ‘dictation test’ at 15); Crock and Saul, above n2, 1.

⁷ The first mandatory detention provisions were inserted into the *Migration Act 1958* (Cth) by the *Migration Amendment Act 1992* (Cth).

⁸ See Blackshield and Williams, above n6, 522-6; Crock and Saul, above n2, 35-42.

⁹ A selection of relevant materials appears in Crock and Saul, above n2, 75-98.

Against that background, this thesis considers the international and domestic legality of Australia's mandatory detention of 'unlawful non-citizens'¹⁰ under the *Migration Act 1958* (Cth).¹¹ The underlying proposition is that the regime of immigration detention in Australia is intended to be mandatory for all 'unlawful non-citizens', and effectively beyond the control of Australian courts. This thesis aims to test the international and domestic legality of that regime.

In focussing on the detention of 'unlawful non-citizens' as a legal issue in itself, this thesis deals only peripherally with issues relating to the conditions of detention.¹² For the purpose of this thesis, it is not important whether detention occurs in remote desert outposts or inner-city luxury hotels.¹³ At the heart of the issue is the fact that a detained person is, "deprived of personal liberty except as a result of conviction for an offence".¹⁴

In Chapter I, the position under international human rights law will be analysed. After considering the legal nature of international human rights law and tracing the evolution of international regulation of human rights, the key issue will be the international prohibition of arbitrary detention, which will be considered as a norm of international human rights law, under the relevant conventions and under the relevant body of 'soft law'.¹⁵

¹⁰ An 'unlawful non-citizen' is not a criminal. Their presence in Australia is 'unlawful' because they fail to comply with the requirement that non-citizens hold a visa: *Migration Act 1958* (Cth), ss 13(1), 14(1).

¹¹ The relevant provisions appear in Division 7 of Part 2 of the *Migration Act 1958* (Cth).

¹² If immigration detention is internationally wrongful in itself, no conditions can remedy that illegality, although the conditions may themselves constitute additional breaches of international human rights law.

¹³ In *Amuur v France* (1992) 22 EHRR 533, the European Commission on Human Rights held that the detention of a group of asylum seekers at a hotel near the airport where they arrived breached Article 5 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 Nov 1950, 213 UNTS 221 (entered into force 3 Sept 1953).

¹⁴ *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res 43/173, UN GAOR, 43rd sess, 76th plen mtg, UN Doc. A/43/49 (1988) ('*Body of Principles*'), Use of Terms.

¹⁵ The concept of 'soft law' is discussed below at 10.

Having determined the scope of the international prohibition of arbitrary detention, the Australian system of immigration detention will be tested for compliance with the requirements of international human rights law. It will be argued that immigration detention in Australia is in breach of international law and in violation of the international prohibition of arbitrary detention.

In Chapter II, the status of international human rights law in Australia will be examined, to determine what domestic consequences flow from international illegality. The relationship between international law and Australian law will be discussed at length. In addition to the case law on this point, the underlying issues will be analysed in depth.

This discussion leads into a focus on two areas where possible future legal directions are examined. First, the use of international law as a tool of constitutional interpretation will be discussed. Second, the argument that there are certain fundamental common law rights which parliament may not abrogate will be considered. Both arguments challenge the traditional view of the relationship between international law and Australian law, and the accepted current position that although immigration detention may be in breach of international human rights law, this has little, if any, legal significance in Australia.

In Chapter III, consideration turns to other provisions of Australian law which may be relevant to the legality of immigration detention. This chapter has a dual focus, discussing first the scope of Commonwealth legislative power, and then the existence of any limits to be derived from the exclusive vesting of judicial power in those courts specified in Chapter III of the Constitution.

The current orthodoxy is that immigration detention is legal under Australian law, notwithstanding that it may be illegal under international law. This thesis explains the theoretical and legal basis of that view, but also challenges that view, exploring considerations that point to the domestic illegality of immigration detention. It is argued that international illegality is relevant to Australian law, and that international human rights law has a part to play in the development and definition of Australian law.

CHAPTER I: IMMIGRATION DETENTION UNDER INTERNATIONAL LAW

Introduction to international human rights law

The first chapter considers the status of immigration detention under international law. The evolution and sources of international human rights law will be discussed, to provide a background to the detailed consideration of the international prohibition of arbitrary detention which follows.

The international regulation of human rights is a relatively new phenomenon, although the concept of human rights is much older and, “traces of rights talk can be found in ancient Greek and Roman philosophy.”¹⁶ International concern for human rights developed later, with the evolution of international humanitarian law dealing with armed conflict.¹⁷

The body of international human rights law that is known today emerged in the wake of World War II, and at its heart, “consists of the United Nations Charter and related instruments.”¹⁸ The *Charter of the United Nations*¹⁹ provides that, “the United Nations shall promote...universal respect for; and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”²⁰

¹⁶ Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights* (2002), 43.

¹⁷ *Victoria v Commonwealth* (1996) 187 CLR 416, 479-80 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ)

¹⁸ Henry J Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (2nd ed, 2000), 136.

¹⁹ *Charter of the United Nations*, opened for signature 26 June 1945, [1945] ATS 1, (entered into force 24 October 1945).

²⁰ *Charter of the United Nations*, above n19, art 55(c).

The *Charter of the United Nations* contains no detailed human rights provisions, but it is from the practice of the United Nations that international human rights law has emerged. The first step towards international protection of human rights came in 1948 with the adoption by the General Assembly of the *Universal Declaration of Human Rights* ('*UDHR*').²¹

The *UDHR* begins by reciting the powerful motive behind its adoption, proclaiming that, "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." As the first comprehensive definition of universal human rights, the *UDHR*, "has become a powerful authority for, and symbol of, the protection of human rights."²² Indeed, as the foundation of the system of international human rights law, the *UDHR* has been called, "possibly the single most important document created in the twentieth century".²³

Sources of international human rights law

Article 38 of the *Statute of the International Court of Justice*²⁴ lists the sources of international law. The two major sources for the purposes of this discussion are:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;

²¹ *Universal Declaration of Human Rights*, GA Res 217A, UN GAOR, 3rd sess, 183rd plen mtg, UN Doc. A/810 (1948).

²² Williams, above n4, 3.

²³ Peter Bailey, "The Creation of the Universal Declaration of Human Rights"
<<http://www.universalrights.net/main/creation.htm>> at 28 September 2002.

²⁴ *Statute of the International Court of Justice*, incorporated in the *Charter of the United Nations*, above n19.

An international convention becomes binding on a state when it accepts the provisions of that convention, in accordance with the *Vienna Convention on the Law of Treaties*.²⁵ Customary international law, as evidenced by state practice and *opinio juris*, binds all states. For the purposes of this thesis, customary international law will not be considered in depth. Rather, reliance will be placed on the relevant norms of international human rights law established by treaties, as enriched by the body of relevant ‘soft law’.

‘Soft law’ is not mentioned in Article 38 of the *Statute of the International Court of Justice*, but is a relevant legal consideration.²⁶ ‘Soft law’ is a concept unique to international law, although it has some familiar elements for lawyers from a common law tradition.²⁷ ‘Soft law’ can be defined as, “guidelines of conduct...which are neither strictly binding norms of law, nor completely irrelevant political maxims, and operate in a grey zone between law and politics.”²⁸ In the context of international human rights law, ‘soft law’ instruments serve the important purpose of better defining and developing the principles of human rights law which are set down in the relevant treaties.

As Steiner and Alston point out, in considering international human rights law it is important to have, “an appreciation of its close relation to and reliance on international organizations.”²⁹ The actions of the United Nations are of great importance in generating a body of ‘soft law’ relating to international human rights. This body of ‘soft law’,

²⁵ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

²⁶ Some ‘soft law’ norms may achieve traditional legal status either by representing a codification of existing customary international law at the time of adoption, or by a process of ‘crystallization of custom’ around the ‘soft law’ instrument, by which it comes to represent customary international law. The International Court of Justice considered the relationship between ‘soft law’ instruments and customary international law in: *Legality of the Threat of Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 2, 40-44.

²⁷ On the issue of ‘soft law’ see: Christine M Chinkin, “The Challenge of Soft Law: Development and Change in International Law” (1989) *International and Comparative Law Quarterly* 850.

²⁸ Peter Malanczuk (ed), *Akehurst’s Modern Introduction to Public International Law* (7th rev ed, 1997), 54.

²⁹ Steiner and Alston, above n18, 137.

consisting of resolutions of the General Assembly and other organs, and decisions of bodies which operate under the auspices of the United Nations, is vital to an understanding of the provisions of the treaties which form the basis of international human rights law.

A right of individuals or of states?

There is an inherent contradiction in analysing international human rights law in accordance with the *Statute of the International Court of Justice*. Individuals have no standing to bring an action before the International Court of Justice,³⁰ even if they allege a violation of their human rights. This is an important procedural limitation, requiring individuals to rely on their own government to prosecute any claims of human rights violations on their behalf in the International Court of Justice.³¹

There is disagreement about whether the state, in such a case, is asserting its own right, or asserting the right on behalf of the individual.³² In 1950, Sir Hersch Lauterpacht argued that, “the legal position is not that the state asserts its own exclusive right but that it enforces, in substance, the right of the individual who, as the law now stands, is incapable of asserting it in the international sphere.”³³

³⁰ *Statute of the International Court of Justice*, above n24, Article 34(1).

³¹ See: Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994), 51.

³² The cases on this point brought before the International Court of Justice have also involved the right to consular assistance: *Vienna Convention on Consular Relations (Paraguay v United States of America) (Provisional Measures)* [1998] ICJ Rep 257; *LaGrand (Germany v United States of America) (Provisional Measures)* [1999] ICJ Rep 4; *LaGrand (Germany v United States of America) (Merits)* 40 ILM 1069 (2001). See also: Louis Henkin, “Provisional Measures, US Treaty Obligations, and the States,” (1998) 92 *American Journal of International Law* 679.

³³ Sir Hersch Lauterpacht, *International Law and Human Rights* (1950), 27; quoted with approval in Higgins, above n34, 53.

This view has been borne out by developments which permit individuals to assert their human rights before bodies established under human rights treaties and under the *Charter of the United Nations*. Whilst lacking enforcement powers, these bodies illustrate that international human rights law has developed mechanisms to assist individuals to bring claims that their human rights have been violated.

However, with the exception of the individual complaints mechanisms, two significant issues arise from the fact that a state must bring a claim on behalf of its own nationals. First, the weakness of the nationality-of-claims rule is that, “it is from his own government that an individual often most needs protection.”³⁴ A refugee, by definition, has a, “well-founded fear of persecution,” in their country of nationality.³⁵ This virtually excludes any ‘asylum seeker’ from state enforcement.

Second, primary legal enforcement of international human rights law occurs not in the international sphere, but in the domestic courts of states. This is a serious weakness because international human rights instruments, “deprived as they are of jurisdictional enforcement, are ultimately left to the good will of the signatory states.”³⁶

To deal with this challenge, international human rights law places a binding legal obligation on states to provide for enforcement of international human rights in domestic courts. It will be seen in Chapter II that Australia has not comprehensively done this. In failing to protect international human rights, Australia is not alone:

³⁴ Higgins, above n34, 95.

³⁵ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150, art 1A(2) (entered into force 22 April 1954).

³⁶ Giovanni Conso, “Epilogue – Looking to the Future”, in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (1999) 471, 476.

The failure on the part of many states to implement the standards in the elaboration of which they themselves have played a part and by which they may be legally bound under international law represents a major challenge in the field of human rights protection.³⁷

However, as the *International Court of Justice* has pointed out, “the lack of means of execution and the lack of binding force are two different matters.”³⁸ Difficulties faced by individuals wishing to enforce their human rights do not detract from the binding nature of international human rights law.

The international prohibition of arbitrary detention

It has been said that, “arbitrary arrest and detention have been the most consistent violations of fundamental individual human rights throughout history.”³⁹ It is not surprising, against that background, that the *Universal Declaration of Human Rights* contains two provisions dealing with the issue of arbitrary detention.

Article 3 of the *UDHR* states that, “Everyone has the right to life, liberty and security of person.” In specifically protecting the right to liberty and security of the person, the *UDHR* draws on the existence of this right, “in all major human rights declarations beginning with the Magna Carta (1215) and the French Revolution (1789),” in giving effect to, “one of the most fundamental of human rights.”⁴⁰

³⁷ Helena Cook, “International Standards and Individual Protection”, in Stanislaw Frankowski and Dinah Shelton (eds), *Preventive Detention: A Comparative and International Law Perspective* (1992) 1, 52.

³⁸ *LaGrand (Germany v United States of America) (Merits)* 40 ILM 1069 (2001), 1095. See also: Thomas M Franck, “Legitimacy in the International System” (1988) 82 *American Journal of International Law* 705.

³⁹ M Cherif Bassiouni, “Preface” in Frankowski and Shelton (eds), above n37, xi.

⁴⁰ Johanna Niemi-Kiesiläinen, “Article 9” in Asbjørn Eide et al (eds), *The Universal Declaration of Human Rights: A Commentary* (1992) 147, 147.

However, the right to liberty of the person is not an absolute right. It is given greater definition by Article 9, which provides that, “no one shall be subjected to arbitrary arrest, detention or exile.” By doing so, the *UDHR* acknowledges a fundamental distinction.

Deprivation of personal liberty in the form of imprisonment...has long represented the most common means used by the State to fight crime and maintain internal security...the basic right of personal liberty does not strive toward the ideal of a complete abolition of State measures that deprive liberty...It is not the deprivation of liberty in and of itself that is disapproved of but rather that which is arbitrary and unlawful.⁴¹

Although the *UDHR* was an important step in the development of international human rights law, its legal status was that of, “a recommendation by the General Assembly...that would exert a moral and political influence on states rather than constitute a legally binding instrument”.⁴² Nonetheless, in the time since the adoption of the *UDHR*, certain fundamental principles have come to be applied as international law, most notably by the International Court of Justice in the *Tehran Hostages Case*:

Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.⁴³

The trilogy of instruments that constitute the International Bill of Rights, which began with the *UDHR* in 1948, was completed in 1976, when the *International Covenant on Civil and Political Rights* (‘*ICCPR*’) and the *International Covenant on Economic, Social*

⁴¹ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993), 159-60.

⁴² Steiner and Alston, above n18, 138. However, note that much of the *Universal Declaration of Human Rights* could now be said to represent customary international law: Bailey, above n23.

⁴³ *United States Diplomatic and Consular Staff in Tehran (United States v Iran) (Merits)* [1980] ICJ Rep 3, 42.

*and Cultural Rights*⁴⁴ entered into force. The Covenants go beyond the *UDHR* by providing much more specific detail on human rights, as well as by virtue of their status as treaties binding on all state parties.

The relevant provisions of the *ICCPR* build upon the prohibition of arbitrary detention contained in the *UDHR*. It should be noted that the prohibition of arbitrary detention also appears in each of the regional human rights conventions.⁴⁵

Australia's ratification of the *ICCPR* attracts two crucial provisions of the *Vienna Convention on the Law of Treaties*.⁴⁶ Article 26 makes the *ICCPR* legally binding on Australia internationally and requires its obligations to be performed in good faith – 'pacta sunt servanda'.⁴⁷ Article 27 reiterates the fundamental principle that no provision of domestic law may be relied upon to excuse or justify a breach of international law.⁴⁸

The international prohibition of arbitrary detention appears in Article 9 of the *ICCPR*, which is extracted below. Article 9(1) sets out the basic principle, and Article 9(4) deals with the related right to bring proceedings which challenge the legality of any detention. Both provisions are relevant to Australia's regime of immigration detention.

⁴⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁴⁵ *American Convention on Human Rights*, opened for signature 22 Nov 1969, OASTS 36, art 7 (entered into force 18 July 1978); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, above n13, art 5; *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 21 ILM 58 (1982), art 6 (entered into force 21 Oct 1986); *Arab Charter on Human Rights*, Council of the League of Arab States, Resolution 5437 (102nd regular session), 15 September 1994, reproduced in (1997) 18 *Human Rights Law Journal* 151, arts 5, 8.

