Should Australia's Judges Resign?

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Should judges who are required to apply law that infringes human rights resign, rather than participate in an unjust legal system? This question is relevant to Australia because of the scope that the Constitution affords to Parliament to enact legislation that is contrary to internationally-accepted human rights norms. This is particularly the case in relation to liberty of the person which can be abrogated without judicial authorisation in a wide range of circumstances and which, in the case of immigration detention, can be indefinite. The question of whether judges should resign was the subject of academic debate during the apartheid era in South Africa. The particular focus of that debate was the moral responsibility of judges in the face of legislation authorising detention without trial and the psychological harm detention inflicted on detainees, a question which also confronts judges in contemporary Australia. The conclusion in South Africa was that resignation would, at best, be of symbolic effect. However, as an alternative to this, judges have open to them the option of refusing to apply such legislation by developing a common law bill of rights. Theoretical justification for this could be based upon a restoration of the common law to the position as enunciated by Coke CJ in *Dr Bonham's Case*, in which it was held that the courts had the power to refuse to apply Acts of Parliament contrary to 'right reason'. An alternative justification could be derived from the new understanding of the rule of law emerging in the United Kingdom, to the effect that the doctrine requires not only that the law conform to formal rules of validity but also that it should comply with external human rights norms. Under this approach, the rule of law imposes on the courts a duty to restrain Parliament if it enacts oppressive legislation. This article argues that such a course should be adopted by courts in Australia, thereby enabling judges to resolve the moral dilemma presented by legislation that infringes human rights.

I INTRODUCTION

This article examines the question of whether judges who are required to apply law that infringes human rights should resign or whether there is an alternative to that course. Its title echoes that of an article published by South African academic John Dugard in 1983 during a debate with fellow constitutional law academic Raymond Wacks. The topic of the debate was whether, by applying unjust law, judges contributed to the legitimacy of an unjust legal order and, if they opposed such law, ought therefore to resign. Part II of the article serves as a prelude to the debate in South Africa, by discussing the resignation two decades earlier of Sir Robert Tredgold, Chief Justice of the then Federation of Rhodesia and Nyasaland. Part III gives an overview of the deprivation of human rights in South Africa during the apartheid era. Part IV discusses the Wacks-Dugard debate. Part V discusses breaches of human rights by the Australian legal system, with a particular focus on liberty of the person. Part VI poses the question of what courses of action are open to Australian judges in the face of legislation that intrudes upon personal liberty and whether resignation would be a fruitful option. Part VII offers an alternative to resignation in the form of a judge-made bill of rights drawing both

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upon common law doctrines of the 17th and on recent developments in rule of law theory. The article concludes in Part VIII.

II PRELUDE: THE RESIGNATION OF CHIEF JUSTICE TREDGOLD

The Federation of Rhodesia and Nyasaland was formed in 1953.[1] Its component elements were the British colonies of Nyasaland, Northern Rhodesia and Southern Rhodesia. The reasons for its formation were to create a strong economic bloc in central Africa in which the different strengths of each member could be combined.[2] The United Kingdom also hoped that the Federation would serve as a liberal counterweight to South Africa, which in the process of erecting the legislative edifice of apartheid. However, a fundamental problem underlying the Federation was the fact that the constitutional status of its constituent elements differed. Whereas Nyasaland and Northern Rhodesia were protectorates in which executive power was wielded by a Governor, Southern Rhodesia was a Crown Colony which had enjoyed responsible government since 1923. Legislative power was vested in a Legislative Assembly, elected under a heavily qualified franchise that excluded all but a small number of blacks from the voters' roll.[3] The government was headed by the colony's Premier who was responsible to the Legislative Assembly in accordance with the Westminster model.

Throughout its brief 10-year history, the federation was wracked by political disputes over its very existence. Although all three countries had overwhelmingly black populations, Southern Rhodesia had a white minority population which, although comprising only 7.5% of the total, constituted a far higher proportion than in the two protectorates.[4] Black political activists had opposed the establishment of the federation, fearing dominance by Southern Rhodesia, while Southern Rhodesian whites hoped that the Federation was an avenue towards full independence – without the need to change franchise qualifications.

Severe political unrest occurred in 1960,[5] in response to which the Southern Rhodesian legislature responded by enacting the *Law and Order (Maintenance) Act No 53 of 1960* which either removed or limited a wide range of civil liberties and the *Emergency Powers Act No 48 of 1960,* s 3 of which gave the government the power to declare a state of emergency and s 4(2)(b) of which empowered the government to detain any person whose detention appeared to the Minister of Justice and Internal Affairs to be expedient in the public interest. In addition, s 4(2)(a) of the Act conferred on the executive a power to restrict people to designated areas of the country, a power which was used to restrict people to areas so remote as to amount to detention under another name.[6] It was in response to the publication of these Bills that Sir Robert Tredgold, Chief Justice of the Federation, resigned, stating that[7]

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[1] For a comprehensive history of the federation see J.R.T. Wood, *The Welensky Papers – A History of the Federation of Rhodesia and Nyasaland* (Graham Publishing, 1983).

[2] Peter Baxter, *Rhodesia: Last Outpost of the British Empire: 1890 – 1980* (Galago, 2010) 249-50.

[3] Reginald Austin, *Racism and apartheid in southern Africa – Rhodesia* (The Unesco Press, 1975) 69-70.

[4] W V Brelsford (ed), *Handbook to the Federation of Rhodesia and Nyasaland* (Cassell, 1960) 783

[5] James Barber, *Rhodesia: Road to Rebellion* (Oxford University Press, 1967) 51. For a survey of oppressive legislation enacted in Southern Rhodesia see Amnesty International, *Prison Conditions in Rhodesia* (1966, Amnesty International) and Christopher Zimmerli, 'Human Rights and the Rule of Law in Southern Rhodesia' (1971) 20 *International and Comparative Law Quarterly* 239.

[6] Barber above n 5, 55-6.

[7] Anon, 'Resignation of the Rt. Hon. Sir Robert Clarkson Tredgold, Chief Justice of the Federation of Rhodesia and Nyasaland' (1961) 78 *South African Law Journal* 13. See also John Redgment, 'Plus ca

> The [Law and Order (Maintenance)] Bill outrages almost every basic human right, and is, in addition, an unwarranted invasion by the executive in the sphere of the courts. These are the custodians of individual rights and are my special responsibility.

and later that that the Bill would 'compel the courts to become party to widespread injustice.'[8] The significance of the fact that Tredgold resigned even before the Bills were passed served to emphasise the degree of repugnance he felt for the inroads it would make into civil liberties and for the erosion of judicial power it would cause, as well as the clarity of his view that to carry on in office would make him complicit in the operation of an unjust legal system. Although no other judge followed Tredgold, the precedent he set was referred to in the debate that arose two decades later in South Africa on the role of the judiciary in an oppressive legal order, to which this article now turns.

III INDEFINITE DETENTION IN SOUTH AFRICA

The policy of apartheid made South Africa synonymous with the denial of human rights. The legal rules by which the policy was implemented were entirely statutory in origin, and at odds with South Africa's Roman-Dutch common law, the principles of which are protective of individual liberty, as is indicated by a number of cases in which judges held that racial discrimination was unlawful under common law.[9] The legislative measures through which apartheid was established were in part enacted in order to displace these common law principles.[10]

The legislative edifice of apartheid covered almost every aspect of life, from where one could live, whom one could marry or have sexual relations with, which school one could attend and which transport and public facilities one could use. Furthermore, in order to suppress the political opposition that apartheid engendered, numerous pieces of security legislation were enacted that either severely limited or entirely abrogated civil liberties.[11]

Perhaps most egregious of all of these were various measures that provided for detention without trial of those who engaged in, or were suspected of being about to engage in, acts of political opposition.[12] Provisions authorising detention were found in a variety of statutes and were subject to frequent change, but they shared the common feature of the exclusion of the jurisdiction of the courts to pronounce upon the validity of detention or to grant the *interdictum de homine libero exhibendo* (the Roman Dutch equivalent of habeas corpus).[13] In addition, the statutes prohibited detainees being allowed visitors or access to a lawyer.

The first of these provisions was s 3 of the *Public Safety Act 3 of 1953* which empowered the government to declare a state of emergency and to issue such regulations as it considered 'necessary or expedient for the safety of the public', which it used to issue regulations permitting arrest without warrant and detention without trial.[14] Subsequently, Parliament enacted the *General Law Amendment Act 37 of 1963*, s 17 of which authorised the executive

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change .... Fifty Years of Judges in Southern Rhodesia, Rhodesia and Zimbabwe' (1985) 102 *South African Law Journal* 529, 532.

[8] Robert Tredgold, *The Rhodesia That Was My Life* (Allen & Unwin, 1968) 232.

[9] *R v Carelse* 1943 CPD 242, *Tayob v Ermelo Local Road Transportation Board* 1951 (4) SA 440 (A). See also the dissenting judgment of Gardener AJA in *Minister of Posts and Telegraphs v Rasool* 1934 AD 167, 185-7.

[10] *Reservation of Separate Amenities Act* 49 of 1953, ss 2 and 3.

[11] Lennox Hinds, 'Apartheid in South Africa and the Universal Declaration of Human Rights' (1985) 24 *Crime and Social Justice* 5.

[12] The ever-expanding scope of legislative authority to detain is traced in John Dugard, *Human Rights and the South African Legal Order* (1978, Princeton University Press) 108-23; Anthony Mathews, *Freedom State Security and the Rule of Law – Dilemmas of the Apartheid Society* (Juta & Co, 1986) 62-100.