⁴⁶ *Vienna Convention on the Law of Treaties*, above n25.

⁴⁷ *Vienna Convention on the Law of Treaties*, above n25, art 26.

⁴⁸ See also: Higgins, above n31, 205; *The SS Wimbledon* [1923] PCIJ (Ser. A), No 1.

To determine the scope of the international prohibition of arbitrary detention, the correct interpretation of Article 9 of the *ICCPR* must be found. In order to do this, the provisions of international law dealing with the interpretation of treaties will be considered, as will the applicable body of ‘soft law’.

Interpretation of Article 9 of the ICCPR

To determine the correct interpretation of Article 9 of the *ICCPR*, the basic principle to be applied is that, “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 its object and purpose.”⁴⁹ The starting point then is the text of the covenant itself.

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

...

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.⁵⁰

Article 9(1) first sets out the right to liberty and security of the person as the broad principle involved. It goes on to define the right to liberty and security of the person in terms of two separate wrongs which are impermissible – first, “arbitrary arrest and detention”; second, “deprivation of liberty except on such grounds and in accordance with such procedure as are established by law”. Giving the ‘ordinary meaning’ to those terms, it

⁴⁹ *Vienna Convention on the Law of Treaties*, above n25, art 31(1).

⁵⁰ *International Covenant on Civil and Political Rights*, above n44, art 9.

can be seen that Article 9(1) contains a dual requirement. Detention must not only be legal according to domestic law, it must also not be arbitrary.⁵¹

In other words, “a detention that is lawful may nonetheless be arbitrary,”⁵² under international law. This view is confirmed in light of the object and purpose of the *ICCPR*, as, “for international human rights to be meaningful there ha[s] to be an international minimum standard that limits the legislative power of the States.”⁵³

Further, under Article 2(2), states are required to give domestic effect to the rights enshrined in the *ICCPR*.⁵⁴ Any interpretation of Article 9(1) that was satisfied with domestic legality alone would be hollow, allowing a state to avoid its Article 9(1) obligations by breaching its Article 2(2) obligations, which would not be acceptable in the light of the object and purpose of the *ICCPR* as a core international human rights treaty.

Further confirmation of this interpretation is provided by the *travaux préparatoires* of the *ICCPR*.⁵⁵ Article 9(1) initially mirrored Article 5 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,⁵⁶ listing several permissible deprivations of liberty but lacking an overarching prohibition of arbitrary detention.⁵⁷

⁵¹ Australia challenged this view in *A v Australia*, arguing that domestic legality is all that is required. Australia’s position is discussed in: Sam Blay and Ryszard Piotrowicz, “The Artfulness of Lawfulness: Some Reflections on the Tension between International and Domestic Law” (2000) 21 *Australian Yearbook of International Law* 1, 7-8.

⁵² Cook, above n37, 8. See also Nowak, above n41, 172.

⁵³ Niemi-Kiesiläinen, above n40, 150. See also Blay and Piotrowicz, above n51, 13 and 18.

⁵⁴ The Soviet representative emphasised this point during drafting: Nowak, above n41, 171.

⁵⁵ This is a permissible use of the *travaux*: *Vienna Convention on the Law of Treaties*, above n25, art 32.

⁵⁶ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, above n13.

⁵⁷ The requirement that detention not be arbitrary, in addition to being in accordance with domestic law, has also been read into Article 5 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, above n13, in light of the object and purpose of that treaty: Blay and Piotrowicz, above n51, 15, citing *Johnson v United Kingdom* (1997) VII Eur Court HR 2391, [60].

Those permissible deprivations were imprisonment and pre-trial detention, detention for failure to obey a court order, detention on grounds of mental illness, custody of minors and detention of aliens prior to expulsion.⁵⁸ Soon proposals had emerged for around 40 permissible deprivations of liberty, including for persons with contagious diseases, enemy aliens or aliens generally, spies, suicidal persons and witnesses.⁵⁹

The attempt to define permissible deprivations of liberty was problematic. The legal position is not that particular categories of persons may be subject to unlimited detention, but that greater detention may be permissible for certain persons according to particular risks they may face or dangers they may pose. In addition, it was feared that a compendious list would risk becoming a charter for human rights violations.⁶⁰

It was Australia that suggested the solution that became part of the *ICCPR* – the overarching requirement that detention not be arbitrary.⁶¹ Discussions during drafting reveal that the meaning of arbitrary, “contained elements of injustice, unpredictability, unreasonableness, capriciousness and [dis]proportionality.”⁶² More detailed elaboration on the meaning of arbitrary is available by reference to the applicable body of ‘soft law’, which includes General Assembly resolutions and the jurisprudence of international human rights bodies.

⁵⁸ Nowak, above n41, 164.

⁵⁹ See: Nowak, above n41, 164; Marc J Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (1987), 187-202.

⁶⁰ Bossuyt, above n59, 193.

⁶¹ See Nowak, above n41, 164; Bossuyt, above n59, 187-91, 194-6.

⁶² Nowak, above n41, 172.

The Body of Principles

In 1988, the General Assembly adopted the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.⁶³ The *Body of Principles* applies to, “any person deprived of personal liberty except as a result of conviction for an offence”.⁶⁴ As a General Assembly resolution, the *Body of Principles* is ‘soft law’. Nigel Rodley has expressed the value to be attached to the *Body of Principles* as follows:

In approving the Body of Principles, the General Assembly urged ‘that every effort be made so that the Body of Principles becomes generally known and respected’. This is strongly supportive language, but certainly not such as to suggest that the Assembly was seeking to promote their recognition as legally binding. Yet the language of many of the principles is peremptory, so clearly they are intended to be persuasive. As is often the case with such ‘soft law’ instruments, its principal value (from the perspective of international law) will be in assisting governments and relevant international bodies in interpreting and applying broader, but more recognizably legal norms.⁶⁵

Principle 4 is vital to the issue of what makes detention arbitrary. It requires that:

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.⁶⁶

A ‘judicial or other authority’ is defined to be, “a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence,

⁶³ *Body of Principles*, above n14.

⁶⁴ *Ibid*, Use of Terms.

⁶⁵ Nigel S Rodley, *The Treatment of Prisoners under International Law* (2nd ed, 1999), 333.

⁶⁶ *Body of Principles*, above n14, Principle 4.

impartiality and independence.”⁶⁷ There is no relevant ‘other authority’ under the *Migration Act* satisfying these criteria, so in Australia this expression means a court.⁶⁸

Under section 189 of the *Migration Act*, immigration detention is an automatic statutory requirement for any person in Australia who is neither an Australian citizen nor the holder of a visa which is in effect – that is, all ‘unlawful non-citizens’.⁶⁹ Immigration detention is initiated by an ‘officer’ which is defined in section 5 of the *Migration Act* to include a vast array of public officials. Immigration detention is not ordered by a court.

The next point to examine is whether detention is, “subject to the effective control of, a judicial or other authority”. Effective control is not defined in the *Body of Principles*. However, the scope of this requirement has been explored by the *Working Group on Arbitrary Detention*, which I deal with below at page 27. The *Working Group* considered that, “what is required is an effective alternative remedy which would entitle the appellate authority to consider on their merits,”⁷⁰ the initial decisions to impose detention.

There is no provision in the *Migration Act* allowing a court to consider the detention of an ‘unlawful non-citizen’. Rather, under section 196, release is possible only if the person has ceased to be an ‘unlawful non-citizen’,⁷¹ either by leaving Australia or being granted a

⁶⁷ Ibid, Use of Terms.

⁶⁸ The Minister for Immigration & Multicultural & Indigenous Affairs enjoys very significant powers under the *Migration Act*, which are either delegated or directly exercised, however lacking any guarantee or impartiality or independence, neither the Minister nor any delegate of the Minister, can be said to constitute an ‘other authority’ for these purposes.

⁶⁹ *Migration Act 1958* (Cth), s189(1): “If an officer knows or reasonably suspects that a person...is an unlawful non-citizen, the officer must detain the person.” The term ‘unlawful non-citizen’ is defined by the *Migration Act 1958* (Cth), ss13(1), 14(1).

⁷⁰ Opinion No. 34/2000 (United States of America), concerning Jan Borek, UN Doc. E/CN.4/2002/77/Add.1, 20 [21].

⁷¹ *Migration Act 1958* (Cth), s196(3) claims that it, “prevents the release, even by a court, of an unlawful non-citizen from detention,” unless they have ceased to be an ‘unlawful non-citizen’. To the extent (if any) that it attempts to prevent the release by a court of an ‘unlawful non-citizen’ whose detention is illegal (as to which see Chapter III) this provision would be invalid: see *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (‘*Lim’s Case*’).

visa. Further, the privative clause (section 474) prevents any court from reviewing decisions concerning deportation or visas.⁷² The requirement of an effective remedy allowing for judicial consideration of the merits of the decision to detain is not satisfied.

Principle 4 further requires that , “all measures affecting the human rights,” of a detainee be subject to the effective control of a court. The *Migration Act* provisions dealing with the detention of ‘unlawful non-citizens’ are silent on the conditions of detention, and provide no basis for any argument concerning the human rights of a detainee. In the absence of an overarching Bill of Rights, or any *Migration Act* provisions dealing with human rights, detainees find themselves in the same position as prisoners, unable to challenge their detention on the basis of the conditions of detention.⁷³

Hence, on the initiation of detention, the availability of court review of continued detention and the availability of court review of the conditions of detention, Australia fails to meet the requirements of the *Body of Principles*.

⁷² All visa and deportation decisions come within the scope of the privative clause in s474 of the *Migration Act*, the validity of which in light of s75(v) of the Constitution has not been finally determined. The Federal Court considered this issue in *NAAV v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 228 (Unreported, Black CJ, Beaumont, Wilcox, French and von Doussa JJ, 15 August 2002).

⁷³ See: *Ex parte Williams* (1934) 51 CLR 545, 549-50 (Dixon J); *Prisoners A to XX Inclusive v New South Wales* (1995) 79 A Crim R 377; *R v Deputy Governor of Parkhurst Prison*; *Ex parte Hague* [1992] 1 AC 58; Stephen Livingstone and Tim Owen, *Prison Law* (2nd ed, 1999), 51-4, 180-1; David Brown and Meredith Wilkie (eds), *Prisoners as Citizens: Human Rights in Australian Prisons* (2002). Prerogative writs are not applicable, as they enable an order of release from detention if it is illegal, but the legality of detention cannot presently be challenged on the basis of the conditions of detention (see Chapter III).

Declaration on the Human Rights of Individuals who are not Nationals

The *Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live*,⁷⁴ has two relevant articles. As a General Assembly resolution it is ‘soft law’, although it essentially reiterates that the ‘hard’ provisions of the *ICCPR* apply to individuals who are not nationals of the country in which they live. Article 2(1) reinforces the primacy of international human rights law over domestic laws, whilst article 5(1)(a) provides that, “no alien shall be subjected to arbitrary arrest or detention.”

Jurisprudence of international human rights bodies

There are two important institutions which consider allegations of violations of the international prohibition of arbitrary detention. Both institutions operate under the auspices of the United Nations, although the *Human Rights Committee* is a treaty-monitoring body, established under the *ICCPR*; whereas the *Working Group on Arbitrary Detention* is a charter-based body, established under the *Charter of the United Nations*.

The Human Rights Committee

The *Human Rights Committee* is established under Article 28 of the *ICCPR* to monitor compliance with the *ICCPR*.⁷⁵ It consists of 18 independent human rights experts.

⁷⁴ *Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live*, GA Res 40/144, UN GAOR, 40th sess, 116th plen mtg, UN Doc. A/RES/40/144 (1985).

⁷⁵ *International Covenant on Civil and Political Rights*, above n44, art 28.

Pursuant to Article 40(4), the *Human Rights Committee* has the competence to issue ‘general comments’ which, “clarify states’ obligations and interpret the substantive provisions of the Covenant.”⁷⁶

In its ‘general comment’ on Article 9,⁷⁷ the *Human Rights Committee* first points out that the Article 9(1) prohibition of arbitrary detention, “is applicable to all deprivations of liberty, whether in criminal cases or in other cases...[including] immigration control”.⁷⁸ It continues to discuss the scope of the Article 9(4) requirement of control by a court.

The important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. Furthermore, States parties have in accordance with article 2 (3) also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his liberty in violation of the Covenant.⁷⁹

The (First) *Optional Protocol to the International Covenant on Civil and Political Rights*⁸⁰ allows individuals to bring complaints to the *Human Rights Committee* alleging a violation of their rights under the *ICCPR*.⁸¹ The jurisprudence of the *Human Rights Committee* is an important additional source of guidance in interpreting the *ICCPR*.

In *Hugo van Alphen v The Netherlands*, the *Human Rights Committee* interpreted Article 9(1) of the *ICCPR* consistently with the interpretation developed above:

⁷⁶ Henry J Steiner, “Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?” in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (2000) 15, 21.

⁷⁷ General Comment 8: Right to liberty and security of persons (Article 9), Human Rights Committee, 16th session, 30 June 1982, reproduced in UN Doc. HRI\GEN\1\Rev.1 (1994), 8.

⁷⁸ *Ibid* [1].

⁷⁹ *Ibid*.

⁸⁰ *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁸¹ The *Optional Protocol* applies to Australia from 25 December 1991: *K L B-W v Australia*, HRC Communication No. 499/1992, 30 March 1993, UN Doc CCPR/C/47/D/499/1992.

The drafting history of article 9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.⁸²

The *Human Rights Committee* held that detention which is consistent with domestic law will be arbitrary if it is not both reasonable and necessary in all the circumstances. It subsequently applied this dual requirement to Australia.

A v Australia

The most relevant opinion of the *Human Rights Committee* to immigration detention in Australia is the successful challenge to detention in *A v Australia*.⁸³ The legislation at that time differs from the current regime, as *A* was a 'designated person', the provisions for whom now appear in Division 6 of Part 2 of the *Migration Act*. However, none of those differences is material to the views of the *Human Rights Committee* on the scope of the prohibition of arbitrary detention in Article 9 of the *ICCPR*.

The *Human Rights Committee* agreed with Australia that it is not, "per se arbitrary to detain individuals requesting asylum."⁸⁴ The *Human Rights Committee* then recalled another aspect of its opinion in *Van Alphen* that, "every decision to keep a person in detention should be open to review periodically so that the grounds justifying the

⁸² *Hugo van Alphen v The Netherlands*, HRC Communication No. 305/1988, 15 August 1990, UN Doc. CCPR/C/39/D/305/1988, [5.8].

⁸³ *A v Australia*, HRC Communication No. 560/1993, 30 April 1997, UN Doc. CCPR/C/59/D/560/1993.

⁸⁴ *Ibid* [9.4].

detention can be assessed.”⁸⁵ The *Human Rights Committee* then went on to discuss the justification that would be required.

In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal. In the instant case, the State party has not advanced any grounds particular to the author's case, which would justify his continued detention...The Committee therefore concludes that the author's detention...was arbitrary.⁸⁶

The most notable element of this passage is the requirement for individual justification of detention. This is consistent with the proposition that human rights are individual rights, so every person deprived of their liberty has a right to have their detention justified on grounds appropriate to them. However, Australia has never adopted an individualized approach to immigration detention. Under the *Migration Act*, it has been determined in advance that all ‘unlawful non-citizens’ will be detained.

The Immigration Minister justifies detention on the basis that detainees are, “readily available during processing of visa applications,” and, “immediately available for health checks,” as well as, “available for removal from Australia if their claims are not successful,” and finally, “to protect the Australian community”.⁸⁷

However, absent any individual reasons for detention, such as the chance of an individual being unavailable for processing and health checks, or the change of an individual

⁸⁵ Ibid [9.4].

⁸⁶ Ibid.

⁸⁷ Phillip Ruddock MP (Minister for Immigration), "Australian Immigration Minister - Frequently Asked Questions - Detention Issues" <<http://www.minister.immi.gov.au/faq/detention.htm>> at 6 October 2002.

absconding to avoid deportation, or the risk posed by a particular individual to the Australian community, immigration detention is in breach of Article 9(1) of the *ICCPR*.

The other relevant provision of the *ICCPR* is Article 9(4) which requires that a detainee be entitled to take proceedings before a court to decide, “on the lawfulness of his detention and order his release if the detention is not lawful”. In its decision in *A v Australia*, the *Human Rights Committee* also dealt with this issue.

In the Committee's opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release "if the detention is not lawful", article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant.⁸⁸

The *Human Rights Committee* went on to consider the type of review available in Australia. As review in *A*'s case was limited to, “a formal assessment of the self-evident fact that he was indeed a "designated person",”⁸⁹ the *Human Rights Committee* found that Australia was in breach of Article 9(4) as well.

In order to satisfy article 9(4), the *Human Rights Committee* required both that review by a court be, “real and not merely formal,” and that courts have the power to order release if detention is inconsistent with article 9(1), or other provisions of the *ICCPR*. As discussed earlier at page 20, under the current regime court review is limited to a formal assessment that a detainee is an ‘unlawful non-citizen’. As will be discussed in Chapter II, Australia

⁸⁸ *A v Australia*, above n83, [9.5].

⁸⁹ *Ibid.*

has not domestically implemented the *ICCPR*, and no court has the power to order the release of a detainee on the grounds of a breach of the *ICCPR*.

Based on the interpretation of article 9 of the *ICCPR* adopted by the *Human Rights Committee* in *A v Australia*, the current regime of immigration detention in Australia would breach both article 9(1) and article 9(4) of the *ICCPR*, by failing to involve any individual justification of detention, by failing to meet tests of necessity and reasonableness in any event, and by failing to provide for adequate review of the fact and conditions of detention by a court. Australia's mandatory detention of 'unlawful non-citizens' is illegal and breaches the international prohibition of arbitrary detention.

The Working Group on Arbitrary Detention

The main human rights organ of the United Nations is the Commission on Human Rights, which operates under the auspices of the Economic and Social Council.⁹⁰ The Commission on Human Rights has established a *Working Group on Arbitrary Detention*:

composed of five independent experts, with the task of investigating cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned.⁹¹

The considerations of the *Working Group* are relevant in two areas. First, the *Working Group* has specifically considered the detention of 'asylum seekers'. Second, it has

⁹⁰ The Economic and Social Council is established under Chapter 10 of the *Charter of the United Nations*, above n24. The Commission on Human Rights is established pursuant to Article 68.

⁹¹ Report of the Working Group on Arbitrary Detention (1993), UN Doc. E/CN.4/1993/24. For a list of instruments considered, see: Report of the Working Group on Arbitrary Detention (1998), UN Doc. E/CN.4/1998/44, Annex I – Revised Methods of Work, [7].

considered a number of cases dealing with immigration detention of persons unable to be deported. Both areas are relevant to Australia's immigration detention.

The majority of 'unlawful non-citizens' detained in Australia are 'asylum seekers', that is, they claim to be refugees, and invoke Australia's obligations as a party to the *Convention relating to the Status of Refugees*, and *Protocol relating to the Status of Refugees*.⁹² The *Working Group* has adopted *Deliberation No 5* on the, "situation regarding immigrants and asylum-seekers".⁹³ The *Deliberation* details the safeguards which would be required in an acceptable regime of immigration detention. These include:

Principle 3: Any asylum-seeker or immigrant placed in custody must be brought promptly before a judicial or other authority.

Principle 6: The decision must be taken by a duly empowered authority with a sufficient level of responsibility and must be founded on criteria of legality established by the law.

Principle 7: A maximum period should be set by law and the custody may in no case be unlimited or of excessive length.

Principle 8: Notification of the custodial measure must be given in writing, in a language understood by the asylum-seeker or immigrant, stating the grounds for the measure; it shall set out the conditions under which the asylum-seeker or immigrant must be able to apply for a remedy to a judicial authority, which shall decide promptly on the lawfulness of the measure and, where appropriate, order the release of the person concerned.

Beginning with the initial taking into custody of an 'unlawful non-citizen', Australia consistently fails to comply with the guarantees sought by the *Working Group*. Principle 3 requires that detainees be brought promptly before a court,⁹⁴ so that the legality of their detention may be examined on its merits. In Australia, detainees are not brought before a

⁹² *Convention relating to the Status of Refugees*, above n35; *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

⁹³ Report of the Working Group on Arbitrary Detention (2000), UN Doc. E/CN.4/2000/4, Annex II.

⁹⁴ Above at note 68 it is explained why 'judicial or other authority' in Australia can only mean a court.

court to examine the legality of their detention.⁹⁵ Further, detention is automatic, not a decision taken in accordance with Principle 6; no maximum period of detention is set, in violation of Principle 7; and detailed information of the nature required by Principle 8 is not provided, nor is there the possibility of review required by Principle 8.

These violations of the guarantees expected by the *Working Group*, at every stage of the process of detention, again bring seriously into question the compliance of Australia's immigration detention with the international prohibition of arbitrary detention. In May 2002, the *Working Group* conducted a visit to Australia to investigate Australia's mandatory detention of 'unlawful non-citizens'. Their views will be known when their report is presented to the Commission on Human Rights in early 2003.

Reference to the *Working Group* is also relevant because it has considered a number of cases dealing with immigration detention of persons unable to be deported. These cases have arisen in the United States of America in the context of Cuban nationals. The same issues are now relevant to Australia, with Australia recently experiencing difficulty deporting certain Palestinian and Iraqi nationals.

In Australia, problems arise in two different ways. Either a detainee has been denied a visa, has exhausted all legal remedies, and has been ordered to be deported; or a detainee has applied in writing to be deported before a final determination.⁹⁶ In both circumstances, the *Migration Act* requires their continued and indefinite detention until deportation, even though there may be no reasonable prospect of deportation occurring.

⁹⁵ Detainees may initiate *habeas corpus* proceedings to determine the legality of their detention, but this falls short of the requirement that all detainees be 'brought promptly' before a court.

⁹⁶ *Migration Act 1958* (Cth), s198(1).

The *Working Group* has adopted general criteria for determining when detention is arbitrary, which are set out as paragraph 3 of each of the opinions of the *Working Group*. The *Working Group* has pointed out that this definition has been, “approved on numerous occasions by the Commission on Human Rights.”⁹⁷ That approval lends support to the definition, which defines three categories of arbitrary detention.

Category I arbitrary detention arises where detention, “manifestly cannot be justified on any legal basis”. Immigration detention may be Category I arbitrary detention, notwithstanding domestic legality. In the case of four Cuban nationals who had no criminal history but had been detained in the United States of America (‘US’) for 10 years, the *Working Group* found detention to be arbitrary under Category I.⁹⁸ In the absence of any individual justification of the reasonableness and necessity of detention, Australia’s immigration detention would be Category I arbitrary detention in most cases.

Category II arbitrary detention arises where, “the deprivation of liberty is the result of a judgement or sentence for the exercise of the rights and freedoms proclaimed,” by certain provisions of the *UDHR* and *ICCPR*. This includes Article 14(1) of the *UDHR*: “Everyone has the right to seek and to enjoy in other countries asylum from persecution”. This does not mean that all detention of ‘asylum seekers’ is arbitrary, as there has been no judgment or sentence, but it would be arbitrary if a criminal offence of seeking to enter Australia without authority were to be created.⁹⁹

⁹⁷ Opinion No. 11/2000 (Peru), concerning Eleuterio Zárate Luján, UN Doc. E/CN.4/2001/14/Add.1, 76 [11].

⁹⁸ Opinion No. 6/1997 (United States of America), concerning Felix Gomez, Angel Benito and Candido Rodriguez Sanchez, UN Doc. E/CN.4/1998/44/Add.1.

⁹⁹ A more complex argument might look at the motives of immigration detention, and if they were found to be punitive, conclude that detainees were being punished for exercising the right to seek asylum protected in Article 14(1) of the *UDHR*. This argument will not be pursued here.

Category III arbitrary detention arises where there is, “complete or partial non-observance of the international standards relating to a fair trial.” This category has been considered by the *Working Group* in several cases dealing with the detention of deportees in the US. These cases highlight the requirements for a non-arbitrary scheme of preventive or security detention designed to protect society from dangerous persons.

The relevant US legislation required that all deportees be detained pending deportation. After the elapse of 90 days without deportation, they would be conditionally released unless the Attorney-General decided otherwise, for the reason that they posed a “risk to the community” or a serious risk of absconding.¹⁰⁰ Even in the case of deportees with a criminal record who had served prison sentences in the US, the *Working Group* found detention to be arbitrary on several occasions.¹⁰¹

However, there was one case where detention was found not to be arbitrary. Severino Puentes Sosa¹⁰² had been either serving criminal sentences or in immigration detention for most of the 20 years he had been in the US. There were two safeguards: the requirement that the Attorney-General release detainees unless they were a “risk to the community”, and a requirement of a parole hearing once a year.

The *Working Group* found, after reviewing his extensive criminal and parole history, that, “whenever Mr. Puentes Sosa has been granted parole he has not only failed to comply with the conditions of parole but has on repeated occasions committed serious criminal

¹⁰⁰ The relevant laws of the United States of America are set out in the opinions of the Working Group.

¹⁰¹ See eg: Opinion No. 32/1999 (United States of America), concerning Mohamed Bousloub, UN Doc. E/CN.4/2001/14/Add.1, 34; Opinion No. 34/1999 (United States of America), concerning Israel Sacerio Pérez, UN Doc. E/CN.4/2001/14/Add.1, 42.

¹⁰² Opinion No. 31/1999 (United States of America), concerning Severino Puentes Sosa, UN Doc. E/CN.4/2001/14/Add.1, 28.

offences for which he was prosecuted.”¹⁰³ On the basis of a number of criminal convictions, a history of bad behaviour on parole, and with the safeguard of an annual parole hearing, detention was held not to be arbitrary.

Taking the above case as a guide, it would appear that a power of detention exercisable on the grounds of “risk to the community”, demonstrated by substantial evidence, coupled with appropriate safeguards, may constitute a permissible system of security detention.

In Australia, s253(9) of the *Migration Act* allows the Minister or Secretary to release from detention a person awaiting deportation. However, this is an exception, the general rule being that there will be no release. Further, there is no requirement of good grounds for refusal to release, or indeed any consideration of release, and the decision is protected by the privative clause, which prevents any judicial consideration of the decision. In addition, there is no link drawn in Australia to any criminal history.

Australia’s justification for detention¹⁰⁴ falls far short of such considerations. The regime of immigration detention in Australia is not a permissible system of security detention. In any event, the evidence suggests that no risk is posed to Australia by the people in immigration detention.¹⁰⁵

¹⁰³ Ibid 32 [25].

¹⁰⁴ See above at 25.

¹⁰⁵ In the period 1 July 2000 – 16 August 2002, the Australian Security Intelligence Organisation conducted 5986 security assessments of ‘unlawful non-citizens’. Not one ‘unlawful non-citizen’ received an adverse assessment: Evidence to Joint Standing Committee on Foreign Affairs, Defence and Trade (Human Rights Subcommittee), Parliament of Australia, Canberra, 22 August 2002 (Dennis Richardson).

Conclusion on international legality

International human rights law draws on the right to liberty and security of the person, which has long been acknowledged as a fundamental human right. The *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* give effect to this right by establishing an international prohibition of arbitrary detention.

The scope of this prohibition is given further definition by the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* and the *Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live*. Valuable guidance is also available from the jurisprudence of the two relevant expert bodies: the *Human Rights Committee*, established under the *ICCPR*, and the *Working Group on Arbitrary Detention* of the Commission on Human Rights.

Assuming, for present purposes, that Australia's detention of 'asylum seekers' is consistent with domestic law, this is not sufficient for international legality. What is required is that all measures of detention can be shown to be both reasonable and necessary in the circumstances of each detainee, a justification which Australia does not attempt. Rather, the *Migration Act* requires that all 'unlawful non-citizens' be detained, insisting that no release is possible until a person is no longer an 'unlawful non-citizen'. Beyond the reasonably narrow period when detention could be justified as reasonable and necessary,¹⁰⁶ Australia's immigration detention is in breach of the international prohibition of arbitrary detention.

¹⁰⁶ This period will vary with the circumstances of each detainee, but would normally be limited to essential health and security checks. As an example, a ten day limit on detention is imposed in the United Kingdom.

Further, international law requires that the fact of detention and the conditions of detention be capable of a meaningful challenge before a court, which is also not possible under Australian law. Justification on the grounds of necessity and reasonableness cannot avoid the need to have effective control over detention by a court, and this lack of an effective legal challenge to detention and the conditions of detention is, of itself, a violation of the international prohibition of arbitrary detention.¹⁰⁷

Immigration detention in Australia is in breach of the international prohibition of arbitrary detention, and constitutes a violation of Australia's obligations under Article 9 of the *International Covenant on Civil and Political Rights*.

¹⁰⁷ The suggestion that the conditions themselves violate many international human rights norms is discussed below at 79.

CHAPTER II: INTERNATIONAL HUMAN RIGHTS LAW IN AUSTRALIA

The reception of international law into Australian law

Having reached the conclusion that Australia's mandatory detention of 'unlawful non-citizens' is in breach of the international prohibition of arbitrary detention, consideration must turn to what domestic consequences flow from this. This depends on the principles relating to the reception of international law into Australian law.

Ancient authority can be found for the proposition that, "the law of nations, in its full extent was part of the law of England,"¹⁰⁸ and that it would override acts of parliament.¹⁰⁹

In modern Australia, this is not the correct legal position.

The importance of the recognition of human rights has long been appreciated by Australian courts. In *Gerhardy v Brown*,¹¹⁰ Justice Brennan said the following:

Human rights and fundamental freedoms are...rights and freedoms which every legal system ought to recognize and observe. They are inalienable rights and freedoms that a human being possesses simply in virtue of his humanity...which must be recognized and observed, and which a person must be able to enjoy and exercise, if he is to live as he was born – "free and equal in dignity and rights", as the Universal Declaration of Human Rights proclaims. The State and other persons are bound morally, though not legally, to recognize and observe those rights and freedoms.¹¹¹

¹⁰⁸ *Triquet v Bath* (1764) 3 Burr 1478, 97 ER 936 (Lord Mansfield); quoted in Blackshield and Williams, above n6, 762.

¹⁰⁹ *Dr Bonham's Case* (1610) 8 Co Rep 107a, 77 ER 638, 118a (Coke CJ); cited and discussed in Williams, *Human Rights*, above n5, 15.

¹¹⁰ (1985) 159 CLR 70.

¹¹¹ *Gerhardy v Brown* (1985) 159 CLR 70, 125-6 (Brennan J).

In contrast to the appreciation of the importance of human rights, it is the final sentence of that quote which reflects the legal position. The power exerted by international human rights in Australia may be regarded as purely moral, in which case there would be no legal enforcement of international human rights in Australia. In the High Court it has been held that, “a human right...is not itself necessarily a legal right”.¹¹²

Patricia Hyndman points out that, “however extensive the acceptance by a government of...human rights instruments, texts alone cannot guarantee that the rights enumerated within them will, in fact, be translated into real and effective protection of those rights.”¹¹³ It is necessary to examine the relationship between international law and Australian law to determine whether or not international human rights are in fact protected in Australia.

The theoretical approach

There are several theories which have been advanced in an attempt to describe the relationship between international law and domestic legal systems. The fundamental theoretical division is between monist and dualist nations, as Rosalyn Higgins explains:

Monists contend that there is but a single system of law, with international law being an element within it alongside all the various branches of domestic law...Dualists contend that there are two essentially different legal systems, existing side by side within different spheres of action – the international plane and the domestic plane.¹¹⁴

¹¹² *Mabo v Queensland (No 1)* (1988) 166 CLR 186, 217 (Brennan, Toohey and Gaudron JJ).