[13] See *Wood and others v Ondangwa Tribal Authority and another* 1975 (2) SA 294 (AD) for a discussion of the remedy.

[14] Regulations 4 and 19, Proc 91 (GGE 6403 of 30 March 1960).

to arrest without warrant any person who it was suspected had committed offences against specified Acts or who had knowledge of such offences for the purpose of interrogation until the detainee had answered all questions to the satisfaction of the detaining officer. Although detention was in theory limited to 90 days, new 90-day orders could be issued in succession. The 90-day detention regime was replaced by 180-day detention contained in s 215*bis* of the *Criminal Procedure Act 56 of 1955*. The 180-day detention law became largely redundant following the enactment of the *Terrorism Act No 83 of 1967*, s 6(1) of which permitted a senior police officer to detain a person without charge if they had reason to believe that the person had either committed an offence under the Act or had any knowledge of such an offence and to keep them in detention for the purposes of interrogation.

The scope of state power to detain reached its zenith with the enactment of the *Internal Security Act 74 of 1982*. Section 28(1)(b) authorised indefinite preventative detention *inter alia* on the extraordinarily broad and subjectively determined ground that the Minister of Law and Order was satisfied that the detainee would endanger the security of the state or the maintenance of law and order, without reference to suspicion that the detainee had our would commit any specific offence. Section 29 of the Act re-enacted s 6 of the *Terrorism Act* by providing that where the police suspected that a person had committed or would commit specified offences, or had knowledge of the commission of an offence or the intended commission of an offence by another person, the first person could be detained for the purpose of interrogation until the police were satisfied that the said person had satisfactorily replied to all questions or that no useful purpose would be served by their further detention.

The psychological effects of indefinite detention in South Africa were the subject of several studies. One of them described the mental condition of detainees as reflecting the D.D.D. syndrome – that is a syndrome of debility, dependency and dread, in which a person experiences extreme helplessness, malleability in the hands of the authority which controls his fate and a feeling of dread both for himself and his family.[15] This in turn leads to mental confusion, impaired concentration and suicidal tendencies. A study by Mathews and Albino found that the despair induced by the indefinite nature of the detention that was a key contributor to the psychological injury it inflicted, and criticised judges for being party to a system that allowed human rights to be abused in this way.[16] The study noted that had the detention been of limited duration, and had the detainee had the prospect of eventual release before some specified date in the same way as does a convicted prisoner, the purpose of the detention – which, apart from isolating opponents of the regime from society was to get them to speak to their interrogators - would have been undermined. In other words, the study concluded that the infliction of psychological injury was a key objective, rather than a by-product, of the process.

The reaction of the judiciary in South Africa to the over-ride of common law rights by apartheid legislation reflected a broad spectrum of what was possible within the parameters of a system based on parliamentary supremacy.[17] When faced with statutory ambiguity, judges who were ideologically aligned with apartheid resolved it in a manner supportive of government policy, even if it was open to them to apply the presumption that statutes are to be interpreted in such a way as to avoid deprivation of individual rights.[18] By contrast, other

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[15] J J Riekert, 'The D.D.D. syndrome - Solitary confinement and a South African Security Law Trial' in A N Bell and R D A Markie (eds), *Detention and Security Legislation in South Africa* (University of Natal, 1985) 121.

[16] A. S. Mathews and R. C. Albino, 'The Permanence of the Temporary – An Examination of the 90- and 180-Day Detention Laws' (1966) 83 *South African Law Journal* 16.

[17] John Dugard *Human Rights and the South African Legal Order* (Princeton University Press, 1978) 367.

[18] See, for example *R v Pitje* 1960 (4) SA 709 (AD), *Minister of the Interior v Lockhat and others* 1961 (2) SA 587 (AD), *Rossouw v Sachs* 1964 (2) SA 551, *Schermbrucker v Klindt N.O.* 1965 (4) SA 606 (AD), *South Afrucan Defence and Aid Fund and another v Minister of Justice* 1967 (1) SA 263 (AD) and *Sobukwe and another v Minister of Justice* 1972 (1) SA 693 (AD). For a survey of these cases see John

judges used the discretion conferred on them by rules of statutory interpretation and principles of administrative law to limit, to the extent that they were able, the effect of legislation which infringed fundamental rights,[19] – although in such instances the government was quick to enact legislation to block loopholes thus identified. In other cases, when faced with statutes that allowed no scope for interpretation, some judges made statements from the bench that were critical of apartheid and in which they declared that they were applying unjust legislation reluctantly. Typical of this was the statement by Didcott JA in *In re Dube*[20] in which he said

> Parliament has the power to pass the statutes it likes, and there is nothing the courts can do about that. The result is law. But that is not always the same as justice. The only way that Parliament can ever make legislation just is by making just legislation

The tensions faced by the judiciary in South Africa led to a famous academic debate which confronted squarely the question of what the moral responsibility of judges was when called upon to apply statutes antithetical to civil liberty enacted in an unjust legal order.

IV JUDGES AND UNJUST LAW – THE DEBATE IN SOUTH AFRICA

The origins of the debate in South Africa on how judges should respond to the unjust legal order lay in an inaugural lecture entitled 'Judges and Injustice' by Raymond Wacks on his appointment as professor at the School of Law at the University of Natal, Durban, in 1983, which was subsequently published in the *South African Law Journal*.[21] In this article, Wacks argued that the ever-diminishing scope of discretion left to judges by legislation, and the ever-widening powers granted by legislation to the executive, meant that judges had been reduced to being 'impotent spectators of administrative action' which was a 'grotesque distortion of their calling.'[22] What Wacks was essentially saying was that the doctrine of parliamentary sovereignty meant that judges had become the mere cyphers of the other two branches of government. This led him to state that[23]

> It is therefore self-evident that a judge who is unable morally to reconcile himself to the injustice of the system willy-nilly lends legitimacy to it.

and that[24]

> Of course, judicial independence, the Rule of Law, freedom and equality of the individual, are ideals of supreme importance; but the law, by violating them, fundamentally alters the very nature of the legal system. Of course, judges adopt the positivist view that Parliament is sovereign and that the law is what Parliament declares it to be, this is a pervasive notion in repressive law (though it is not exclusive to it). Of course, the law may be employed to control arbitrary power, but the courts are paralysed by legislation in almost every area pertaining to civil liberty. It is in this context that the judge's role (as well as the function of other elements in the legal system) needs to be analysed and evaluated.

Dugard, *Human Rights and the South African Legal Order* (1978, University of Princeton Press) 303-65.

[19] See, for example *R v Abdurahman* 1950 (3) SA 136 (AD), *R v Lusu* 1953 (2) SA 484 (AD), *R v Ngwevela* 1954 (1) SA 123 (AD), *Saliwa v Minister of Native Affairs* 1956 (2) SA310 (AD), *Wood and others v Ondangwa Tribal Authority and another* 1975 (2) SA 294 (AD), *Magubane v Minister of Police* (1982) 3 SA 542 (N), *Hurley v Minister of Law and Order* 1985 (4) SA 709 (D), *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) and *Rikhoto v East Rand Administration Board and another* 1982 (1) SA 257 (W).

[20] 1979 (3) SA 820 (N), 821.

[21] Raymond Wacks, 'Judges and Injustice' (1983) 101 *South African Law Journal* 266.

[22] Ibid 279

[23] Ibid 280.

[24] Ibid 281-2.

This led Wacks to his ultimate conclusion, which he supported with a reference to the precedent set by Tredgold CJ in the Federation of Rhodesia and Nyasaland, and which he expressed as follows:[25]

> If the judge is to square his conscience with his calling, there would appear to be no choice open to him but to resign. How have I arrived at this conclusion? First, by rejecting the positivist assumption that judges have discretion in the strong sense. Secondly, by recognizing that South Africa conforms in many ways to the model of a repressive legal system. Thirdly, by accepting that a judge in such a system who is unable to reconcile his moral standpoint with the law has three choices: to protest, to lie or to resign. And fourthly (by expressing doubts on whether protests would bear fruit, and by pointing to the limitations of the judicial lie—caused principally by the severe constraints of the courts' jurisdiction) concluding that there is no compelling alternative to resignation.

In response to Wacks, John Dugard published an article entitled 'Should Judges Resign? A Reply to Professor Wacks'[26] in which he argued that, despite the relative powerlessness of the courts in the face of the doctrine of parliamentary sovereignty upon which the South African constitution was based, judges still had sufficient room, applying the liberal principles of Roman-Dutch law and rules of statutory interpretation, to mitigate the harshness of legislation that infringed individual liberty.[27] Dugard conceded that[28]

> It may be that the scope for judicial discretion is so restricted that the good that a moral judge may do is outweighed by the harm done by his participation in and legitimation of the system.

However, his counter to this was that resignation of judges 35 years after apartheid was introduced would be 'too little and too late' and would be of minimal impact,[29] and that the question was[30]

> … whether judges and lawyers do more for justice in South Africa by actively participating in the system than by withdrawing from it and thereby depriving it of some measure of legitimacy.