¹¹³ Patricia Hyndman, “Constitutions, Constitutionalism and the Effective Implementation of the International Standards of Human Rights” (2000) 21 *Australian Yearbook of International Law* 95, 111.

¹¹⁴ Higgins, above n31, 205. For a discussion of this issue in Australia, see: Andrew D Mitchell, “Genocide, Human Rights Implementation and the Relationship between International Law and Domestic Law: *Nulyarimma v Thompson*” (2000) 24 *Melbourne University Law Review* 15.

So far as either description applies, Australia is a dualist nation.¹¹⁵ There is no clearer example of this than cases where domestic laws have been upheld despite direct findings of international illegality.¹¹⁶ However, international law has been acknowledged to have direct relevance to Australian law in a range of matters as diverse as informing the common law, interpreting statutes and possibly the constitution, and administrative decision-making.¹¹⁷ The dualist theory fails to capture any of this interaction.

The alternative theories of incorporation and transformation also fail to satisfactorily explain the relationship.¹¹⁸ Given the current state of the law, theoretical arguments appear to be a, “doctrinal dispute...largely without practical consequence”.¹¹⁹ No theory yet advanced is capable of fully explaining the relationship between international law and Australian law, which will now be examined in more detail.

International law as an interpretive tool

It is accepted in the jurisprudence of the High Court that international law can be relevant in informing the construction of Commonwealth statutes. Thus, it has been held that, “where a statute or subordinate legislation is ambiguous, the courts should favour that

¹¹⁵ Sir Michael Kirby, “Domestic Implementation of International Human Rights Norms,” (1999) 5(2) *Australian Journal of Human Rights* 109, 109. See also the emphatic comments of Justice Brennan in *Re Citizen Limbo* (1989) 92 ALR 81, 82-3 (Brennan J).

¹¹⁶ See eg: *Collins v South Australia* (1999) 74 SASR 200, 215 (Millhouse J).

¹¹⁷ The argument that Australia’s ratification of an international instrument has no effect on domestic law has been strongly criticised: Sir Anthony Mason, “The Influence of International and Transnational Law on Australian Municipal Law” (1996) 7 *Public Law Review* 20, 23.

¹¹⁸ For a discussion of these theories see: Mitchell, above n114; Kristen Walker, “Treaties and the Internationalisation of Australian Law” in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 204.

¹¹⁹ Stephen Donoghue, “Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia” (1995) 17 *Adelaide Law Review* 213, 214.

construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party."¹²⁰

Justice Deane has specifically held that, "a legislative provision would need to be quite unambiguous before I would construe it as disclosing an intention to...step towards the tyranny of arbitrary detention."¹²¹

However, in reality, "the terms of the majority of statutory provisions are, or are treated as if they are, unambiguous and therefore likely to be unaffected by this principle".¹²² Specifically, the provisions of the *Migration Act* providing for immigration detention appear to be unambiguous.¹²³ In the absence of ambiguity, no rule of construction is required to interpret the clear words of the *Migration Act*.

On several occasions the High Court has invoked international law as a source of guidance when interpreting and developing the common law. Justice Brennan expressed the relationship between the common law and international law as follows:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.¹²⁴

¹²⁰ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

¹²¹ *South Australia v O'Shea* (1987) 163 CLR 378, 420 (Deane J).

¹²² Roger Douglas, *Douglas and Jones's Administrative Law* (4th ed., 2002), 43.

¹²³ On this issue, I discuss the decision in *Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1009 (Unreported, Merkel J, 15 August 2002) below at 81.

¹²⁴ *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42 (Brennan J). Similar comments appear in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 499-500 (Mason CJ and Toohey J).

However, as the majority judgment in *Western Australia v Commonwealth*¹²⁵ makes clear, domestic implementation of international law is not an end in itself.

The common law may, it is true, find in international law concepts or values which may advantageously be used in the development of the common law, but the common law of native title is not developed in order to satisfy the obligations of a treaty.¹²⁶

Indeed, to whatever extent international law may influence the common law, there is one important qualification to be noted. Any international law principles brought into the common law, “would thereby attain only common law status: that is, they could be overridden by statute.”¹²⁷ Accordingly, the *Migration Act* would override any suggested principles that might be incorporated into the common law from international law.

Despite the accepted use of international law as an interpretive tool in the context of both statutes and the common law, in the case of the *Migration Act* provisions which establish the regime of immigration detention in Australia, these interpretive tools are not relevant. Any common law incorporation of international law would be overridden by a statute such as the *Migration Act*, and no tool of statutory interpretation is required, because the words of the *Migration Act* do not appear to be ambiguous at all – they are starkly clear.

¹²⁵ (1995) 183 CLR 373.

¹²⁶ *Western Australia v Commonwealth* (1995) 183 CLR 373, 486 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

¹²⁷ Blackshield and Williams, above n6, 763.

Domestic consequences of ratification of ICCPR

The structure of the Australian Constitution has significant bearing on the domestic consequences of Australia's ratification of the *ICCPR*. The executive act of ratifying a treaty, which at the international level is the point at which legal obligations attach, does not automatically incorporate that treaty into domestic law.¹²⁸ Put simply, "treaties do not have the force of law unless they are given that effect by statute".¹²⁹

The domestic legal significance of Australia's ratification of the *ICCPR* was specifically considered by the High Court in *Dietrich v The Queen*.¹³⁰

Ratification of the *ICCPR* as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the *ICCPR* are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions.¹³¹

Given that the *ICCPR* does not automatically take effect under Australian law, and that the role of international law in statutory interpretation and development of the common law is not relevant, the issue becomes to what extent legislation has implemented domestically the international human rights guaranteed by the *ICCPR*.

¹²⁸ See: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286-7 (Mason CJ and Deane J); *Attorney-General for Canada v Attorney-General for Ontario*, [1937] AC 326, 347 (Lord Atkin).

¹²⁹ *Kioa v West* (1985) 159 CLR 550, 570 (Gibbs CJ).

¹³⁰ *Dietrich v The Queen* (1992) 177 CLR 292 ('*Dietrich*').

¹³¹ *Ibid* 305 (Mason CJ and McHugh J). Principles of international law were also used in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, particularly by Justice Brennan: see above n124.

The Human Rights and Equal Opportunity Commission

The *ICCPR* has been indirectly brought into Australian law by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), which establishes the Human Rights and Equal Opportunity Commission (*'HREOC'*). *HREOC* implements the approach taken by the Australian government to the domestic implementation of international human rights, which eschews legal processes in favour of, “less formal processes, often associated with inquiry, conciliation and report.”¹³²

Under the Australian Constitution, this is the only role *HREOC* can ever have. In Australia, “the Constitution remits to the judicial power of the Commonwealth the jurisdiction and authority to determine whether a subject has or has not contravened a law or regulation of the Commonwealth.”¹³³ Accordingly, when the government constructed a scheme to give effect to the decisions of *HREOC* by registration with the Federal Court of Australia, it was held that this amounted to a usurpation of the judicial power of the Commonwealth,¹³⁴ and was struck down as unconstitutional.

Consequently, *HREOC* can only recommend human rights be observed, it cannot legally enforce them. As Roger Douglas points out, “the fact that *non-administrative* tribunals (such as the Human Rights and Equal Opportunity Commission) cannot make final enforceable orders seriously weakens such bodies.”¹³⁵

¹³² Australia, *Third Periodic Report to the Committee on Economic, Social and Cultural Rights*, 23 July 1998, UN Doc E/1994/104/Add.22, [21]. For discussion of the “tenuous” implementation of international human rights through *HREOC*, see: Hilary Charlesworth, *Writing in Rights*, above n16, 34.

¹³³ *Victorian Chamber of Manufactures v Commonwealth* (1943) 67 CLR 413, 422 (Starke J); cited with approval in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 269 (Deane, Dawson, Gaudron and McHugh JJ) (*'Brandy'*).

¹³⁴ *Brandy* (1995) 183 CLR 245, 264 (Mason CJ, Brennan and Toohey JJ) and 269-71 (Deane, Dawson, Gaudron and McHugh JJ).

¹³⁵ Douglas, above n122, 30.

Legislative incorporation

The legislative power of the Commonwealth is not unlimited,¹³⁶ but does include, under section 51(xxix) of the Constitution, power to make laws with respect to “external affairs”. The scope of the external affairs power is broad. “In relation to external affairs...the legislative power...extends to the enactment of laws implementing the provisions of treaties entered into by the Executive so as to bind the Commonwealth.”¹³⁷

Under the external affairs power, the Commonwealth has the ability to domestically implement the *ICCPR*.¹³⁸ However, it has not done so comprehensively, and cannot be forced to do so. Australia’s position has been summarised as follows:

Australia appears to be Janus-faced with respect to human rights treaties. The internationally-oriented face basks in the international status it receives from being a party to the treaties, while the nationally-turned face is more diffident, reluctant to acknowledge the domestic implications of its international obligations.¹³⁹

Australia’s failure to meaningfully implement the *ICCPR* has led to the result that Australians must resort to communications to the *Human Rights Committee*, rather than domestic courts, to enforce their human rights. The argument most often raised against domestic implementation of international human rights is that this would undermine Australian ‘sovereignty’ in some manner. The opposite view is compelling:

¹³⁶ This statement is axiomatic, notwithstanding the comments of Sir Daryl Dawson who wrote, shortly after his dissent in the *Tasmanian Dam Case*, that “the external affairs power may, as a matter of constitutional theory, be regarded as open-ended”: Sir Daryl Dawson, “The Constitution – Major Overhaul or Simple Tune-up?” (1984) 14 *Melbourne University Law Review* 353, 358.

¹³⁷ *Victoria v Commonwealth* (1995) 187 CLR 416, 476 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

¹³⁸ Williams, *Human Rights*, above n5, 19.

¹³⁹ Charlesworth, *Writing in Rights*, above n16, 56.

It is extraordinary that the people of Australia must resort to an international body to seek redress in circumstances where it is alleged that Australia has not complied with the very international obligations that the government's executive branch has explicitly stated that it will uphold, simply because the relevant convention has not been implemented into Australian domestic law. By not providing a mechanism for the Australian legal system to consider and adjudicate such issues before an international body does so, it seems that the government of Australia is in fact abrogating its sovereignty rather than exercising this sovereignty through the Australian legal system.¹⁴⁰

Responses to individual communications

An examination of Australia's responses to individual communications to the *Human Rights Committee* reveals the extent to which the *ICCPR* has been implemented in Australia, showing the powerful influence of political factors in this process. As Hilary Charlesworth has observed, "while the views of the committees constitute an authoritative interpretation of the treaties, there is little formal pressure on governments to accept interpretations adverse to their perceived interests."¹⁴¹

On two occasions, the *Human Rights Committee* has found Australia to be in breach of the *ICCPR*.¹⁴² Wayne Morgan has criticised the Australian Government's approach as revealing, "a 'passive / aggressive' mentality,"¹⁴³ accusing the government of failing to take meaningful action domestically whilst being overly aggressive internationally. There is some force in his comments, but there is also a sharp distinction between the two cases.

¹⁴⁰ Mason, above n117, 28.

¹⁴¹ Charlesworth, *Writing in Rights*, above n16, 62.

¹⁴² Wayne Morgan, "Passive / Aggressive: the Australian Government's responses to Optional Protocol communications", (1999) 5(2) *Australian Journal of Human Rights* 55, 61.

¹⁴³ Morgan, above n142, 55.

In response to *Toonen v Australia*,¹⁴⁴ where the *Human Rights Committee* found Australia to be in breach of the *ICCPR*, the Commonwealth government enacted the *Human Rights (Sexual Conduct) Act 1994* (Cth), which implemented part of the relevant article of the *ICCPR*.¹⁴⁵ This was an effective response for two reasons.

First, the result of *Toonen's* case was the enactment of a Commonwealth law which remedied Australia's breach of the *ICCPR*. Second, the *Human Rights (Sexual Conduct) Act* has been said to create, "a fundamental right to privacy in relation to sexual conduct between adults".¹⁴⁶ This remains the only instance where legislation has specifically guaranteed the legal enforcement in Australia of a right guaranteed by the *ICCPR*.

The result in *Toonen* can be contrasted with the reaction to *A v Australia* – rejection of the view of the *Human Rights Committee*; widening of the offending regime of immigration detention to now detain all 'unlawful non-citizens' not just 'designated persons'; removal of the legislative provision imposing a time limit on detention;¹⁴⁷ and significant questioning of international human rights norms and enforcement mechanisms.¹⁴⁸

Political motives provide one explanation for the different responses. In *Toonen*, the Commonwealth acted against the last state in Australia to persist with laws criminalising homosexuality. In contrast, one view could be that *A* was seen as an 'outsider' and undeserving of sympathy. Domestic responses to the opinions of the *Human Rights Committee* appear to be a function of political, not legal, processes.

¹⁴⁴ *Toonen v Australia*, HRC Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992. This case is discussed in George Williams, *A Bill of Rights for Australia* (2000), 24-5.

¹⁴⁵ The *Human Rights (Sexual Conduct) Act* was the subject of the litigation in *Croome v Tasmania* (1997) 191 CLR 119, although the offending sections of the *Criminal Code Act 1924* (Tas) were repealed before a final determination of the case by the High Court.

¹⁴⁶ Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2001), 644.

¹⁴⁷ The former section 54Q of the *Migration Act 1958* (Cth) limited detention to 273 days – see Chapter III.

¹⁴⁸ See eg Morgan, above n142, 62.

International Law and Constitutional Interpretation

The role of international law as an interpretive tool when considering statutes and the common law has already been considered, but it has been shown that neither is applicable in the context of the provisions of the *Migration Act* dealing with immigration detention. One very important issue remains. If international law is accepted as a legitimate source of guidance when interpreting statutes and the common law, is it also a legitimate source of guidance in the interpretation of the Australian Constitution?

The traditional view of this concept is quite simple: “international law is not a “higher law”, like the Constitution, with which statutes must comply...parliaments can legislate inconsistently with international norms”.¹⁴⁹ The authority most often cited for this proposition is *Polites v The Commonwealth*,¹⁵⁰ which dealt with two aliens who attempted to avoid Australian conscription during World War II on the basis of its illegality under international law. Despite finding international illegality,¹⁵¹ the result of the case was clear: “The Commonwealth Parliament can legislate...in breach of international law, taking the risk of international complications.”¹⁵²

¹⁴⁹ Blackshield and Williams, above n6, 765.

¹⁵⁰ *Polites v The Commonwealth; Kandiolites v The Commonwealth* (1945) 70 CLR 60 (‘*Polites*’).

¹⁵¹ *Ibid* 83 (Williams J).

¹⁵² *Ibid* 69 (Latham CJ). The Chief Justice went on to point out that Australia may find itself without grounds for objection if its citizens were similarly treated overseas. This is surely a powerful consideration in the context of breaches of international human rights law.

An anachronistic view

The body of international human rights law represents a fundamental change in the focus of international law, from concern purely for the relationship between nation states, to concern for issues once regarded as of an entirely 'domestic nature'. International law has grown to the point where, "there are few issues of contemporary significance that are not directly or indirectly the subject of international law norms."¹⁵³ Sir Michael Kirby has referred to the magnitude of the developments which have occurred in the international sphere since the adoption of the Australian Constitution, and asked the following question:

The fact that the Australian Constitution must now operate in a different international milieu is so obvious that it scarcely requires mention. Should not the construction of that document adapt to that milieu, as so much else has had to do?¹⁵⁴

It has been said that, "the genius of the common law system consists in the ability of the Courts to mould the law to correspond with the contemporary values of society".¹⁵⁵ It would be surprising if constitutional interpretation were unable to do the same. Tony Blackshield has suggested that constitutional interpretation must be an evolving concept:

A Constitution, like a Shakespearean tragedy, may in the end be susceptible of an infinite range of meanings. The task of the judge...is to find that view in the text which most closely conforms to a currently relevant perception of the human condition.¹⁵⁶

¹⁵³ Amelia Simpson and George Williams, "International Law and Constitutional Interpretation" (2000) 11 *Public Law Review* 205, 206.