This led him to conclude that since activism on the part of judges and lawyers might advance the cause of justice (even as it conferred legitimacy on the legal order) it was the duty of lawyers to continue in their role of offering their clients such defence as was possible and on judges to become sensitive to human rights values and to use them – again where possible – to fill the gaps left by unjust statute law. That such consciousness-raising could occur was not mere wishful thinking – many years after the demise of apartheid Dugard credited Mathews', Albino's and others' criticism of judges in the 1970s with drawing the attention of judges to their moral responsibility, which in turn led some of them to adopt a more activist role in the 1980's in which they endeavoured wherever possible to read race and security legislation down in accordance with the values of the common law.[31]

Wacks published a brief rejoinder to Dugard.[32] In it argued that the zone of discretion available to the just judge was so narrow as to give little scope for the operation of the values

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[25] Ibid 282-3.
[26] John Dugard, 'Should Judges Resign? A Reply to Professor Wacks' (1983) 101 *South African Law Journal* 286.
[27] Ibid 289-90.
[28] Ibid 291.
[29] Ibid 292.
[30] Ibid 293.
[31] John Dugard, 'Tony Mathews and Criticism of the Judiciary' in Marita Carnelly and Shannon Hoctor (eds), *Law, Order and Liberty - Essays in Honour of Tony Mathews* (2011, University of Kwa-Zulu Natal) 3, 6-7.
[32] Raymond Wacks, 'Judging Judges: A Brief Rejoinder to Professor Dugard' (1983) 101 *South African Law Journal* 295.

of the common law and that were a substantial number of judges to resign, it might have significant impact – although that of course was a matter of conjecture.

In the event, no South African judge did resign but the Wacks-Dugard debate had the effect of encouraging judges to enter into off-the-record debates about the future of the legal order[33] prior to the end of apartheid in 1989 and the holding of elections in 1992. The debate in South Africa remains relevant as a parallel to draw upon in discussing what the response of judges in other jurisdictions should be when their judicial duty compels them to apply law that is inimical to fundamental rights. It is to the situation in Australia that I now turn.

V HUMAN RIGHTS IN CONTEMPORARY AUSTRALIA – THE SPECIFIC QUESTION OF LIBERTY OF THE PERSON

A *Limited constitutional protection for human rights*

To what extent does the legal system in Australia put judges in the position of having to apply unjust law? The answer to this is a function of the relative absence – when compared to other liberal democracies – of constitutional protection for human rights. The Constitution exhibits inconsistency when it comes to rights protection. On the one hand, it gives express protection to five rights[34] and has been found to give implied protection to three more,[35] while on the other it denies protection to the many other rights recognised in the various international human rights documents that Australia has ratified. The reason for this lies in the absence of debate on broad questions of principle, in particular on the power of the state vis-à-vis the individual, at the Constitutional Conventions of the 1890s. Such rights as were included in the Constitution were incorporated not in order to give effect to any underlying theory but rather to address concerns on the part of the colonies about the balance of power in the federation and in order to defuse religious divisions that were then current. Nevertheless, the question should be asked as to why, if such rights as have been included in the Constitution have not unduly disturbed the balance between Parliament and the courts, the remining body of fundamental human rights ought not also be constitutionalised? Also of note is the contradiction inherent in the views of conservative academic commentators such who defend the constitutional right to some rights – for example freedom of religion[36] - while rejecting constitutional protection for other fundamental rights.[37]

The absence of constitutional restraints has enabled legislatures to enact a wide range of statutes which trench upon fundamental rights. In a report on rights and freedoms published in 2016, the Australian Law Reform Commission found numerous examples of Commonwealth legislation which infringed a range of rights including freedom of expression, freedom of association, the right to the presumption of innocence, the privilege against self-incrimination, freedom of movement and the right to a fair trial.[38] Space does not permit an analysis of the approach of the courts to the interpretation of all this legislation, so this article focuses attention on freedom of the person, in particular on the ethical questions posed for judges by legislation that imposes mandatory detention on refugees.

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[33] Dugard, above n 31, 7-8.

[34] The right to compensation when property is acquired by the Commonwealth (s 51(xxxi), freedom of inter-State trade commerce and intercourse (s 92), the right to a jury trial for indictable Commonwealth offences (s 90), the right not to be discriminated against on grounds of residence in another State (s116) and freedom of religion (s 118).

[35] Freedom of political communication (*Australian Capital Television v Commonwealth* (No.2) (1992) 177 CLR 106), the right to vote (*Roach v Electoral Commissioner* (2007) 233 CLR 162) and a qualified right to due process (*Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

[36] Greg Craven, 'Deliver us from hostility to freedom of faith,' *The Australian* (Sydney) 12 October 2018.

[37] Greg Craven, *Conversations with the Constitution – Not Just a Piece of Paper* (University of New South Wales Press, 2004) 181-8.

[38] Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*, Report No 129 (2016).

B *The decision in Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*

The origin of the problem that forms the subject of this article lies in the High Court's decision in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.[39] In *Lim*, Brennan, Deane and Dawson JJ held that while involuntary detention by the state is penal in character and, under the doctrine of separation of powers, can occur only as the result of a determination of criminal liability by the courts,[40] this was subject to a number of exceptions, including detention after arrest pending a criminal trial (noting that this was under the ultimate supervision of the courts), detention in cases of infectious disease or mental illness, the exercise of powers by military tribunals, and Parliament's exercise of its contempt powers, all of which the executive could effect without judicial authorisation.[41] In addition to these, and arising from the facts of *Lim* itself, the justices held that the power of the executive to detain aliens 'is neither punitive in nature nor part of the judicial power of the Commonwealth,' although they also stated that the power to detain under the *Migration Act 1958* (Cth) was[42]

> … limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered. On the other hand, if the detention which those sections require and authorize is not so limited, the authority which they purportedly confer upon the Executive cannot properly be seen as an incident of the executive powers to exclude, admit and deport an alien. In that event, they will be of a punitive nature and contravene Ch. III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates.

In subsequent decisions the court held that the executive might detain people for a number of other purposes,[43] including public safety where noxious materials have escaped, drug treatment, detention pending extradition (although extradition would be as the result of judicial process), detention for a person's own welfare, detention during wartime when the executive believes a person to be disloyal, detention where a person is believed to pose a national security risk, detention where a person poses a threat by virtue of abnormality falling short of mental illness and detention for the safety and welfare of the community in general. Many of these – in particular the last five – are cast in extraordinarily broad language and raise the spectre of executive detention for reasons which are wholly subjective and, therefore, arbitrary. Furthermore, in a number of subsequent cases members of the court have held that the list of circumstances in which non-punitive detention by the executive is not closed.[44] Would the High Court uphold as non-punitive legislation which provided for detention in order to prevent some broad, yet arguably important, interest such as the prevention of social unrest, which was the reason for the enactment of the *Law and Order (Maintenance) Act* and the *Emergency Powers Act* in Southern Rhodesia? Indeed two of the categories which case law has already identified as being ones in which the executive may detain - detention where a person is believed to pose a national security risk and detention for the safety and welfare of the community in general – reflect the typical language used to justify detention by the

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[39] (1992) 176 CLR 1.
[40] Ibid 27.
[41] Ibid 28.
[42] Ibid 33. Similar reasoning was also advanced by McHugh J at 65-6, 71. The fact that the duration of detention was limited to such period as was required for processing an application or deportation was also emphasised by the court in *Plaintiff M76/2013 v Minister for Immigration, Cultural Affairs and Citizenship* (2013) 251 CLR 322, 369 (Crennan, Bell and Gageler JJ).
[43] These categories and the cases in which they were identified are listed in George Williams and David Hume, *Human Rights and the Australian* Constitution (Oxford University Press, 2nd ed, 2013) 345-6. For a discussion of them see Jeffrey Gordon, 'Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from Non-Criminal Detention' (2012) 36 *Melbourne University Law Review* 41.
[44] Williams and Hume, above n 43, 346 n 149.

government in Southern Rhodesia and by governments in other countries where civil liberties have been curtailed. In light of this, the danger posed by executive detention can readily be appreciated.

There are three reasons why the reasoning in *Lim* (and subsequent cases in so far as they have applied or expanded upon *Lim*) is problematic. The first is the way in which the court used the word 'punitive.' Whether an act – in this case detention – is punitive depends on one's perspective. In the sense that the High Court uses the term, whether detention is punitive depends on the intention of the detaining authority, whereas from the perspective of the person subject to detention, whether detention is punitive depends on its effect. Since detention obviously always involves a deprivation of a right, one can say that, from the perspective of the detained person, it is always punitive, and that the concept of 'non-punitive detention' is therefore an oxymoron. This applies even if the detaining authority is acting with beneficial intent – for example, to protect a person who is mentally ill from harming themselves. In such instances the question should become one of determining whether achievement of the beneficial purpose outweighs the limitation of the right to personal liberty, a question which obviously requires adjudication by a court. The way the High Court uses the word 'punitive' has the effect of immunising from judicial oversight a wide range of measures authorising detention, simply on the basis of what is in the mind of the detaining authority. Furthermore, in *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*[45] the court held that detention does not become punitive even if its conditions are inhumane – a striking illustration of how different is the meaning of the word 'punitive' when used by the court as compared to how it would be used by a person actually experiencing detention.

This brings one to the second problem with *Lim* and its progeny, which is the failure of the courts to enunciate any underlying theory or set of principles that would justify executive detention.[46] It appears that the court has simply identified a list of circumstances in which such detention has historically been permitted. Yet the fact that things have occurred historically does not, of course, provide justification for why they *should* occur, still less why they should stand as exceptions to the important general principle that separation of powers requires that a person not be deprived of liberty except by judicial process. Why should supervision by the courts be more lax in cases of non-punitive detention than they are in cases of punitive detention? The effect on the person is the same, but the sting more severe in the case where the subject of the detention has committed no crime. There is terrible irony in the fact that a person who commits a crime is arguably in a fact better position than one who is detained for some non-punitive purpose. The former has the comfort of knowing that his or her deprivation of liberty resulted from an application of its mind by a court and that that the duration of that deprivation of liberty will be fixed, whereas the latter has committed no offence and, as we shall see, may endure detention of limitless duration.

The decision in *Lim*, and in particular the absence of any underlying principle that could act as a limit on the capacity of the state to impose non-punitive detention, means that any of the Commonwealth's legislative powers could be used as the basis for non-judicially supervised detention. As examples of this, in *Al-Kateb v Godwin*[47] Gummow J said that that on the basis of the *Lim,* Parliament could enact a law under s 51(xxvii) providing for the administrative detention of bankrupts, or one under s 51(xi) confining everyone to their home on census night. Why the High Court abandoned the field to the executive in relation to these (potentially expanding) categories of detention is a mystery. The court could have said that separation of powers requires that deprivation of liberty is lawful only if grounds there for are proved to a court. Its failure to do so means, with respect, that the decision in *Lim* must be considered a blot on the legal landscape.

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[45] (2004) 219 CLR 486, 499 (Gleeson CJ).
[46] Williams and Hume, above n 43, 346, 350-1.
[47] (2004) 219 CLR 562, [133].

The third problem that arises from *Lim* is that by immunising a whole range of categories of detention from judicial oversight, it laid the way open for widespread deprivation of liberty which might be unlawful even in terms of the authorising legislation. The consequences of this are dire for people unfortunate enough to be caught up in the machinery of executive power: After the chance discovery that an Australian citizen, Vivian Alvarez Solon, had been deported because she was unable to communicate after a head injury, and that another citizen, Cornelia Rau, had been held in immigration detention after she was unable to identify herself because of mental illness, the Commonwealth Ombudsman was asked to conduct an investigation into immigration detention. His report found that no less than 247 citizens and lawful residents had been unlawfully detained under the *Migration Act 1958* (Cth) over a period of 14 years.[48] The fact that the executive has the power to detain people under various pieces of legislation, Commonwealth and State, without needing to prove reasonable grounds – or even the identity of the detainee - to a court, creates an obvious risk of widespread denial of rights, as the Ombudsman's investigation shows. The fact that, in theory, a detainee might be able to challenge a detention decision by means of judicial review provides cold comfort – for example, the mental condition of the detainee may be such as not to enable them to challenge their detention, as was so in the cases of Solon and Rau. Furthermore, it is contrary to the presumed liberty of a person under the common law that the detainee should have the burden of challenging detention rather than the detaining authority having the burden of proving its lawfulness.

C *Lim's descendants*

It is the application of *Lim* to migration law that has attracted the greatest controversy and has generated a significant amount of litigation in the High Court, particularly in relation to those provisions of the *Migration Act 1958* (Cth) which mandate detention of migrants deemed to have arrived in Australia unlawfully. Section 189 of the Act requires that an officer who knows or reasonably suspects that a person is an unlawful non-citizen to detain that person. Section 196(1) states that such a person must be kept in immigration detention until removed from Australia, deported or granted a visa. Section 198 of the Act governs removal from Australia. Its various sub-sections govern a number of circumstances in which a person must be removed from Australia 'as soon as reasonably practicable.'

As noted above, the majority in *Lim* stated that detention under the Act was 'limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered.' [49]

Similarly, in *Plaintiff S4/2014 v Minister for Immigration and Border Protection*[50] the court held that detention could only be for

> … one of three purposes: the purpose of removal from Australia; the purpose of receiving, investigating and determining an application for a visa permitting the alien to enter and remain in Australia; or, in a case such as the present, the purpose of determining whether to permit a valid application for a visa.

So far as the duration of detention is concerned, in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*[51] the court stated that the decision in *Lim* required that the

> … the period of detention be limited to the time necessarily taken in administrative processes directed to the limited purposes identified. The temporal limits and the

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[48] Commonwealth Ombudsman, *Lessons for public administration – Ombudsman investigation of referred immigration cases*. (2007).

[49] (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ).

[50] (2014) 253 CLR 219, [26] (French CJ, Hayne, Crennan, Kiefel and Keane JJ). See also *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 [138] (Crennan, Bell and Gageler JJ) and *Plaintiff M96A /2016 v Commonwealth* (2017) 261 CLR 581 [21] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ), [126] Hayne J.

[51] (2013) 251 CLR 322, [138] (Crennan, Bell and Gageler JJ).

> limited purposes are connected such that the power to detain is not unconstrained.

and that[52]

> The constitutional holding in Lim was therefore that conferring limited legal authority to detain a non-citizen in custody as an incident of the statutory conferral on the executive of powers to consider and grant permission to remain in Australia, and to deport or remove if permission is not granted, is consistent with Ch III if, but only if, the detention in custody is limited to such period of time as is reasonably capable of being seen as necessary for the completion of administrative processes directed to those purposes.

In *Plaintiff S4/2014 v Minister for Immigration and Border Protection*,[53] the court held that

> Because detention under the Act can only be for the purposes identified, the purposes must be pursued and carried into effect as soon as reasonably practicable…. The duration of any form of detention, and thus its lawfulness, must be capable of being determined at any time and from time to time. Otherwise, the lawfulness of the detention could not be determined and enforced by the courts, and, ultimately, by this Court.

The court further held that[54]

> … consideration of whether a protection visa may be sought by or granted to the plaintiff had to be undertaken and completed as soon as reasonably practicable. Departure from that requirement would entail departure from the purpose for his detention and could be justified only if the Act were construed as permitting detention at the discretion of the Executive. The Act is not to be construed as permitting detention of that kind.

Unfortunately, the limitations that these dicta appear to impose on the duration of detention proved to offer little protection to individual liberty when the question of what the legal position would be if the executive had not achieved any of the statutory processes contained in s 196(1) within a reasonable time was considered by the court in *Commonwealth of Australia v AJL20*.[55] The court held that a detainee could be held in detention 'until' one of those purposes had *actually* been achieved, not until one of them *ought reasonably* to have been achieved. In other words, the failure of the executive to fulfil any of the purposes for which detention was authorised within a reasonable time did not provide grounds for release of a detainee.[56] The court held that in such circumstances, the appropriate remedy was mandamus.[57] The court held that the fact that in *Plaintiff S4/2014 v Minister for Immigration and Border Protection*[58] the court had said that the duties of the executive under s 196(1) had to be performed as soon as was reasonably practicable did not mean that failure to do so changed the purpose of the detention in such a way as to make it unlawful.[59]

Even more controversial has been the question of whether detention is lawful when it becomes evident that there is no real likelihood of a person being able to be removed from Australia. In *Al-Kateb v Godwin*[60] the High Court considered the detention of the appellant who had unsuccessfully applied for a protection visa and who had asked to be removed from Australia. This was one of the circumstances in which s 198 of the Act required that the detainee be removed from Australia as soon as was reasonably practicable. However, the appellant was

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[52] Ibid [140].
[53] (2014) 253 CLR 219, [28] - [29] (French CJ, Hayne, Crennan, Kiefel and Keane JJ).
[54] Ibid [34].
[55] (2021) 391 ALR 562.
[56] Ibid [46] – [51] (Kiefel CJ, Gageler, Keane and Steward JJ).
[57] Ibid [52].
[58] (2014) 253 CLR 219, [28] - [29] (French CJ, Hayne, Crennan, Kiefel and Keane JJ).
[59] Ibid [68] – [70].
[60] (2004) 219 CLR 562.

stateless, and the Commonwealth could not get any other country to accept him. The question was whether it was lawful for him to be detained indefinitely. A majority of the Court, applied *Lim* to hold that the appellant's indefinite detention was necessary for the non-punitive purposes of either removing non-citizens or of separating them from the community until they could be removed, and that this was so even if it was not 'reasonably practicable' for them to be removed.[61]

The combined result of these decisions is that detention under immigration legislation is lawful even if the executive has not discharged within a reasonable time the purposes for which such detention may occur and that detention may continue indefinitely even if it is not possible for any of those purposes to be achieved.

The willingness of the High Court in *Lim* to accept that the existence of a wide range of categories in which the executive may detain without judicial authority, in *AJL20* that migration detention may continue even if the executive has not achieved its purpose within a reasonable time and in *Al-Kateb* that a person may be detained indefinitely is all the more surprising given how jealously the court has guarded separation of powers in other cases. To take an obvious example, in *Kable v Director of Public Prosecutions (NSW)*,[62] the court declared unconstitutional a legislative scheme in terms of which judges of the New South Wales courts were empowered to order the continued detention of the appellant after the completion of his sentence if they were reasonably satisfied on a balance of probabilities that the appellant was more likely than not to commit a serious offence. The court held that the vesting of such a power in the courts was incompatible with the judicial function and that its exercise would cause the confidence of the public in the integrity of the courts to be diminished, because it involved the detention of a person for what he might do rather than for what he had done.[63] As McHugh J stated[64]

> The Act seeks to ensure, so far as legislation can do it, that the appellant will be imprisoned by the Supreme Court when his sentence for manslaughter expires. It makes the Supreme Court the instrument of a legislative plan, initiated by the executive government, to imprison the appellant by a process that is far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person. The Act expressly removes the ordinary protections inherent in the judicial process. It does so by stating that its object is the preventive detention of the appellant, by removing the need to prove guilt beyond reasonable doubt .... The Act is thus far removed from the ordinary incidents of the judicial process. It invests the Supreme Court with a jurisdiction that is purely executive in nature.