¹⁵⁴ Kirby, above n115, 124; see also Simpson and Williams, above n153, 205.

¹⁵⁵ *Dietrich* (1992) 177 CLR 292, 319 (Brennan J).

¹⁵⁶ A R Blackshield, "The Implied Freedom of Political Communication," in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (1994) 232, 243.

The 'living force' approach to Constitutional interpretation appears to recognise that argument, when it stipulates: "The Constitution cannot be frozen by reference to the year 1900 or thereabouts. The Constitution must be construed as a living force and the Court must take account of political, social and economic developments since that time."¹⁵⁷

International law could offer, "a vast new source of guidance and norms,"¹⁵⁸ with which to interpret the Australian Constitution. In recent years there have been suggestions that international law may be used as a tool of constitutional interpretation. This is a controversial issue, which has driven an ideological divide among the Justices of the High Court of Australia. The debate concerns the proper roles of the judiciary, the parliament and the executive under the Australian Constitution, with particular reference to the concept of parliamentary sovereignty.

The internationalisation of law does not undermine Australian sovereignty where international law norms are adopted by legislation or infuse the common law. In the former respect, the Parliament must directly lend its authority and in the latter it is able to override the common law...Interpreting the Constitution by reference to international law gives that law an entry point into Australia's domestic law over which Parliament has no control. Parliament's ability to opt out is lost.¹⁵⁹

The use of international law in constitutional interpretation has been criticised as an unacceptable judicial expansion into areas reserved for the Parliament. Equally it can be argued that using international law to interpret the Constitution is not tantamount to imposing international law as a constitution. This approach seeks to use international law to interpret the existing Constitution, not to impose a new one.

¹⁵⁷ *McGinty v Western Australia* (1996) 186 CLR 140, 200-201 (Toohey J).

¹⁵⁸ Simpson and Williams, above n153, 206.

¹⁵⁹ *Ibid* 225.

Parliamentary sovereignty and human rights

The idea of parliamentary sovereignty has long been upheld in Australia.¹⁶⁰ The basic principle is that, “a court, once it has ascertained the true scope and effect of valid legislation, should give unquestioned effect to it.”¹⁶¹ Thus, it has been held that:

The court cannot deny the validity of an exercise of a legislative power expressly granted merely on the ground that the law abrogates human rights and fundamental freedoms or trenches upon political rights which, in the court’s opinion, should be preserved.¹⁶²

However, human rights protection should not be seen as incompatible with the concept of parliamentary supremacy, as the protection of human rights is not ‘undemocratic’.

Human rights are not...against the interest of society; on the contrary, the good society is one in which individual rights flourish, and the promotion and protection of every individual’s rights are a public good. There is an aura of conflict between individual and society only in that individual rights are asserted against government...this apparent conflict between individual and society is specious; in the longer, deeper view, the society is better if the individual’s rights are respected.¹⁶³

As Hilary Charlesworth points out, “a richer understanding of democracy involves acknowledging that there are some rights that are so basic to human dignity that they should be taken out of the political arena and given special protection.”¹⁶⁴ An interpretation of the Australian Constitution which draws on international human rights law does not necessarily conflict with the democratic basis of parliamentary sovereignty.

¹⁶⁰ See eg: *Amalgamated Society of Engineers v Adelaide Steamship Company* (1920) 28 CLR 129, 151-152 (Knox CJ, Isaacs, Rich and Starke JJ).

¹⁶¹ *Kruger v Commonwealth* (1996) 190 CLR 1, 73 (Dawson J).

¹⁶² *Nationwide News v Wills* (1992) 177 CLR 1, 43 (Brennan J); cited in Williams, “Civil Liberties and the Constitution,” (1994) 5 Public Law Review 82, 83.

¹⁶³ Louis Henkin, *The Age of Rights* (1990), 5; quoted in Blackshield and Williams, above n6, 1090.

¹⁶⁴ Hilary Charlesworth, *Writing in Rights*, above n16, 39.

Australia's Constitution in historical perspective

The Australian Constitution was adopted in 1901, at a time before international human rights law in its current form existed, when Australia was still very much influenced by its British heritage. In contrast to the United States, “no guarantee against deprivation of life, liberty or property without due process of law,”¹⁶⁵ was incorporated.¹⁶⁶

In framing the Constitution the “guiding purpose” was not to protect fundamental freedom but to outline the legislative and executive power held by the federal and State tiers of government...the drafters, “wanted a Constitution that would make capitalist society hum”.¹⁶⁷

A century later, Australia differs from many other developed nations in lacking comprehensive human rights protection. “No parliament has taken the step of adopting a Bill of Rights, leaving Australia as the only western nation that does not have such an instrument.”¹⁶⁸ It has been suggested that as a consequence of this, Australia is now isolated from other legal systems and that the significant use made of international human rights law in interpreting the constitutions of other countries is irrelevant to Australia.¹⁶⁹

Whilst care must certainly be taken not to apply the Constitution of another country to Australia, this is not a reason to ignore international and comparative law totally. It has been observed that, “the debate over the role of international law in Australia has been

¹⁶⁵ *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 580 (Dixon and Evatt JJ); as quoted in Blackshield and Williams, above n6, 1106.

¹⁶⁶ Analysis of the Convention Debates, however, reveals that human rights protection was not universally and deliberately shunned in favour of parliamentary sovereignty: Williams, *Human Rights*, above n5, 25.

¹⁶⁷ Williams, “Civil Liberties,” above n162, 93; quoting Manning Clark, “The People and the Constitution” in Encel, Horne and Thompson (eds), *Change the Rules! Towards a Democratic Constitution* (1977), 18.

¹⁶⁸ Blackshield and Williams, above n6, 1099.

¹⁶⁹ *Dietrich*, (1992) 177 CLR 292, 317 (Brennan J).

insular.”¹⁷⁰ The lack of a bill of rights need not isolate Australia from interaction with international human rights law. It simply requires that Australian courts be cautious to ensure their use of international and comparative norms is appropriate to Australia.

A limited comparative perspective

Notwithstanding the need for caution when considering the decisions of courts in countries which have a bill of rights, it is useful to look at the recent United Kingdom cases which considered the detention of people who, in Australia, would be described as ‘unlawful non-citizens’.

In *Saadi*,¹⁷¹ the Court of Appeal considered the legality of immigration detention both under ‘traditional’ English law and under English law following the incorporation of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.¹⁷² The statutory scheme in the United Kingdom authorised detention for 10 days upon arrival. Under ‘traditional’ English law the position was summarised as follows.

Faced with applications for asylum at the rate of nearly 7000 per month...a short period of detention is not an unreasonable price to pay in order to ensure the speedy resolution of the claims of a substantial proportion of the influx...such detention can properly be described as a measure of last resort.¹⁷³

¹⁷⁰ Gavan Griffith and Carolyn Evans, “Teoh and Visions of International Law”, (2000) 21 *Australian Year Book of International Law* 75, 89.

¹⁷¹ *R (Saadi and ors) v Secretary of State for the Home Department* [2002] 1 WLR 356 (Court of Appeal) (‘*Saadi*’). The House of Lords heard argument in the appeal against this decision on 1 and 2 May 2002. Judgment had not been delivered at the time of printing.

¹⁷² The position under English law following the incorporation is not relevant to Australia. However, the analysis of the ‘traditional’ position under English law is relevant to our discussion.

¹⁷³ *Saadi* [2002] 1 WLR 356, 385 (Lord Phillips MR for the Court).

The court considered the rate of unauthorized arrivals, the short period of detention and that the detention assisted in a speedy outcome. Legality was upheld by finding that detention was a “measure of last resort”. It appears unlikely that those same indicators would be satisfied in Australia, where detention is indefinite and processing often takes months or years, when in the busiest year, Australia’s boat arrivals averaged less than 350 per month.¹⁷⁴ Detention cannot be described as a ‘measure of last resort’ in Australia.

In addition, a line of authority in the United Kingdom deals with a statutory discretion to detain pending deportation, establishing the so-called *Hardial Singh* principles. That is, although the power, “to detain individuals is not subject to any express limitation of time...it is...impliedly limited to a period which is reasonably necessary for that purpose”.¹⁷⁵ This principle has been approved by the Judicial Committee of the Privy Council,¹⁷⁶ where Lord Browne-Wilkinson reiterated that, “if it becomes clear the removal is not going to be possible within a reasonable time, further detention is not authorised.”¹⁷⁷

However, their Lordships left open the issue of legislative modification of this principle, but with the proviso that, “the courts should...be slow to hold that statutory provisions authorise administrative detention for unreasonable periods or in unreasonable circumstances”.¹⁷⁸ This accorded with their view that courts should, “regard with extreme jealousy any claim by the executive to imprison a citizen without trial.”¹⁷⁹

¹⁷⁴ In the financial year 1999-2000, 4175 boat people arrived in Australia: Crock and Saul, above n2, 3.

¹⁷⁵ *Regina v Governor of Durham Prison, Ex parte Hardial Singh* [1984] 1 WLR 704, 706 (Woolf J).

¹⁷⁶ *Tan Te Lam v Tai A Chau Detention Centre* [1997] AC 97, 111 (*‘Lam’*).

¹⁷⁷ *Ibid.* The issue of a reasonable time is discussed below in Chapter III.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid* 113-14.

The English cases reveal an important principle. Protection from arbitrary detention is a fundamental concept of the common law. Accordingly, international law, so far as it defines the international prohibition of arbitrary detention, should be seen as relevant to the scope of any common law protection. The judgment in *Saadi* concluded:

We started this judgment by remarking that it was artificial to consider English domestic law and the Human Rights Convention separately. The Human Rights Act has made the Convention part of the constitution of the United Kingdom, but the Convention sets out values which our laws have reflected over centuries...The policies that have constrained...the exercise of the statutory power to detain aliens who arrive on our shores do not result from any conscious application of Article 5 of the Convention. They result from a recognition, that is part of our heritage, of the fundamental importance of liberty.¹⁸⁰

The undue reticence of Australian courts

A number of influential commentators have criticised the traditional approach taken by Australian courts to international law. As Hilary Charlesworth has noted, “the High Court has been very cautious in its embrace of international law; it has kept its gloves and hat on at all times.”¹⁸¹ Sometimes the High Court has been not only cautious, but hostile. It is clear that, “inertia based on hostility towards international norms should be rejected.”¹⁸²

The judiciary and the government should accept international law as a valuable source of ideas and obligations. With sensitive use, international standards and norms will inspire the development of domestic law that is responsive to individual rights and freedoms. This is a development to be embraced by a mature Commonwealth established by its Constitution as a free, open and democratic society.¹⁸³

¹⁸⁰ *Saadi* [2002] 1 WLR 356, 394 (Lord Phillips MR for the Court).

¹⁸¹ Hilary Charlesworth, “Dangerous Liaisons: Globalisation and Australian Public Law” (1998) 20 *Adelaide Law Review* 57, 66.

¹⁸² Griffith and Evans, above n170, 92-3.

¹⁸³ *Ibid.*

Notwithstanding the caution necessarily needed to ensure Australian courts stay within the limits of the Australian Constitution, it is suggested that it would be appropriate to approach international law in a more meaningful way. Failing to do so exposes Australia to the risk that, “our public and constitutional law will be impoverished and undermined by isolation from international developments.”¹⁸⁴ Further, the current approach cannot be sustained in the modern world.

Just as the Australian economy cannot be insulated from the impact of the international economy and the economies of other countries, so Australian national law cannot be insulated from the influence of international and transnational law.¹⁸⁵

Justice Kirby’s interpretive principle

The emergence of a more open and responsive attitude to international law has been heralded by a series of judgments in which Justice Kirby develops a principled approach to the relationship between international law and constitutional interpretation. Writing extra-curially, Justice Kirby has invoked strong justification for this new approach.

The age of reconciliation of international and national law has dawned in Australia...It is a development as natural to the age as jumbo jets, international informatics, pandemics, global warming and the international economy. In this little planet, we are ultimately bound together. Diminution in the human rights of others endangers peace and security elsewhere and offends the sensibilities of people everywhere, who are increasingly well informed on such matters.¹⁸⁶

¹⁸⁴ Charlesworth, “Dangerous Liaisons,” above n181, 72.

¹⁸⁵ Mason, above n117, 29.

¹⁸⁶ Kirby, above n115, 124-5.

In *Newcrest Mining*,¹⁸⁷ Justice Kirby introduced his interpretive principle.

International law is a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental rights. To the full extent that it's text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law...the Constitution not only speaks to the people of Australia who made it and accept it for their governance. It also speaks to the international community as the basic law of the Australian nation, which is a member of that community.¹⁸⁸

This is subject to the proviso that, "if the constitutional provision is clear and if a law is clearly within power, no rule of international law, and no treaty (including one to which Australia is a party) may override the Constitution or any law validly made under it."¹⁸⁹ However, even as a tool of constitutional interpretation, the interpretive principle has caused significant disagreement between members of the High Court.

In *Kartinyeri*, Justices Gummow and Hayne rejected the approach of Justice Kirby:

[S]ubmissions were made as to the scope of the legislative power in exercise of which the Bridge Act was enacted. In essence, the submissions sought to apply a rule for the construction of legislation passed in the exercise of the legislative power to limit the content of the legislative power itself. Such an attempt failed in *Polites* and in *Horta* and it should fail here.¹⁹⁰

¹⁸⁷ *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513

¹⁸⁸ *Ibid* 657-8 (Kirby J).

¹⁸⁹ *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 417 (Kirby J) ('*Kartinyeri*').

¹⁹⁰ *Ibid* 386 (Gummow and Hayne JJ). This objection was first raised in *Polites* (1945) 70 CLR 60, 78 (Dixon J).

In a more recent rejection, Chief Justice Gleeson, with Justices McHugh and Gummow, declared: “As to the Constitution, its provisions are not to be construed as subject to an implication said to be derived from international law.”¹⁹¹

Notwithstanding the fact that four of Justice Kirby’s present colleagues have rejected the interpretive principle, it may well continue to attract attention in the future.

Fundamental common law rights?

Justice Kirby has not been alone on the High Court in considering the way in which Commonwealth heads of power should be construed in light of international human rights law. The opportunity arose in *Kruger v Commonwealth*¹⁹² to consider the international prohibition of the crime of genocide, in the context of the Commonwealth legislative power in s122 of the Constitution to make laws for the territories. The traditional view held that the power in s122 was, “plenary in quality and unlimited and unqualified in point of subject matter.”¹⁹³ Justice Gaudron considered a radical departure from this:

Were it necessary to decide the matter, I would hold that, whatever the position with respect to other heads of legislative power, s122 does not confer power to pass laws authorising acts of genocide as defined in Art II of the Genocide Convention.¹⁹⁴

Although this is an extreme example, it is noteworthy that Justice Gaudron was willing to limit an express grant of power because of a principle of international human rights law.

¹⁹¹ *AMS v AIF* (1999) 199 CLR 160, 180 (Gleeson CJ, McHugh and Gummow JJ).

¹⁹² (1997) 190 CLR 1.

¹⁹³ *Teori Tau v Commonwealth* (1969) 119 CLR 564, 570.

¹⁹⁴ *Kruger v Commonwealth* (1997) 190 CLR 1, 107 (Gaudron J).

However, the value of that finding is hard to determine, given that Justice Gaudron has not followed this decision with any other relevant uses of international law, and expressly stated that it was not necessary to decide the matter on the facts of *Kruger*.

Much earlier, Justice Murphy also considered inherent limits on Commonwealth judicial power in several judgments during his time on the High Court. He was prepared to draw certain inferences from the Constitution protecting human rights, including an implication prohibiting, “arbitrary discrimination between the sexes.”¹⁹⁵ Justice Murphy also found a significant constitutional protection against arbitrary deprivation of liberty:

It is a Constitution for a free society. It would not be constitutionally permissible for the Parliament of Australia or any of the States to create or authorize slavery or serfdom. A law which (apart from justifications relating to infancy, unsoundness of mind, quarantine or administration of the criminal law) kept migrants or anyone else in a subordinate role inconsistent with the status of a free person, would be incompatible with a fundamental basis of our Constitution.¹⁹⁶

The judgments of Justice Murphy go much further than the interpretive principle of Justice Kirby. In doing so, they raise an issue which the High Court has asked, but never conclusively answered. That is the question of whether or not there are certain common law rights that ‘run so deep’ they may not be abrogated by the parliament.

This question arose for consideration following a series of judgments by Sir Robin Cooke in New Zealand. The first indication of a possible limit derived from the common law came in 1982, when it was said that: “we have reservations as to the extent to which in

¹⁹⁵ *Ansett Transport Industries v Wardley* (1980) 142 CLR 237, 267 (Murphy J).

¹⁹⁶ *R v Director-General of Social Welfare (Victoria); Ex parte Henry* (1975) 133 CLR 369, 388 (Murphy J).

New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary courts of law for the determination of their rights.”¹⁹⁷

His Honour later suggested that, “it is arguable that some common law rights may go so deep that even Parliament cannot be accepted by the Courts to have destroyed them”.¹⁹⁸

An indication of such a right was that: “I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them.”¹⁹⁹

There has been sporadic and often incidental consideration of the issues involved in Australia. For example, Justice Wilson found it relatively easy to dismiss an argument based on Magna Carta and the Bill of Rights.

The validity of laws enacted by the Commonwealth Parliament falls to be determined by reference to the proper construction of the Australian Constitution. It is not open to base an argument for invalidity by reference to alleged inconsistencies between laws of the Commonwealth and either Magna Carta or the Bill of Rights.²⁰⁰

The High Court has attracted attention to this issue by specifically raising it in a case where it did not need to be considered. In *Union Steamship Co of Australia v King*,²⁰¹ the judgment of the Court referred to possible constraints on State legislative power,²⁰² obliquely stating that, “whether the exercise of that legislative power is subject to some

¹⁹⁷ *New Zealand Drivers' Association v New Zealand Road Carriers* [1982]1 NZLR 374, 390 (Cooke J).

¹⁹⁸ *Fraser v State Services Commission* [1984] 1 NZLR 116, 121 (Cooke J).

¹⁹⁹ *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398 (Cooke J).

²⁰⁰ *Re Cusack* (1985) 66 ALR 93, 95 (Wilson J).

²⁰¹ *Union Steamship Co of Australia v King* (1988) 166 CLR 1.

²⁰² Presumably the same considerations would apply to Commonwealth legislative power.

restraints by reference to rights deeply rooted in our democratic system of government and the common law...is another question we need not explore.”²⁰³

It is not clear what should be read into this specific mention. One commentator has supported the view that some rights must be so fundamental that they may not be abrogated, on the basis that to hold otherwise would be, “arbitrarily to privilege the principle of majority rule at the expense of other features of liberal democracy”.²⁰⁴

More recently in *Durham Holdings Pty Ltd v New South Wales*,²⁰⁵ an argument was made that the requirement s51(xxxi) of the Constitution that property be acquired “on just terms” was a right so fundamental to the common law that it could not be abrogated by a state parliament. The majority judgment decided that the acquisition of property on just terms is definitely not a right of sufficient importance.

Whatever may be the scope of the inhibitions on legislative power involved in the question identified but not explored in *Union Steamship*, the requirement of compensation which answers the description “just” and “properly adequate” falls outside that field of discourse.²⁰⁶

In the same case, Justice Callinan decided to, “reserve,” any possible decision on this point.²⁰⁷ Justice Kirby, however, had a very strong view as to the impropriety of such a course. Yet, at the same time, his Honour developed a different theory:

²⁰³ *Union Steamship Co of Australia v King* (1988) 166 CLR 1, 10.

²⁰⁴ T R S Allen, “The Common Law as Constitution: Fundamental Rights and First Principles,” in Saunders (ed), above n118 146, 146.

²⁰⁵ *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 (*‘Durham Holdings’*).

²⁰⁶ *Ibid* 410 (Gaudron, McHugh, Gummow and Hayne JJ).

²⁰⁷ *Ibid* 433 (Callinan J).

The significance of the contemporary realization that the foundation of Australia's Constitution lies in the will of the Australian people has not yet been fully explored...In Australia, considerations such as these, derived directly or indirectly from the Constitution, afford the likely future judicial response to any extreme affront masquerading as a State law. The answer lies in the implications derived from the Constitution, not in assertions by judges that the common law authorises them to ignore an otherwise valid law.²⁰⁸

In rejecting the argument that fundamental rights may not be abrogated, Justice Kirby reached the same conclusion as Justice Dawson in the earlier case of *Kruger*.²⁰⁹ However, the reasons invoked were fundamentally different. For Justice Dawson, parliamentary sovereignty defeated any argument on fundamental rights. In contrast, Justice Kirby drew on the emerging theory of popular sovereignty which recognises that, "it is the people who are ultimately supreme, not their representatives."²¹⁰

If there are indeed certain fundamental common law rights which are protected from legislative interference, there could be no clearer right to be protected than the right to liberty and security of the person. This is much more than an avenue for judicial imposition of, "idiosyncratic notions of what is fair and just".²¹¹

The right to liberty and security of the person can be traced back at least as far as Magna Carta (1215) and appears in all of the relevant modern international human rights instruments. It has been recognised and upheld through a thousand years of common law tradition, and is now comprehensively defined and protected under international human rights law.

²⁰⁸ Ibid 431-2 (Kirby J).

²⁰⁹ *Kruger v Commonwealth* (1996) 190 CLR 1, 73 (Dawson J).

²¹⁰ Williams, "Civil Liberties," above n162, 98.

²¹¹ To borrow a phrase from *Dietrich* (1992) 177 CLR 292, 363-364 (Gaudron J).

As Justices Wilson and Dawson said in *Williams v The Queen*:²¹²

A person is not to be imprisoned otherwise than upon the authority of a justice or a court except to the extent reasonably necessary to bring him before the justice to be dealt with according to law. That, as we conceive it, is one of the foundations of the common law. It is by writ of habeas corpus that the immediate restoration to freedom of a person illegally detained may be achieved. That is a remedy as old as the law and was declared by the Bill of Rights 1688 to be so.²¹³

The issue of whether there are certain fundamental common law rights that may not be abrogated by parliament remains open. Powerful arguments can be made in support of such a contention, but these are as perceived radical by some. In the absence of strong judicial approval of such an approach, the more conventional analysis of the issues will be developed in Chapter III.

²¹² (1986) 161 CLR 278.

²¹³ *Williams v The Queen* (1986) 161 CLR 278, 306 (Wilson and Dawson JJ).

Conclusion on international human rights law in Australia

Despite Australia's active participation in human rights internationally, within Australia international human rights law has not been given meaningful effect. Under the Constitution, the parliament is the appropriate body to implement international law in Australia. However, there is a very important legal dimension, as the Australian Constitution provides significant opportunity for courts to protect individual rights, but has been interpreted instead to reduce individual protection.

Our common law tradition is rich in ideals corresponding to those of international human rights law, not least in the area of arbitrary detention, which draws on the long history of the common law writ of *habeas corpus*. However, courts have been very reluctant to consider international human rights law, and the guidance it could give to Australian law.

Notwithstanding the majority conservative view, it is arguable that international human rights law should play a much more important part in constitutional interpretation in Australia. This development would not seek to apply international law as a new constitution, but to use it to interpret the Australian Constitution.

A different approach may take the view that the right to liberty and security of the person is a common law right so fundamental that it may not be abrogated by parliament. Strong arguments can be made in support of such a proposition, although this is an argument which calls for a significant departure from the conservative view. It raises the issue of how far a system of government ruled by a written Constitution which is imbued with a separation of judicial power allows parliamentary sovereignty to extend.

The conclusion is that international human rights law currently plays a relatively limited role in Australian law. If immigration detention is internationally illegal, the prevailing view is that this does not create domestic rights or remedies. However, there are developing arguments which suggest that international law is relevant to interpreting the Australian Constitution, and should be recognised as such. International human rights law may also be relevant to defining certain, limited rights which are fundamental to our system of government.

In the absence of majority approval of either of these approaches, the more traditional analysis of Australian constitutional law will now be undertaken, to reach a conclusion on the domestic legality of immigration detention.

CHAPTER III: AUSTRALIAN CONSTITUTIONAL LAW

The conclusion that international human rights law cannot be directly enforced in Australia does not determine the legality of immigration detention in Australia. The Australian Constitution may still deny the validity of the detention provisions under Australian law. There are two issues to be considered in this regard. The first is whether or not the legislative provisions are within the legislative power of the Commonwealth. The second is whether the otherwise valid legislation constitutes a usurpation of the judicial power of the Commonwealth, and thus is invalid under Chapter III of the Constitution.

Detention under the microscope: Lim's Case

The most important consideration of the legality of immigration detention is the High Court decision in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ('*Lim's Case*').²¹⁴ The provisions challenged in *Lim's Case* were the same provisions which were later the subject of the successful communication to the *Human Rights Committee* in *A v Australia*.

The current *Migration Act* detention provisions differ from those considered in *Lim's Case*, in lacking a provision to the effect of the former s54Q of the *Migration Act* which limited detention to 273 days. In addition, the regime considered in *Lim's Case* applied only to 'designated persons' and not to all 'unlawful non-citizens'. Notwithstanding the

²¹⁴ *Lim's Case* (1992) 176 CLR 1. This case is discussed in Williams, *Human Rights*, above n5, 205-9.

fact that detention is now indefinite and mandatory for all ‘unlawful non-citizens’, the principles considered by the High Court in *Lim’s Case* remain equally relevant.

Analysis of the decision in *Lim’s Case* properly begins by setting out the position at common law. This provides a useful background to the issues which later arise.

An alien who is within this country, whether lawfully or unlawfully, is not an outlaw. Neither public official nor private person can lawfully detain him...except under and in accordance with some positive authority conferred by the law. Since the common law knows neither lettre de cachet nor other executive warrant authorizing arbitrary arrest or detention, any officer of the Commonwealth Executive who purports to authorize or enforce the detention in custody of such an alien without judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provision.²¹⁵

The provisions of the *Migration Act* constitute just such an authorising statutory provision, to the extent that they are valid. The question then becomes whether or not the provisions establishing the regime of immigration detention in Australia are valid.

Is detention within the legislative power of the Commonwealth?

The first issue to be decided is whether the relevant provisions of the *Migration Act* indeed fall within any head of Commonwealth legislative power. The head of power used to support the *Migration Act* is the ‘aliens power’ in s51(xix) of the Constitution.²¹⁶

²¹⁵ *Lim’s Case* (1992) 176 CLR 1, 19 (Brennan, Deane and Dawson JJ) and 63 (McHugh J), citing *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 528 (Deane J).

²¹⁶ The power in s51(xxvii) to make laws with respect to immigration and emigration, which was formerly relied on to support migration laws, is no longer considered, attention now focussing on the aliens power.

The heart of the aliens power

The ‘aliens power’ is the legislative power, “to make laws...with respect to...aliens,” expressed in s51(xix) of the Constitution. However, a law is not valid under this power merely because it contains the word ‘alien’. It has been pointed out that, “the words “with respect to” ought never to be neglected in considering the extent of a legislative power...what they require is a relevance to or connection with the subject.”²¹⁷

The broadest view of the scope of the aliens power was that taken by Justice McHugh, who explicitly held that detention falls directly under s51(xix). His Honour stated that the aliens power, “is limited only by the description of the subject matter,”²¹⁸ holding that the *Migration Act* was a law, “with respect to the subject of aliens,” because it applied to aliens.²¹⁹ Likewise, Justice Toohey stated that the law was supported by the aliens power because, “it is part of a regime dealing with aliens.”²²⁰

For Chief Justice Mason, and Justices Brennan, Deane, Dawson and Gaudron, detention arose not from the heart of the power, but as a matter incidental to the aliens power.

The implied incidental power with respect to aliens

The existence of an implied incidental power has long been recognised by the High Court. As early as 1904, it was held that, “where any power or control is expressly granted, there

²¹⁷ *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 77 (Dixon CJ, McTiernan, Webb and Kitto JJ).

²¹⁸ *Lim’s Case* (1992) 176 CLR 1, 64 (McHugh J).

²¹⁹ *Ibid* 64-5 (McHugh J).

²²⁰ *Ibid* 46 (Toohey J).

is included in the grant...every power and every control the denial of which would render the grant itself ineffective.²²¹ Hence, it has been said that each head of power carries with it an implied incidental power, “to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose.”²²²

The test for whether a law can be considered necessary, as Leslie Zines points out, strikes a balance to, “accommodate both the function of the court and the legislative discretion of parliament”.²²³ The result of this balance is the requirement that a law be, “reasonably considered to be appropriate and adapted,”²²⁴ to giving effect to the power.

In *Lim’s Case*, the majority took a narrower view of the scope of the aliens power than Justices McHugh and Toohey. Justice Gaudron referred to the power as a, “power to legislate with respect to the consequences of alienage,”²²⁵ being that:

Aliens...have no right to enter or remain in Australia unless such right is expressly granted. Laws regulating their entry to and providing for their departure from Australia (including deportation, if necessary) are directly connected with their alien status. And laws specifying the conditions on and subject to which they may enter and remain in Australia are also connected with their status as aliens to the extent that they are capable of being seen as appropriate or adapted to regulating entry or facilitating departure if and when departure is required.²²⁶

²²¹ *D’Emden v Pedder* (1904) 1 CLR 91, 110 (Griffith CJ).

²²² *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 77 (Dixon CJ, McTiernan, Webb and Kitto JJ).

²²³ Zines, *The High Court and the Constitution* (4th ed., 1997), 39.

²²⁴ *Cunliffe v Commonwealth* (1994) 182 CLR 272, 297 (Mason CJ). See also: *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270, 286 (Deane and Gaudron JJ).

²²⁵ *Lim’s Case* (1992) 176 CLR 1, 56-7 (Gaudron J).

²²⁶ *Ibid* 57 (Gaudron J).

A similar position appears to have been taken by Justices Brennan, Deane and Dawson, who on one reading appeared to take a similar view to Justices McHugh and Toohey, before clearly relying on the implied incidental power for their holding that:

authority to detain an alien in custody, when conferred upon the Executive in the context and for the purposes of an executive power of deportation or expulsion, constitutes an incident of that executive power. By analogy, authority to detain an alien in custody, when conferred in the context and for the purposes of executive powers to receive, investigate and determine an application by that alien for an entry permit and (after determination) to admit or deport, constitutes an incident of those executive powers.²²⁷

Chief Justice Mason explicitly agreed with this proposition.²²⁸ The majority view, then, appears to be that the aliens power is a power, “to receive, investigate and determine an application by [an] alien for an entry permit and (after determination) to admit or deport”.²²⁹ The power to detain aliens during this process, in order to enable those matters to be dealt with, is an incident of that power. All members of the High Court in *Lim’s Case* found that the detention legislation was supported by the aliens power, either directly or by virtue of the implied incidental power.

A ‘rule of law’ limit on the implied incidental power?

There is an issue as to whether the implied incidental power is limited by the assumption of the rule of law, upon which the Constitution is based. In *Australian Communist Party v Commonwealth*,²³⁰ Justice Dixon raised this possibility:

²²⁷ Ibid 32 (Brennan, Deane and Dawson JJ).

²²⁸ Ibid 10 (Mason CJ).

²²⁹ Ibid 32 (Brennan, Deane and Dawson JJ).

²³⁰ (1951) 83 CLR 1.