It is difficult to understand why, if the legislative scheme struck down in *Kable* was found to be inconsistent with separation of powers, legislation which permits the executive to detain without any judicial authorisation at all in the categories identified in *Lim* and subsequent cases does not offend against the doctrine to a far greater degree. Equally, if the scheme in *Kable* was invalidated on the ground that it reduced the role of the courts to that of a rubber stamp for the executive, surely the conferral of a power on the executive to detain under the *Migration Act 1958* (Cth) amounts to a far greater intrusion by Parliament into the judicial function in that once it has been determined that an asylum-seeker falls within the ambit of the section, the courts have no option but to uphold his or her indefinite detention, irrespective of whether that detention is reasonably justifiable?

D *Detention, deterrence and psychological harm*

As we saw in Part III of this article, a key objective of indefinite detention in South Africa was to break the detainee psychologically in order to achieve the objective of making the detainee

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[61] Ibid 584-95 (McHugh J), 647-50 (Hayne J), 657-61 (Callinan J) and 662-3 (Heydon J).
[62] (1996) 189 CLR 51.
[63] Ibid 96-7 (Toohey J), 106-07 (Gaudron J), 120-4 (McHugh J), 132-4 (Gummow J).
[64] Ibid 122.

speak. The harmful psychological effects of detention, documented by Mathews and Albino,[65] was therefore integral to its effectiveness.

There is voluminous research containing evidence to the effect that mandatory detention of migrants by the Australian government causes severe psychological harm.[66] Perhaps most damning of all was a finding in 2013 by the United Nations Human Rights Committee that the policy of indefinite detention constituted cruel, inhuman or degrading treatment, contrary to Article 7 of the *International Covenant on Civil and Political Rights* and that the failure to treat detainees with dignity violated Article 10 of the same Convention.[67] In 2015 the United Nations found that Australian was in breach of the *International Convention Against Torture* because of its treatment of child detainees and the violence to which detainees in general were exposed.[68] In 2018 Medecins Sans Frontieres issued a report stating that the psychological harm inflicted on detainees was akin to that sustained by people who had been subjected to torture.[69] There are obvious parallels between the mental harm suffered by those held in detention by the Australian government and those who were detained under apartheid in South Africa. A similar parallel can also be found between the defiant attitude shown by the South African government in response to criticisms of apartheid by the United Nations – for example, Prime Minister John Vorster memorably said that United Nations criticism of South Africa was 'devoid of all sense and substance'[70] – and the attitude of Australian governments to adverse reports by that organisation – for example Prime Minister Tony Abbott saying that Australia was 'sick of being lectured to by the United Nations' after the publication of the report which found that Australia had breached the *International Convention Against Torture*.[71]

It is notorious that one of the purposes of immigration detention is to deter refugees from travelling to Australia. This is key to understanding both the cause and impact of the psychological harm suffered by detainees. Deterrence has been a consistent theme of government communication to would-be asylum-seekers, who are told that their journey will end in immigration detention.[72] That deterrence is an objective of mandatory detention has been openly stated by the government. As long ago as 1994, the Department of Immigration and Ethnic Affairs conceded that deterrence was incidental to the border control system.[73]

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[65] Mathews and Albino, above n 16.

[66] Jane McAdam and Fiona Chong, *Refugee Rights and Policy Wrongs* (2019, University of New South Wales Press) 104-09, 237 n 29.

[67] United Nations Human Rights Committee, *FKAG v Australia*, UN Doc CCPR/C/108/D/2094/2011, 26 July 2013, [3.12]; United Nations Human Rights Committee, UN Doc CCPR/C/108/D/2136/2012, 25 July 2013, [3.14].

[68] United Nations Office for the Commissioner for Human Rights, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Addendum: Observations on communications transmitted to Governments and replies received*, UN doc A/HRC/28/68/Add.1 (2015), [19].

[69] Medecins Sans Frontiere,s *Indefinite Despair - The tragic mental health consequences of offshore processing on Nauru*, 2 December 2018 https://www.msf.org/indefinite-despair-report-and-executive-summary-nauru.

[70] Kathleen Teltsch, 'South Africa is Condemned by U.N.' *The New York Times* (New York), 23 December 1976.

[71] Lisa Cox, 'Tony Abbott: Australians 'sick of being lectured to' by United Nations, after report finds anti-torture breach' *The Sydney Morning Herald* (Sydney), 10 March 2015.

[72] See Sharon Pickering and Leanne Weber, 'New Deterrence Scripts in Australia's Rejuvenated Offshore Detention Regime for Asylum Seekers' (2014) 39 *Law & Social Inquiry* 1006 and Caroline Fleay et al, 'Missing the Boat: Australia and Asylum Seeker Deterrence Messaging' (2016) 54 *International Migration* 60.

[73] Parliament of Australia, Joint Standing Committee on Migration *Asylum, Border Control and Detention* (1994) [4.12].

Similarly, during his tenure as Minister for Immigration, Philip Ruddock Attorney General stated that[74]

> . detention arrangements ...have been a very important mechanism for ensuring that people are available for processing and available for removal, and thereby a very important deterrent in preventing people from getting into boats ...

Similarly, while serving as Attorney-General he stated that[75]

> ... retaining the policies of excision, offshore processing and mandatory detention that act as a powerful deterrent to unauthorised arrivals.

Despite this, the courts have not characterised detention as having a deterrent purpose – a finding which would, on the High Court's own definition of the difference between punitive and non-punitive detention, in terms of which detention which has deterrence as one of its principal objects is punitive[76] - have led to a finding that migration detention was punitive and thus not lawful without judicial authorisation.

What is crucial to understand is that this deterrent effect is achieved not only by the fact that migrants will be placed in mandatory indefinite detention (a practice that sets Australia apart from other liberal democracies which impose time limits on detention)[77] but also by intentionally creating a psychologically damaging environment for them while they are in detention. In the words of one former Department of Immigration Officer, conditions in detention were designed to achieve[78]

> ... the deliberate and intentional removal of hope... As many asylum seekers flee countries, which are so dangerous that death is a very real and present fear, the only other way to create a meaningful deterrent in practice, is to actively remove a person's sense of hope. The intention is that these hopeless, broken people will then send a message back to any family members or friends who might be in transit towards Australia that it isn't worth coming.

It is therefore clear that whatever formal legal purpose mandatory detention serves under the *Migration Act 1958* (Cth), a key policy purpose is deterrence, and a major part of the deterrent effect is the cruelty of the system and the harm it inflicts. In other words, just as the psychological harm suffered by detainees in South Africa was an important component of detention and not merely an unfortunate by-product, so too in the case of migration detention in Australia the harshness of its conditions is designed to induce current detainees to give up their claims for asylum and, equally importantly, to deter other refugees from seeking asylum. In other words, the adverse mental effect of unending detention is an essential objective of the policy, because it is that prospect in which the deterrent effect lies. Therefore it can be said that, as in the case of political detainees in South Africa, a key purpose of immigration detention is the infliction of psychological harm. The harsher the regime and the greater the hopelessness it engenders the more effective it is in achieving its objective. Furthermore, as was held in *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs,*[79] detention remains lawful even if it crosses the line into inhumanity. If, as one must surely agree, the enforcement of legislation which authorised detention which caused psychological harm to detainees in South Africa was damnable, so too must one agree that the inhumanity of the conditions to which asylum-seekers are subject is something which presents a moral question which judges in Australia must answer. If one can agree that the

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[74] ABC Radio, 'Interview on the treatment of children in detention,' *Radio National Breakfast*, 1 August 2002.

[75] Joint Press Release, Attorney-General The Hon Philip Ruddock and Minister for Justice and Customs, Senator The Hon Christopher Ellison 'Strengthening our Borders,' E 140/04, 27 September 2004.

[76] *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, [61] (McHugh J).

[77] McAdam and Chong, above n 66, 95-6.

[78] Greg Lake 'What Kind of Nation are we Building?' *Asylum Insight* (19 January 2015) <https://www.asyluminsight.com/c-greg-lake>.

[79] (2004) 219 CLR 486, 499 (Gleeson CJ).

infliction of devastating psychological harm though prolonged detention described by Mathews and Albino in South Africa was repugnant to the rule of law, why should one not reach the same conclusion in relation to mandatory indefinite detention under the *Migration Act 1958* (Cth)?

VI SHOULD AUSTRALIA'S JUDGES RESIGN?

None of the foregoing is to suggest that breaches of rights in Australia match either the seriousness or the scope of breaches that occurred in South Africa, but the indisputable fact remains that aspects of Australian law breach a significant number of rights to a serious extent, and that therefore the moral responsibility of judges in enforcing such laws is, in comparison to judges in those historical circumstances, one of degree rather than of type. The scheme of mandatory detention authorised by the *Migration Act 1958* (Cth) which is the focus of this article, is arguably the most egregious of these laws.

If the law as stated in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[80] to the effect that there are a wide number of grounds upon which the executive can detain without judicial supervision, in *Commonwealth v AJL20* to the effect that detention remains lawful even if the executive has not achieved its statutory purpose within a reasonable time and in *Al-Kateb v Godwin* to the effect that detention may be of limitless duration is correct, and that the judges in those cases (or at least those in the majority) had no option but to find as they did (which one must presume, in light of the judicial oath, discussed below) then a moral dilemma arises for Australian judges just as it did for judges in South Africa.

In *Al-Kateb*, Hayne J, one of the majority justices said that the appellant's situation was 'tragic,'[81] and that while many had argued that the Constitution should contain a bill of rights, as the law stood

> … the justice or wisdom of the court taken by the parliament is not examinable in this or any other domestic court … it is not for the courts to determine whether the course taken by Parliament is unjust or contrary to basic human rights.