The power is ancillary or incidental to sustaining and carrying on government...under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from the other functions of government, others of which are simply assumed. Among these I think it may fairly be said that the rule of law forms an assumption.²³¹

The significance of Justice Dixon's statement is not settled. As Geoffrey Lindell has said, the comments, "appear to leave some scope for limiting the reach of incidental powers generally by reference to traditional views involving individual liberty."²³²

However, Bradley Selway has taken a different view, stating that, "the aspirational aspects of the rule of law under the Australian Constitution are left to the democratic institutions, not to Judges."²³³ Yet, it is difficult to understand how the rule of law could not be intimately related to the High Court, given its role as the Federal Supreme Court.²³⁴ As Sir Maurice Byers points out, "for most Australians the [High] Court embodies the rule of law...the principle which inheres in and informs our society, enlivens the instruments which constitute it and guarantees the freedoms which are essential to it."²³⁵

As recently as 1998, Justices Gummow and Hayne recalled Justice Dixon's statement, noting that: "the occasion has yet to rise for consideration of all that may follow from Dixon J's statement."²³⁶ As Leslie Zines has observed, "it is difficult to know what to

²³¹ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

²³² Geoffrey Lindell, "Recent Developments in the Judicial Interpretation of the Australian Constitution," in Lindell (ed), above n156 1, 21. However, Linda Kirk appears to take a narrower view of Justice Dixon's comment: Linda J Kirk, "Chapter III and Legislative Interference with the Judicial Process: *Abebe v Commonwealth* and *Nicholas v The Queen*," in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 119, 122.

²³³ Bradley Selway, "The Attorney-General, Government Lawyers and the Rule of Law," Paper presented to the Adelaide Law School Seminar Series "Do Lawyers Contribute to the Social Good?", 16 September 2002, 4.

²³⁴ Australian Constitution, s71.

²³⁵ Sir Maurice Byers, "Vote of Thanks," in Saunders (ed), above n118 108, 108.

²³⁶ *Kartinyeri* (1998) 195 CLR 337, 381 (Gummow and Hayne JJ).

make of this,” later statement.²³⁷ Their Honours were potentially taking a broad view of such an implication, although it is not possible to read more than that into what was said.

The essential statement of the rule of law is Diceyan: “Englishmen are ruled by the law, and by the law alone: a man may with us be punished for a breach of law, but he can be punished for nothing else.”²³⁸ If the rule of law does not admit of punishment but for an established breach of the law, a law purportedly enacted under the incidental power would not be within power if it constituted a punishment, by establishing punitive detention.

If the power to detain is an incident of the aliens power, this limit on the implied incidental power could be relevant. Detention which is punitive in character would breach the underlying assumption of the rule of law, and thus may fall outside the scope of the incidental legislative power. What makes detention punitive is explored in detail below.

Does detention usurp the federal judicial power?

Chapter III of the Constitution exclusively vests federal judicial power in the courts which it designates. In doing so, the Constitution establishes a separation of judicial power. This is a familiar concept which has been invoked on numerous occasions by the High Court. The implications of this were clearly expressed in the *Boilermakers’ Case*.²³⁹

²³⁷ Leslie Zines, “The Present State of Constitutional Interpretation,” in Stone and Williams (eds), above n232, 231.

²³⁸ A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959), 202; quoted in Blackshield and Williams, above n6, 105.

²³⁹ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

The existence in the Constitution of Chap III and the nature of the provisions it contains make it clear that no resort can be made to judicial power except...through or in conformity with Chap III...Indeed, to study Chap III is to see at once that it is an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested...its very nature puts out of question the possibility that the legislature may be at liberty to turn away from Chap III to any other source of power when it makes a law giving judicial power exercisable within the Federal Commonwealth of Australia. No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap III.²⁴⁰

The legislative powers of the Commonwealth Parliament are necessarily restricted by the exclusive vesting of judicial power in Chapter III courts because, “just as Parliament cannot vest judicial power in a body other than a court contemplated by s71 of the Constitution, so it cannot exercise judicial power itself.”²⁴¹ It is now clear that, “an attempt by the Parliament to usurp or substantially interfere with “exclusively judicial functions” will be held unconstitutional.”²⁴² Justice Deane expressed the principle as follows:

In insisting that the judicial power of the Commonwealth be vested only in the courts designated by Ch III, the Constitution’s intent and meaning were that the judicial power would be exercised by those courts...Accordingly, the Parliament cannot, consistently with Ch III of the Constitution, usurp the judicial power of the Commonwealth by itself purporting to exercise judicial power in the form of legislation.²⁴³

The issue, then, is whether the provisions of the *Migration Act* which establish the regime of mandatory detention for ‘unlawful non-citizens’ in fact purport to exercise judicial power. The basic principle is that the power to detain is punitive, and punitive detention is an exclusively judicial function.

²⁴⁰ Ibid 269-70 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

²⁴¹ George Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in Lindell (ed), above n156, 185, 190.

²⁴² Kirk, above n232, 119.

²⁴³ *Polyukhovich v The Queen* (1991) 172 CLR 501, 607 (Deane J).

The involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.²⁴⁴

Thus, if legislation purported to sanction punitive detention, it would be invalid as an attempt to usurp the judicial power of the Commonwealth. The issue then becomes whether or not detention is punitive in nature. The vital part of the quote extracted above is the careful use of the word 'citizen'. Their Honours held that detention would be punitive and thus unconstitutional if citizens were detained. However, aliens were not so protected, because detention of aliens may be able to be characterised as non-punitive.

Limited authority to detain an alien in custody...is neither punitive in nature nor part of the judicial power of the Commonwealth...it takes its character from the executive powers to exclude, admit and deport of which it is an incident.²⁴⁵

Notice what has happened here. The joint judgment held that detention was non-punitive because it fell within the incidental power. Implicitly, at least, Justices Brennan, Deane and Dawson, with whom Chief Justice Mason concurred on this point, characterized the nature of detention by reference to the criterion of whether or not the law was in fact a valid law supported by the implied power incidental to the aliens power.

In contrast, Justice McHugh was at pains to draw a distinction between the scope of the aliens power and the determination of any Chapter III questions. His Honour concluded

²⁴⁴ *Lim's Case* (1992) 176 CLR 1, 27-8 (Brennan, Deane and Dawson JJ). Acknowledged exceptions to this were: "the arrest and detention in custody, pursuant to executive warrant, of a person accused of crime to ensure that he or she is available to be dealt with by the courts...detention in cases of mental illness or infectious disease...[and] the traditional powers of the Parliament to punish for contempt and of military tribunals to punish for breach of military discipline."

²⁴⁵ *Lim's Case* (1992) 176 CLR 1, 32 (Brennan, Deane and Dawson JJ).

that the limitation to be derived from Chapter III is a prohibition of the enactment of Bills of Pains and Penalties, one of the requirements of which is that there be, “a law...which punishes.”²⁴⁶ His Honour determined the appropriate test of the character of detention:

Although detention under a law of the Parliament is ordinarily characterized as punitive in character, it cannot be so characterized if the purpose of the imprisonment is to achieve some legitimate non-punitive object...if imprisonment goes beyond what is reasonably necessary to achieve the non-punitive object, it will be regarded as punitive in character.²⁴⁷

Justice McHugh applied the same test for determining the nature of detention as the majority judges, despite drawing a distinction between the two issues of implied power and Chapter III limitations which the majority had considered together.

The result of the decisions of Chief Justice Mason, and Justices Brennan, Deane, Dawson and McHugh in *Lim's Case* is that immigration detention will be valid if it is, “reasonably capable of being seen as necessary for the purposes of deportation or...to enable an application for an entry permit to be made and considered.”²⁴⁸

Justice Gaudron, however, disagreed with the other members of the court, expressing scepticism about whether Chapter III provided any protection from detention of any sort. Her Honour was, “not...persuaded that legislation authorizing detention in circumstances involving no breach of the criminal law and travelling beyond presently accepted categories is necessarily and inevitably offensive to Ch III.”²⁴⁹

²⁴⁶ Ibid 70 (McHugh J).

²⁴⁷ Ibid 71 (McHugh J).

²⁴⁸ Ibid 33 (Brennan, Deane and Dawson JJ). Justice Toohey appears to have implicitly agreed with this approach: at 46.

²⁴⁹ *Lim's Case* (1992) 176 CLR 1, 55 (Gaudron J).

Reasonably capable of being seen as necessary?

For the majority of judges in *Lim's Case*, detention was held to be non-punitive as it was 'reasonably capable of being seen as necessary' for a non-punitive purpose.

Central to this decision were two factors. First, there was a statutory limit on detention of 273 days after application for entry.²⁵⁰ Second, the provision, which is now contained in s198(1), that, "an officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed." For the joint judgment, the combined effect of these two restrictions was to give detention a non-punitive character.

In the context of that power of a designated person to bring his or her detention...to an end at any time, the time limitations imposed...preclude a conclusion that the powers of detention...exceed what is reasonably capable of being seen as necessary for the purposes of deportation or for the making and consideration of an entry application.²⁵¹

Justice McHugh agreed, describing the power to request deportation as, "vital,"²⁵² whilst acknowledging that the choice could be seen, "as not a real choice".²⁵³

A person is not being punished if, after entering Australia without permission, he or she chooses to be detained in custody pending the determination of an application for entry rather than to leave the country during the period of determination.²⁵⁴

²⁵⁰ *Migration Act 1958* (Cth), s54Q (as it then stood).

²⁵¹ *Lim's Case* (1992) 176 CLR 1, 34 (Brennan, Deane and Dawson JJ).

²⁵² *Ibid* 72 (McHugh J).

²⁵³ *Ibid* 72 (McHugh J).

²⁵⁴ *Ibid*.

Describing it as a ‘choice’ is unrealistic because a refugee, by definition, has a well-founded fear of persecution if deported, and because choosing to leave means the abandonment of any application for refugee status in Australia as, with a debt owing to the Commonwealth,²⁵⁵ no former detainee would later be re-admitted to Australia.

Justice Toohey agreed that detention was non-punitive, concluding that, “the object of the...legislation is to hold aliens...in custody, not for punitive purposes, but to ensure that they leave Australia if they are not given an entry permit.”²⁵⁶

The clear majority position of the judges in *Lim’s Case* is that although punitive detention is exclusively judicial in character, and cannot be validly imposed by legislative or executive branches of government, immigration detention constituted permissible non-punitive detention, because it was reasonably capable of being seen as necessary to the legitimate objective of regulating the entry to and departure from Australia of aliens.

It is important to remember that the joint judgment in *Lim’s Case* placed great emphasis on a statutory limit on detention of 273 days, and on the power of a detainee to request immediate deportation. Although the power to request deportation remains, the 273 day time limit has been abolished, and detention is now without limit. The effect of this change on the validity of immigration detention is uncertain, although it is hard to imagine how unlimited detention could be described as ‘reasonably necessary’ for any purely administrative purpose.

²⁵⁵ Detainees are charged for their detention: *Migration Act 1958* (Cth), ss209 - 212.

²⁵⁶ *Lim’s Case* (1992) 176 CLR 1, 46 (Toohey J).

Further judicial consideration

In *Kruger v Commonwealth*,²⁵⁷ some members of the High Court considered the argument that Aboriginal children, part of the ‘Stolen Generation’, had been removed from their parents and detained in breach of the Chapter III prohibition of punitive detention. The plaintiffs failed, but two important affirmations of the decision in *Lim’s Case* were made.²⁵⁸ Justice Gummow, who was not on the court for *Lim’s Case*, expressed his view of the necessary test, in essentially the same terms as the majority in *Lim’s Case*:

The question whether a power to detain persons or to take them into custody is to be characterised as punitive in nature, so as to attract the operation of Ch III, depends upon whether those activities are reasonably capable of being seen as necessary for a legitimate non-punitive objective. The categories of non-punitive, involuntary detention are not closed.²⁵⁹

Justice Gaudron, meanwhile, confirmed her view that detention in any form is not impacted by Chapter III, stating that, “it is not possible to say that...the power to authorise detention in custody is necessarily and exclusively judicial power...a law authorising detention in custody is not, of itself, offensive to Ch III.”²⁶⁰

The detention without trial of a citizen arose for the consideration of the High Court in *Kable v Director of Public Prosecutions (NSW)*.²⁶¹ The New South Wales government passed the *Community Protection Act 1994* (NSW) to provide for the detention of Gregory

²⁵⁷ (1997) 190 CLR 1.

²⁵⁸ Brennan CJ, Dawson and McHugh JJ, did not consider Chapter III in *Kruger*, as they regarded it as inapplicable to the territories: Williams, *Human Rights*, above n5, 207.

²⁵⁹ *Kruger v Commonwealth* (1997) 190 CLR 1, 161 (Gummow J). Justice Gummow’s reference to ‘a power to detain persons’ is presumably to a power bestowed by legislation on the Commonwealth executive to detain persons, because ‘to detain persons’ is not a placentum of legislative power in s51 of the Constitution.

²⁶⁰ *Kruger v Commonwealth* (1997) 190 CLR 1, 110 (Gaudron J).

²⁶¹ (1995) 189 CLR 51. This case is discussed in Williams, *Human Rights*, above n5, 210-14, 242.

Wayne Kable, on the order of the Supreme Court of New South Wales, after the completion of his sentence for manslaughter.²⁶² The whole of the act was declared invalid.

Justice Toohey contrasted the detention of Kable with, “a system of preventive detention with appropriate safeguards, consequent upon or ancillary to the adjudication of guilt,”²⁶³ concluding that detention was punitive because of a lack of appropriate safeguards and lack of an appropriate connection to a criminal trial.

Justice Gaudron referred to the fact that detention occurred in a prison, that the detainee was subject to the same regime as persons convicted of criminal offences,²⁶⁴ and that material not acceptable as evidence was considered.²⁶⁵ The combination of these factors rendered detention punitive for Justice Gaudron.

Justice McHugh regarded the fact that a court order was necessary to initiate detention as a safeguard indicating non-punitive detention,²⁶⁶ but contrasted this with the overall express removal of, “the ordinary protections inherent in the judicial process,”²⁶⁷ which determined the punitive nature of the provisions.

Justice Gummow compared the position of a detainee to an ordinary prisoner. His Honour considered the fact a detainee would be required to be held in prison, that no fixed term of detention was set, that no parole would be available, and that no bail was available.²⁶⁸ In light of this lack of safeguards, Justice Gummow also found detention to be punitive.

²⁶² The *Community Protection Act 1994* (NSW) applied to Gregory Wayne Kable alone: s3(3).

²⁶³ *Kable* (1995) 189 CLR 51, 98 (Toohey J).

²⁶⁴ *Ibid* 105 (Gaudron J).

²⁶⁵ *Ibid* 106 (Gaudron J).

²⁶⁶ *Ibid* 121 (McHugh J).

²⁶⁷ *Ibid* 123 (McHugh J).

²⁶⁸ *Ibid* 129 (Gummow J).

It is not possible to determine a conclusive test for punitive detention from the decisions in *Kable*. However, it appears that whether or not detention is punitive does depend on the conditions of detention and the legal safeguards in place. Immigration detention occurs in ordinary prisons²⁶⁹ or in prison-like conditions,²⁷⁰ is indeterminate, and bail and parole are not available. Many of the indications of punitive detention are present.

Conditions of detention and the ‘reasonably necessary’ test

The majority view is that detention will be non-punitive providing that it is ‘reasonably capable of being seen as necessary’ for a legitimate non-punitive objective. It has been held that, “the substance and not the mere form,”²⁷¹ of a law authorising detention should be considered, and that, “the length and circumstances of the detention contemplated are...significant.”²⁷² In addition, the presence or lack of appropriate procedural safeguards is relevant to the issue of whether or not detention is ‘reasonably capable of being seen as necessary’ to some non-punitive objective.²⁷³

In Chapter I, it was suggested that, in the absence of any legislative provisions changing the ordinary rule, the principle that prisoners cannot challenge their detention on the basis of the conditions of detention applies to people in immigration detention. This section

²⁶⁹ “Immigration detention” is defined in s5 of the *Migration Act 1958* (Cth) to include being held: “in a detention centre...prison or remand centre...police station or watch house” or any other “place approved by the Minister in writing”.

²⁷⁰ Crock and Saul, above n2, 84, describe all detention facilities simply: “The facilities are jails.” Special mention is made of the desert detention facilities: “Remote centres are similar to prisoner-of-war camps.”