However, apart from such rare instances where judges have expressed reservations about the law they are required to apply, we cannot know what is in the mind of justices of the High Court when confronted with legislation that is repugnant to human rights. For some there may be no boundary beyond which Parliament may not legislate so long as the legislation falls within the Commonwealth's legislative power and therefore no law which they would not apply. Others may apply such law because they are of the view that their judicial role requires them to even though they may profoundly disagree with its content. When taking office judges swear an oath in terms of which, to take the example of the oath prescribed for justices of the High Court, they swear to 'do right to all manner of people according to law.'[82] What should a judge do if they come to the conclusion that in all conscience they cannot apply certain laws because of the unjust consequences of doing so? Judges cannot absolve themselves from moral responsibility on the basis of a constitutional requirement that they give effect to legislation enacted by Parliament, and I would respectfully argue that there is an obligation on judges to confront the same question that was raised in relation to judges in South Africa – whether they should resign.

Before discussing this, it is necessary in passing to anticipate and reject the argument that because in South Africa the franchise was restricted to whites, parallels cannot be drawn with Australia where there is universal adult franchise. Arguing in such a way is to accept the fallacy – unfortunately widespread – that the fact that an unjust law is the product of democratic processes cures its injustice. The bankruptcy of the theory of democratic positivism upon

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[80] (1992) 176 CLR 1.
[81] (2004) 219 CLR 562, 581. See also *Plaintiff M76 / 2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 32, [35] – [36], [130] Hayne J.
[82] Schedule to the *High Court of Australia Act 1979* (Cth).

which the argument is based is easily demonstrated: If one accepts that racial discrimination and the panoply of security laws required to sustain it in South Africa were unjust, would it have made any difference if, instead of being legislated by a Parliament representing 20% of the population which denied rights to the remaining 80%, those laws had been enacted by parliament, elected on the basis of universal franchise, in which MPs representing 51% of the voters had enacted legislation depriving the other 49% of their rights? Obviously not – the laws were inherently unjust, and majority support for them would not have altered that fact. Therefore, it makes no difference to the moral dilemma facing judges in Australia that the unjust laws they apply are the products of a democratic system.

In addressing the question of whether judges should resign, the mere fact that rights are breached in a society is, of course, in itself not a reason for judges to take such a step. Breaches of rights occur in every legal system, and the existence of courts and judges to staff them is necessary in order to provide a remedy in cases of breach. But that is not the issue here – the problem in Australia is the more fundamental one that the legal system protects no more than a handful of rights, which means that when the vast majority of human rights are breached, there is no remedy to be had.

Of course, only a small part of the law that judges apply that does not breach human rights. Most of the cases that come before the courts involve quotidian issues of criminal, contract and family law and so, to state the obvious, a resignation of judges *en masse* would work great social harm. Furthermore, the judge who resigns as a matter of principle will, in all likelihood, be replaced by a judge who has no such qualms, which means that the resignation by the first judge would have been counter-productive.[83] On the other hand, it is questionable moral reasoning for a person to say that there is no point in refusing to take an office in the discharge of which they must act unjustly because if they do not someone-else will.

But even if one was to conclude that the correct moral response to unjust legislation was to resign then, as in South Africa, next question that would need to be answered is the practical one of whether resigning (publicly stating why that step is being taken) would have any effect on the legal system. Consistent with what Wacks concluded in respect of the South African judiciary, I would regretfully conclude that in all likelihood it would not. Australian governments are notoriously thick-skinned when it comes to criticism of their failings with respect to human rights, and so the resignation of a judge who opposed government policy would in all likelihood be shrugged off – indeed might even be welcomed – by the government. Furthermore, there is little evidence of a deeply held understanding on the part of the public that courts are the final bastion of constitutionalism and the rule of law. Indeed the fact that politicians[84] and conservative academic commentators[85] find it profitable to refer in derogatory terms to 'unelected judges' when arguing against the expansion of constitutional rights protection suggests that, in the event of a controversy arising between the government and the courts, most members of the public would be likely to side with the former.

So if resignation would not achieve the objective of making the legal system more just, what course is left open to judges? The next part of this article offers an avenue by which the judiciary can resolve this moral dilemma.

VII A COMMON LAW BILL OF RIGHTS

A *Dr Bonham's Case*

The solution to the moral problem raised by the failure of the Australian legal order adequately to protect human rights has its roots in the doctrine of common law supremacy over the will

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[83] Wacks, above 32, 282.

[84] Warwick Stanley, 'Rights bill to empower unelected: Howard,' *The Sydney Morning Herald* (Sydney), 27 August 2009; Michael Gordon, 'Tony Abbott and Bill Shorten meet in private to nut out indigenous constitution question,' *The Sydney Morning Herald* (Sydney) 17 September 2014.

[85] Frank Brennan, *No Small Change: The Road to Recognition for Indigenous Australia*. (2015, University of Queensland Press) 246; Greg Craven, 'Heresy as Orthodoxy: Were the Founders Progressivists?' [2003] 31 *Federal Law Review* 87, 88 and Craven above n 37, 143, 150-1, 185.

of parliament, enunciated by Lord Coke CJ in his famous decision in *Dr Bonham's Case,*[86] as re-cast in recent decades.

The question in *Dr Bonham's Case* was whether it was lawful for the Royal College of Physicians to use a statutory power to impose a fine and subsequently imprisonment on Dr Bonham for practising medicine without a licence in circumstances where half the fine would accrue to the College. Because this made the College in its own cause in breach of the common law rule *nemo iudex in sua causa*, Coke CJ held the statute to be invalid, stating that[87]

> And it appears in our books, that in many cases, the common law will … controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void.

The rule in *Dr Bonham's Case* was restated by Coke CJ in *Rowles v. Mason*[88] and was either followed or approved of throughout the 17th century in *Day v Savadge,*[89] *Sheffield v Radcliffe*,[90] *R v Love*,[91] *Streater's Case*,[92] *Thomas v Sorrell*,[93] *R v Earl of Banbury*,[94] in the 18th century in *City of London v Wood*[95] and *R v Inhabitants of Cumberland*[96] and even into the 19th century in *Forbes v Cochrane*[97] and *Green v. Mortimer*.[98] The point at which the principle in *Dr Bonham's Case* was no longer considered good law is uncertain. There was no express rejection of the doctrine until *Logan v Burslem,*[99] decided in 1842. In *Pickin v British Railway Board*,[100] Reid LJ stated that parliamentary supremacy had been established by the Glorious Revolution of 1688. However, in light of the continued application of the case in the 18th and 19th centuries, one cannot say that 1688 provides a bright line demarcating when *Dr Bonham* no longer correctly reflected the law. Nevertheless, appears that by the late 18th century the prevailing view was that *Dr Bonham's Case* was no longer authoritative: In his *Commentaries on the Laws of England*, Blackstone stated that while it was 'generally laid down that acts of parliament contrary to reason are void,' his view was that 'if the parliament will positively enact a thing to be done which is unreasonable, I know of no power … to control it…'[101] So it may not be possible to be more precise as to the timing of the abandonment of the rule in *Dr Bonham's Case* other than to say that, in the wake of the Glorious Revolution, and at some point in the 18th century the prevailing (although not universal) rule accepted by the courts was that they, as much the Crown, were subject to the supremacy of Parliament.[102] One final point to note is the significance of the fact that, in *Pickin*, Reid LJ attributed the origin of parliamentary supremacy to an historical event rather than to changes in case law. This is consistent with the way in which constitutional law evolved in the United Kingdom, where

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[86] (1610) 8 Co Rep 107a, 118a; 77 ER 638, 652
[87] Ibid 118a, 652.
[88] (1612) 2 Brownl 192, 198.
[89] (1614) Hob 85, 87; 80 ER 235, 237.
[90] (1615) Hob 334, 336.
[91] (1651) 5 St Tr 43, 172.
[92] (1653) 5 St Tr 366, 372.
[93] (1673) Vaughan 330, 336-337; 124 ER 1098, 1102.
[94] (1694) Skin. 517, 526-27; 90 ER 231, 236 – where it was stated that "every day" judges "construe and expound Acts of Parliament, and adjudge them to be void."
[95] (1702) 12 Mod 669, 687-88; 88 ER 1592, 1601-02.
[96] (1795) 6 T.R. 194, 195; 101 E.R. 507.
[97] (1824) 2 B & C 448, 471-2.
[98] (1861) 3 L.T. 642 (CP), 543.
[99] (1842) 4 Moore PC 284, 296. See also *Lee v Bude and Torrington Junction Railway Co* (1871) L.R. 6 C.P. 576, 582.
[100] [1974] AC 765 (HL), 782.
[101] William Blackstone, *Commentaries on the Laws of England* (Reprinted 2016, Oxford University Press) vol 1, 66.
[102] George Winterton 'Extra-Constitutional Notions in Australian Constitutional Law' (1986) 16 *Federal Law Review* 223, 231.

rules are shaped as much by changes in the balance of power between the institutions of government as by judicial decisions.

B *Contemporary theories on limits to legislative supremacy*

1 *New Zealand*

The idea that the common law might allow the courts to override the will of parliament received a new lease of life in New Zealand[103] where, in a number of cases[104] Cook CJ held (albeit without mentioning *Dr Bonham's Case*) held that common law rights might limit legislative power. The most frequently cited of these is *Taylor v New Zealand Poultry Board,*[105] where he stated:

> I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some common law rights lie so deep that even Parliament could not override them.

Cooke expanded on his ideas extrajudicially, stating that a free and democratic society was based on the two fundamental pillars of a democratic legislature and independent courts and that if either of these was undermined then[106]

> … it would be the responsibility of the Judges to say so and, if their judgments to that effect were disregarded, to resign or to acknowledge frankly that they are prepared to depart from their judicial oath and to serve a state not entitled to be called a free democracy.

More specifically in relation to the issue of human rights, Cooke referred to hypothetical examples of legislation that deprived people of the franchise on the basis of religion or gender or which mandated that confessions be accepted irrespective of whether they were voluntary, and stated[107]

> Can any lawyer in all honesty accept as a viable principle that some infringements of human rights are so grave that if enacted in other countries they will not be recognised as law at all by us, but that this would not matter if they were enacted by our own legislature? It would seem that hypocrisy on that scale must be the ultimate result of taking Dicey undiluted. It is easy to say that the hypothetical examples are so unlikely that we need not bother about the problem. That may be so. On the other hand, if honesty compels one to admit that the concept of a free democracy must carry with it some limitation on legislative power, however generous, the focus of debate must shift. Then it becomes a matter of identifying the rights and freedoms that are implicit in the concept…. One may have to accept that working out truly fundamental rights and duties is ultimately an inescapable judicial responsibility.

That the idea of legislative subordination to fundamental common law rights was also enunciated extrajudicially by retired New Zealand Court of Appeal judge Edward Thomas who stated that[108]

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[103] For an overview of *Dr Bonham's Case* and its influence in New Zealand see Karen Grau, *Parliamentary Sovereignty: New Zealand – New Millennium* (2002) 33 *Victoria University of Wellington Law Review* 351.

[104] *L v M* [1979] 2 NZLR 73, 78 (dissenting), *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390; *Fraser v State Services Commission* [1984] 1 NZLR 116, 121 and *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398.

[105] [1984] 1 NZLR 394, 398.

[106] Robin Cooke, 'Fundamentals' [1988] *New Zealand Law Journal* 158, 164. See also support for Cooke's argument in John Caldwell, 'Judicial Sovereignty – A New View' [1984] *New Zealand Law Journal* 357.

[107] Cooke, above n 106, 164-5.

[108] Edward Thomas, 'The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium' (2000) 31 *Victoria University of Wellington Law Review* 5, 36.

> [t]he possibility that courts may review the validity of extreme legislation is part of the ongoing development of a dynamic constitution…

The justification he advanced was based on the idea that under Westminster-style constitutions both parliament and the courts have a role to play in upholding the rule of law and that if Parliament broke the convention that it should not undermine the rule of law by enacting legislation that undermined democratic government,[109] or use its legislative power in a 'tyrannical or oppressive way,'[110] the courts might decline to enforce laws breaching those conventions.

Thomas rejected the idea that the fact that a parliament that had enacted tyrannical laws had been democratically elected would make it illegitimate for the courts to intervene, saying[111]

> An important qualification is at once required to confirm that the sovereignty of the people may need to be augmented by the support and, if necessary, resistance of an independent judiciary. The qualification is that the concept is not to be equated with the notion of majority rule. It has been widely recognised that the tyranny of the majority may be no less oppressive than the tyranny of a despot. Underlying the majoritarian principle, therefore, must be a recognition of the fact that majorities may be transient, may not be fully and freely informed, and may not be committed to the very democratic precepts which the majority invoke to exercise the power they hold. To the extent that any particular majority contrives to enact oppressive legislation, that majority simultaneously strikes at the legitimate basis of its own exercise of power. Its sway in Parliament is necessarily subject to the same limitations as Parliament itself if the ultimate sovereignty of the people is to be recognised through truly representative government. The constitutional predicate of the sovereignty of the people thus contains within itself a constitutional canon that gives force to enduring democratic values which may at any particular time be at variance with the wishes of a transient, ill-informed, or indifferent majority.

Subsequently he stated that[112]

> Working within this framework, the possibility of judicial review of oppressive legislation at a future date should be beneficial. It is salutary for Parliament to know that it works within legislative limits which are fixed, not by the majorities or coalitions within Parliament that may come and go, but by the permanent constraints of a constitution. A mature conception of democracy accepts that citizenship in a free and democratic society is founded on the observance of the rule of law and basic human rights, and that these qualities must therefore be placed beyond serious legislative encroachment.

In making his argument, Thomas did not rely on natural law theory as embodied in *Dr Bonham's Case*. According to him, neither the courts nor Parliament should be seen as supreme, and the right of the courts to over-ride the will of Parliament derives not from common law authority but rather from a contemporary analysis of constitutional structure, a view that has attracted increasing support in the United Kingdom.

2. *The United Kingdom*

In the United Kingdom, there has since the 1990s been a growing trend towards the view that the rule of law imposes limits on parliamentary sovereignty. Perhaps surprisingly, the charge has been led by judges in extra-judicial writing. Thus Lord Woolf, stated that[113]

> As both Parliament and the courts derive their authority from the rule of law, so both are subject to it and can not act in a manner which involves its

[109] Ibid 22.
[110] Ibid 23.
[111] Ibid 23-4.
[112] Ibid 30-31.
[113] Lord Woolf, 'Droit public – English style' (1995) *Public Law* 57, 68-9.

> repudiation….if Parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which would be without precedent…I myself would consider that there are advantages in making it clear that ultimately there are even limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold.

Sir John Laws, positing a 'higher order law', superior to the will of Parliament argued that[114]

> The democratic credentials of an elected government cannot justify its enjoyment of a right to abolish fundamental freedoms. If its power in the state is in the last resort absolute, such fundamental rights such as free expression are only privileges; no less so if the absolute power rests in an elected body. The by-word of every tyrant is "My word is Law"; a democratic assembly having sovereign power beyond the reach of curtailment or review may make just such an assertion, and its elective base cannot immunise it from playing the tyrant's role….the fundamental sinews of the constitution, the cornerstones of democracy and of inalienable rights, ought not by law to be in the keeping of the government, because the only means by which these principles may be enshrined in the state is by their possessing a status which no government has the right to destroy.

He went on to note that the doctrine of parliamentary supremacy was created by the courts, even though its validity has been assumed, rather than argued, in recent centuries, and that the doctrine developed out of political facts[115] – an argument which accords with the idea that it was a reaction by the courts to the Glorious Revolution rather than a change in legal reasoning, which led to the establishment of the doctrine. This led him to conclude that[116]

> My thesis is that the citizen's democratic rights go hand in hand with other fundamental rights; the latter, certainly, may in reality imaginably at risk in any given political circumstances, than the former. The point is that both are or should be off limits for our elected representatives. They are not matters which in a delegated democracy - a psephocracy – the authority of the ballot box is any authority at all.

As justification for the need for judicial power to place restraints on government, Laws noted the irony that despite the subjection of the Crown to Parliament as a consequence of the Glorious Revolution, the increasing dominance by the executive over Parliament and its lack of accountability to Parliament meant that power had now moved back to the executive, albeit to ministers rather than to the monarch herself.[117] The control that the ministry had over Parliament and the absence of restraint over what legislation it might use its power to enact thus provided a rationale for the courts' adoption of a protective role.

Sir Stephen Sedley, Lord Justice of the Court of Appeal also rejected the idea of legislative supremacy, writing of a new constitutional order[118]

> … no longer of Dicey's supreme parliament to whose will the rule of law must finally bend, but of a bi-polar sovereignty of the Crown in Parliament and the Crown in its courts, to each of which the Crown's ministers are answerable - politically to Parliament, legally to the courts.

and further that[119]

> … if in our own society the rule of law is to mean much, it must at least mean that it is the obligation of the courts to articulate and uphold the ground rules of ethical social existence which we dignify as fundamental human rights…

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[114] Sir John Laws, 'Law and Democracy' (1995) *Public Law* 72, 84-5.
[115] Ibid 86-7.
[116] Ibid 90.
[117] Ibid 90-1.
[118] Sir Stephen Sedley, 'Human Rights: a Twenty-First Century Agenda' (1995) *Public Law* 386, 389.
[119] Ibid 391.

There was also academic comment to the same effect. T.R.S. Allan observed that[120] .

> It would clearly be absurd to allow a Parliament whose sovereign law-making power was justified on democratic grounds to exercise that power to destroy democracy, as by removing the right to vote from sections of society or abolishing elections. Moreover, an appropriately sophisticated conception of democracy would be likely to recognise the existence of certain basic individual human rights, whose importance to the fundamental idea of citizenship in a free society, governed in accordance with the rule of law, will properly place them beyond serious legislative encroachment.

However of greatest significance was the fact that similar views were subsequently expressed from the bench in *R (Jackson) v Attorney General*[121] in which members of the court suggested that in certain circumstances the courts might be able to over-ride the will of Parliament. Thus, pointing to the effect that the incorporation into United Kingdom law of the European Convention on Human Rights had had on the law in the United Kingdom, Steyn LJ stated[122]

> The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish. It is not necessary to explore the ramifications of this question in this opinion.

Similar views were expressed by Hope LJ who said[123]

> Parliamentary sovereignty is no longer, if it ever was, absolute. ... It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified. ... The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.

In the same vein, Baroness Hale stated[124]

> The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny

The idea expressed by Steyn LJ that the doctrine of the sovereignty of Parliament was a creation of the courts and could therefore be modified by the courts received academic support from Jowell and O'Cinneide who stated[125]

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[120] T. R. S. Allan, 'Parliamentary sovereignty: Law, politics and revolution' (1997) 113 *Law Quarterly Review* 443, 448-9.