²⁷¹ *The Queen v Garry Kenneth McKay* and *The Queen v Darren John West*, [1998] ACTSC 128 (Unreported, Crispin J, 2 December 1998), [11].

²⁷² *Ibid* [14].

²⁷³ See eg *S v Principal Reporter and Lord Advocate* [2001] ScotCS 82 (Unreported, Lord President, Lords Penrose and Macfadyen, 30th March 2001), where it was held that Regulations specifically protecting the welfare of children in detention ‘preserved’ the non-punitive object of the relevant legislation.

develops an argument that the conditions of detention can change detention which is otherwise ‘reasonably necessary’ into unreasonable and unnecessary detention, which, being punitive, violates Chapter III of the Constitution.

A deeper analysis of what is ‘reasonably capable of being seen as necessary’ to enable consideration of applications for entry visas, and to deport persons as required, would also look to the conditions of immigration detention to determine if detention is punitive. This is because a regime of immigration detention that did only what was ‘reasonably necessary’ would violate only those rights whose violation could be justified as necessary to achieve its legitimate purpose.

George Williams gives examples of two comparative perspectives on this issue. In the United States, he refers to a doctrine that where legislatures use, “means which sweep unnecessarily broadly,”²⁷⁴ in infringing human rights, they exceed what is permissible. In Canada, he refers to a test which requires that, “the means, even if rationally connected to the objective...should impair ‘as little as possible’ the right or freedom in question”.²⁷⁵

Both examples may be distinguished, but the principle they protect is very important. As Louis Henkin points out, “a society may derogate from rights only to the extent strictly required by the exigencies of the situation.”²⁷⁶ The principle is expressed in the *Basic Principles for the Treatment of Prisoners* adopted by the General Assembly:

²⁷⁴ *NAACP v Alabama* 377 US 288 (1964), 307 (Harlan J); cited in Williams, *Human Rights*, above n, 90.

²⁷⁵ *R v Oakes* [1986] 1 SCR 103, 139 (Dickson CJ); cited in Williams, *Human Rights*, above n, 89.

²⁷⁶ Henkin, above n163, 4; quoted in Blackshield and Williams, above n6, 1090.

Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights...the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.²⁷⁷

Richard Harding described the conditions of immigration detention very succinctly as, “an absolute disgrace”.²⁷⁸ There have been allegations of, “sexual and other assault...abuse of refugee children, repeated hunger strikes, suicide attempts, mass disturbances, the use of chemical sedation, and even death in detention centres across Australia.”²⁷⁹

International concern has also been raised. In May 2002, P. N. Bhagwati conducted a visit to Australia as a personal envoy of the United Nations High Commissioner for Human Rights, to investigate the human rights situation in Australia’s immigration detention centres. He reported that he was, “considerably distressed by what he saw and heard,” which he described as, “a great human tragedy”.²⁸⁰

Justice Bhagwati went on to question Australia’s compliance with certain provisions of the *International Covenant on Civil and Political Rights*,²⁸¹ the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,²⁸² the

²⁷⁷ *Basic Principles for the Treatment of Prisoners*, GA Res 45/111, UN GAOR, 45th sess, 68th plen mtg, UN Doc. A/RES/45/111(1990), Principle 5. See also: *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc. A/CONF/611(1955), art 60(1): “The regime...should seek to minimize any differences between prison life and life at liberty.”

²⁷⁸ Professor Richard Harding (Inspector of Custodial Services, State of Western Australia), Speech to the International Corrections and Prisons Association Conference, Perth, 31 October 2001.

²⁷⁹ Crock and Saul, above n2, 3.

²⁸⁰ Justice P N Bhagwati, “Mission to Australia 24 May to 2 June 2002: Human Rights and Immigration Detention in Australia,”

<<http://www.unhchr.ch/hurricane/hurricane.nsf/view01/BC4C8230F96684C8C1256C070032F5F1?opendocument>> [20].

²⁸¹ Bhagwati, above n280, [62]. *International Covenant on Civil and Political Rights*, above n44.

²⁸² Bhagwati, above n280, [62]. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 Dec 1984, 1465 UNTS 85 (entered into force 26 June 1987).

International Covenant on Economic, Social and Cultural Rights,²⁸³ the *Convention on the Rights of the Child*,²⁸⁴ and the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.²⁸⁵

The failure to provide any mechanism of enforcing human rights is critical. Even if the legislation does not itself sanction breaches of human rights, the failure of detention legislation to provide any mechanism of enforcing basic rights (the exercise of which is not relevant to the power to detain) is a strong indication that the regime of immigration detention has gone beyond what is necessary.

Notwithstanding any justification of a breach of the right to liberty and security of the person as a necessary incident of the power to admit or deport aliens, no justification has been advanced for a breach of any other fundamental rights. No justification could be given for the indiscriminate violations of human rights which have been alleged.

Taking a deeper view, it is hard to see how detention could be regarded as ‘reasonably necessary’ when the conditions of detention violate not just the right to liberty and security of the person, but sweep much wider, infringing a number of fundamental human rights. Any claim to violate basic human rights must be held to a strict test of whether such violations are in fact ‘reasonably necessary’, lest Australia become like John Milton’s Satan, who, “with necessity, the tyrant’s plea, excus’d his devilish deeds.”²⁸⁶

²⁸³ Bhagwati, above n280, [49]. *International Covenant on Economic, Social and Cultural Rights*, above n44.

²⁸⁴ Bhagwati, above n280, [51], [52], [53], [61].

²⁸⁵ *Body of Principles*, above n14.

²⁸⁶ John Milton, *Paradise Lost* (1667) bk 4, l 393; quoted in Bill Swainson (ed), *Encarta Book of Quotations* (2000), 650.

Akram Al Masri

The first recent case in Australia to consider the validity of immigration detention was *Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs*.²⁸⁷ Justice Merkel of the Federal Court ordered the release from potentially indefinite immigration detention of Akram Al Masri, a detainee who had requested to be deported, but at the time could not be deported.

Justice Merkel's decisions did not challenge the Constitutional validity of immigration detention. Rather, Justice Merkel applied the *Hardial Singh* principles, determining that detention was only authorised provided, "the Minister is taking all reasonable steps to secure the removal from Australia of a removee as soon as is reasonably practicable," and, "the removal of the removee from Australia is "reasonably practicable", in the sense that there must be a real likelihood or prospect of removal in the reasonably foreseeable future."²⁸⁸

On the 15th of August 2002 those conditions were not met, and accordingly Justice Merkel released Mr Al Masri. However, by the 6th of September, deportation had been arranged, so there was a real likelihood of removal, and Mr Al Masri was ordered back into immigration detention, pending deportation.

²⁸⁷ *Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1009, (Unreported, Merkel J, 15 August 2002); *Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1037 (Unreported, Merkel J, 15 August 2002); *Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1099 (Unreported, Merkel J, 6 September 2002).

²⁸⁸ *Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1009 (Unreported, Merkel J, 15 August 2002), [38].

Approving the *Hardial Singh* principles in *Lam*, the Privy Council was at pains to point out that, “subject to any constitutional challenge...the legislature can vary or possibly exclude the *Hardial Singh* principles.”²⁸⁹ Justice Merkel decided in *Al Masri* that the *Migration Act* did not exclude the *Hardial Singh* principles.

Such an approach requires a strong emphasis to be placed on the rule of interpretation that legislation must be unambiguous to violate common law rights, at the expense of the reasonably clear text of the *Migration Act*. It is an approach that was open to be taken, but it is also an approach which could be criticised. In any event, in taking this approach, Justice Merkel did not need to consider the Constitutional issues.

At the time of writing, a number of cases challenging the legality of immigration detention were pending or had been heard before a number of different courts in Australia. Although all the relevant cases at the time of writing have been included and discussed, there will be further judgments handed down in the near future. The issues canvassed in the foregoing discussion should be important factors in the consideration of these cases.

²⁸⁹ *Lam* [1997] AC 97, 111.

Conclusion on Domestic Legality

The scope of Commonwealth legislative power and the restrictions placed on it by Chapter III of the Constitution, though conceptually different issues, were linked in the decisions of the majority of the High Court in *Lim's Case*.

It is accepted that the aliens power, at minimum, extends to laws which deal with the arrival of an alien in Australia, the investigation and determination of an application for an entry permit, and anything associated with the admission or deportation of an alien. Whether a power of detention is included is a more difficult question. The broadest approach, holding that any law which deals with an alien is validly enacted, gives the Commonwealth extraordinary powers, and should not be entertained.

The majority view would appear to be that detention arises as an incident of the main power, to the extent that it can be viewed as coming within the incidental power. Thus, detention is within power when it is 'reasonably capable of being seen as necessary' to give effect to the main power.

The question of whether there is a limit on the incidental power implied from the assumption of the rule of law, on which the Constitution is based, was discussed. This is another area where arguments can be made in support of this view, but where the orthodox approach does not confirm that such an approach will succeed. As such, the argument deals with a possible future development of the law, not with its current state.

Assuming that detention can be seen as an incident of the aliens power, it may still be impermissible as a usurpation of the judicial power of the Commonwealth. Legislation providing for detention will breach Chapter III of the Constitution if the detention it imposes is punitive in nature

In *Lim's Case*, detention was said to take its character from the power under which the law is enacted. Accordingly, it was held that detention would be non-punitive providing it was 'reasonably capable of being necessary' for a non-punitive objective, which must itself be within power. In *Lim's Case*, it was held that immigration detention was not punitive.

The result in *Lim's Case* is open to serious question now. One reason for this is that detention is now unlimited in time, which raises significant questions about compliance with the 'reasonably necessary' test. Further, the conditions of detention have become a vital issue for the first time. An approach which is responsive to human rights and gives meaningful effect to the 'reasonably necessary' test would consider the conditions of detention. This approach would not be tantamount to implementing international conventions by the back door. Rather, it would question the 'reasonableness' and 'necessity' of violating a large number of human rights, when even the strongest possible justification would allow only a limited restriction of the right to liberty and security of the person. This approach would break new ground, but is based on the existing, accepted test.

The fact that immigration detention is now unlimited in time and that allegations of the most serious nature have been made about the conditions of detention fundamentally distinguish the current regime of immigration detention from that considered by the High Court in *Lim's Case*, raising significant issues about the legality of the current regime.

CONCLUSION

The conclusion of Chapter I is that Australia's mandatory detention of 'unlawful non-citizens' under the *Migration Act 1958* (Cth) is in breach of the international prohibition of arbitrary detention. As a consequence, Australia is in breach of its obligations under Article 9 of the *International Covenant on Civil and Political Rights*.

In Chapter II it was seen that, on a conservative view of Australian law, no domestic consequences flow from this international illegality. However, it is argued that this view is unsustainable, and that international law must be regarded as relevant to interpreting the Constitution. The High Court has been reluctant to accept such an approach, although powerful arguments can be made in support of it.

It is also argued that certain key common law rights 'run so deep' they may not be abrogated by parliament. Drawing on the common law tradition, it is suggested that the right to liberty and security of the person is just such a right, and that international human rights law is relevant to determining the scope of this fundamental right.

In Chapter III, the decision in *Lim's Case* was examined. Since *Lim's Case* it has been widely assumed that detention without trial can be the norm for 'unlawful non-citizens' although such a power could not lawfully be exercised over Australian citizens. However, the legality of immigration detention, both by reference to the scope of Commonwealth legislative power, and limits derived from Chapter III of the Constitution, is open to significant challenge.

That detention is unlimited in duration and that the conditions are not open to challenge both indicate that the regime of immigration detention is not ‘reasonably necessary’ for the administrative purpose of facilitating entry to and departure from Australia. This changes the character of immigration detention from non-punitive to punitive, and breaches the exclusive vesting of judicial power in Chapter III of the Constitution.

An acceptable regime of administrative detention would guarantee to each detainee as many of the rights of an ordinary citizen as possible, whilst permitting deprivation of the right to liberty and security of the person only to the extent that is demonstrably reasonable and necessary in all the circumstances. It would guard against, rather than invite, violations of other human rights.

The tests applied under international law and Australian law are fundamentally different. In Chapter I, the international test was shown to require that detention be both reasonable and necessary in all the circumstances. In Chapter III, the Australian test was shown to require that detention be ‘reasonably capable of being seen as necessary’. Apart from the very different interpretations of what is ‘reasonable’ and ‘necessary’ internationally and within Australia, the more fundamental point is the weakness of the Australian test.

International law requires that the imposition of detention be positively demonstrated to be both reasonable and necessary in all the circumstances, for each individual detained. In contrast, Australian law requires only that the legislation establishing the *regime* of immigration detention be reasonably capable of being seen as necessary – there is no requirement that detention be reasonable at all, and detention need not be actually necessary, so long as it is reasonably capable of being seen as necessary.

The weaker Australian test does not sit well with a Constitution which emphatically separates the judicial power from the other branches of government, and is based upon fundamental notions of the rule of law and liberal democratic principles. Nor does the Australian test compare favourably with the approach taken under international human rights law, which could beneficially be used to give proper effect to the separation of judicial power contained in the Australian Constitution.

Mary Crock has written that the High Court, “has returned to a more constrained and deferential approach to the review of migration cases – a trend that may reflect an upsurge in the community’s concern about illegal immigration.”²⁹⁰ It is suggested that a deferential approach is not appropriate when interpreting the Australian Constitution; that community concerns based at least partly on, “a crisis manufactured by the government to increase its electoral support,”²⁹¹ are inappropriate considerations; and that deference is highly inappropriate when human rights of fundamental importance are being violated.

To the extent that the High Court has adopted an approach that is deferential to the intentions of parliament but gives weak effect to protections enshrined in the Australian Constitution, it may be viewed as complicit in the violation of fundamental human rights which are constitutionally protected. It is the duty of the High Court, under the Australian Constitution, to jealously guard the exclusively judicial function of imposing punitive detention. Vigilance, not deference, is required when the legislative or executive arms of government are accused of attempting to impose punitive detention or the, “judicial power may be eroded...contrary to the clear intention of the Constitution.”²⁹²

²⁹⁰ Mary Crock, “Immigration Law” in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001), 333.

²⁹¹ Crock and Saul, above n2, 2.

²⁹² *Liyanage v The Queen* [1967] 1 AC 259, 291-2 (Lord Pearce).

The reasons why Australia should respect the obligations of international human rights law go beyond the fact that those obligations are legally binding on Australia internationally. International human rights law is justified by ideals such as freedom, integrity, dignity, justice and humanity.²⁹³ These ideals are much more than mere rhetoric.²⁹⁴ Not only are they ideals worth striving for, they are ideals embedded deeply in Australia's legal system.

The words of Nelson Mandela seem particularly appropriate in conclusion.

The oppressor must be liberated just as surely as the oppressed. A man who takes away another man's freedom is a prisoner of hatred, he is locked away behind the bars of prejudice and narrow-mindedness. I am not truly free if I am taking away someone else's freedom, just as surely as I am not free when my freedom is taken from me. The oppressed and the oppressor alike are robbed of their humanity.²⁹⁵

International human rights law requires Australia to treat with humanity all 'unlawful non-citizens'. This is not a concept which could be described as 'alien' to the Australian legal system. International human rights law offers the opportunity to define and develop existing fundamental principles of Australian law, and give full effect to the Australian Constitution's requirement that courts be the final arbiter of when a human being can be denied the fundamental right to liberty and security of the person.

²⁹³ These words were taken from the *Charter of the United Nations*, above n24, Preamble; *Universal Declaration of Human Rights*, above n21, Preamble; and Higgins, above n31, 96.

²⁹⁴ In contrast, the Australian government's attitude to human rights, "can be viewed as little better than rhetoric": Morgan, above n142, 63. The right to a fair trial was described as 'rhetoric' in *Dietrich* (1992) 177 CLR 292, 324-5 (Brennan J).

²⁹⁵ Nelson Mandela, *The Long Walk to Freedom* (1994), 751.

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