[121] [2006] 1 AC 262. For a discussion of this case see Jeffry Jowell and Colm O'Cinneide, *The Changing Constitution* (9th ed, 2019, Oxford University Press) 23-5, 52.

[122] [2006] 1 AC 262, [102].

[123] Ibid [104]. See also Hope LJ in *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, [50]-[51] where he said 'whether the principle of the sovereignty of the United Kingdom Parliament is absolute or may be subject to limitation in exceptional circumstances is still under discussion.' See also similar dicta in *Moohan v Lord Advocate* [2015] AC 901, [35].

[124] [2006] 1 AC 262, [159].

[125] Above n 121, 332.

> The classification of parliamentary sovereignty as a principle of the common law suggests that it is not Parliament who is supreme, but rather the courts. Parliament only enjoys legislative supremacy to the extent that it is conferred on it by the common law, as determined by the courts. Although it may be argued that legislation is able to override the common law, this too could also be construed as a principle of the common law. As such, it could be open to courts to modify this principle, such that there were aspects of the common law that could not be overridden by legislation, even if this was the clear and specific intention of Parliament.

The statements in *Jackson* found justification for the idea that the courts might over-ride the will of Parliament not in the theory of natural rights embodied in *Dr Bonham's Case,* but rather in the need to preserve the courts as a branch of government as a *sine qua non* of the rule of law. This reflects the development of the theory of dual sovereignty, which Knight refers to as 'bi-polar sovereignty,'[126] in terms of which sovereignty is shared by Parliament and the courts, rather than being vested in an omnipotent legislature. According to Knight, the theory has developed as a pragmatic response to alterations in the power-relationship between the branches of government and is therefore consistent with the history of constitutional evolution in the United Kingdom, which has been marked by practical changes effected in order to address new political realities. Thus he states[127]

> That the developments in the role of the judiciary illustrate the English tradition of institutional pragmatism stem from the observation that the expansion in judicial review has been a necessary corrective to what has been described by Sedley as a "long-term dysfunction in the democratic process". There has been a gradual evolution in the role of the House of Commons away from being a body which genuinely scrutinises governmental measures with consistent rigour. The courts have assumed the responsibility for providing the primary check on executive use of power. The shift in apparent institutional responsibility from the Commons to the courts is a pragmatic development to counter Lord Hailsham's fear of an "elective dictatorship". (References omitted).

These statements by English courts and academicians reflect a new understanding of the rule of law which goes beyond mere formalism and a requirement that the institutions of government (such as a democratically-elected Parliament and independent courts) be preserved to include a new requirement that the content of the law comply with extra-legal values. Hitherto, the problem with the concept of the rule of law is its meaning is nebulous. According to the narrowest definition, it means that government operates by law rather than by arbitrary will, that law is made by a defined process, that it is ascertainable, that it applies to everyone equally without prejudice and that it is enforceable by independent courts. As was stated extra-judicially by Lord Bingham of Cornhill, former Lord Chief Justice of England and Wales[128]

> The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.

However, this minimalist definition, may in fact have harmful consequences unintended by those who subscribe to it, in that it allows the rule of law to be used as a cover for denial of substantive freedoms. It is not difficult for an oppressive government to comply with the rule of law in its formal sense and yet enact oppressive legislation. As Raz noted 'The law may…institute slavery without violating the rule of law.'[129] It was in acknowledgement of this

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[126] C.J.S. Knight, 'Bi-Polar Sovereignty Restated' (2009) 68 *Cambridge Law Journal* 361.
[127] Ibid 362-3.
[128] Thomas Bingham, 'The rule of law' (2007) 66 *Cambridge Law Journal* 67, 69.
[129] Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz (ed) *The Authority of Law* (Oxford University Press, 2009), 221.

defect in traditional, narrow definitions of the rule of law that Bingham formulated a broader definition, consisting of eight points, the fourth of which is that 'The rule of law must, surely, require legal protection of such human rights as, within that society, are seen as fundamental.'[130] A similar position was adopted by Lakin who, citing the dicta from the *Jackson* case, argued that the basis of the power of both Parliament and the courts is the rule of law, which requires not just adherence to processes but also conformity with the *values* that underlie the legal system.[131] This is consistent with the argument advanced by Marshall who stated[132]

> Though it is rarely formulated as a conventional rule the most obvious and undisputed convention of the British constitutional system is that Parliament does not use its unlimited sovereign power of legislation in an oppressive or tyrannical way. That is a vague but clearly accepted conventional rule resting on the principle of constitutionalism and the rule of law.

Poole addressed squarely the question of why defence of extra-legal values (which he based on Kantian notions of individual autonomy) would make it legitimate for the courts to over-ride the will of Parliament, stating as follows:[133]

> ...since in the non-ideal world we cannot rely on others not to interfere with our autonomy-protecting rights, the existence of rights demands an institution capable of enforcing them against the powerful, and especially the government .... the courts are ideal agents for assuming this role. Ordinary political institutions (like the legislature) cannot be trusted consistently to respect autonomy since it is their function to decide upon and implement policies which further particular ends, a process which may well produce results that are antithetical to the autonomy of particular individuals. The common law stands in stark contrast. Although courts also wield considerable power, they are unique in that they 'have no programme, no mandate, no popular vote,' and are, for that reason, in a position to prioritize autonomy in their decision-making. (References omitted).

A definition of the rule of law which imposes obligations relating to the content and not just the form of the law offers a justification for an application of the principle in *R (Jackson) v Attorney General*[134] to the effect that if Parliament enacts legislation that infringes fundamental rights, such legislation may be invalidated by the courts. How those rights are to be ascertained is discussed later in this article.

3 *Australia*

An early challenge to the absolutist view of parliamentary sovereignty in Australia was launched by Geoffrey de Q Walker, who argued that that preservation of the rule of law might empower the courts to imply rights, superior to the will of Parliament, to separation of powers, freedom of expression and freedom of association.[135] A number of other academics have expressed support for judicially-created rights.[136] However, Australian courts have not gone so far as have the courts in New Zealand and the United Kingdom in suggesting that there may be rights (outside what can be implied from the text of the Constitution) that Parliament

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[130] Bingham n 128, 75-7.
[131] Stuart Lakin, 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution' (2008) 28 *Oxford Journal of Legal Studies* 709, 729-34.
[132] Geoffrey Marshall, *Constitutional Conventions* (Clarendon Press, 1984) 9.
[133] Thomas Poole 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' (2003) 23 *Oxford Journal of Legal Studies* 435, 442.
[134] [2006] 1 AC 262.
[135] Geoffrey de Q Walker, 'Dicey's Dubious Dogma of Parliamentary Sovereignty' (1985) 59 *Australian Law Journal* 276, 282-3.
[136] David Feldman, 'Democracy, The Rule of Law and Judicial Review' (1995) 19 *Federal Law Review* 1, 6-7; David Smallbone, 'Recent Suggestions of an Implied 'Bill of Rights' in the Constitution, Considered as Part of a General Trend in Constitutional Interpretation' (1993) 21 *Federal Law Review* 254.

cannot over-ride, but even so, they have not shut the door on the idea that common law rights might limit legislative power. In *Union Steamship Co v King*,[137] the court, echoing the words of Cooke J, said that[138]

> Whether the exercise of … legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government, and the common law … is another question which we need not explore.

Similar statements raising but not deciding the question have been made in a number other High Court decisions,[139] although it should be noted that in *Kable v Director of Public Prosecutions (NSW)*[140] two justices rejected the idea that there might be common law values capable of over-riding the will of Parliament.[141]

Support for the idea of a common law bill of rights has been expressed more openly in other contexts. Thus, writing extrajudicially, Toohey J stated that[142]

> …there is an increasing recognition of the tension between deference to the will of parliaments as expressed in legislation and maintenance of the rule of law. Parliaments are increasingly seen to be the de facto agents or facilitators of executive power, rather than bulwarks against it

He further wrote that[143]

> Of course, judicial review can directly and effectively influence the protection of liberties if a written constitution enshrines them in express terms. However, in the absence of such express articulation, a question arises as to whether a court which is established as guardian of a written constitution within the context of a liberal-democratic society may to any extent imply limits upon the powers with respect to subject matter granted by that constitution so as to protect core liberal-democratic value.

and that[144]

> …courts would over time articulate the content of the limits on power arising from fundamental common law liberties…. In that sense, an implied "bill of rights" might be constructed.

Thus, although it would run counter to current orthodoxy for a court to find that the common law vested the courts with the power to invalidate legislation which breached fundamental rights, in light of the discussion above one could not say that it would be beyond the range of contemplation. What remains to be considered is the theoretical basis that would justify that step, how the courts would identify fundamental rights and what the political repercussions of such a development would be.

C *Justification for a common law bill of rights in Australia*

On what theoretical basis could an Australian court justify the step of finding that it lay within its powers to invalidate an Act which infringed fundamental rights? There are two ways in which this could be done. The first is to revive the precedent in *Dr Bonham's Case* and its

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[137] (1988) 166 CLR I
[138] Ibid 10.
[139] *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 687 (Toohey J); *Momcilovic v The Queen* (2011) 254 CLR 1,47 n 217 (French CJ), 215-6 (Crennan and Kiefel JJ); *South Australia v Totani* (2010) 242 CLR 1, 29 (French CJ); *Durham Holdings v New South Wales* (2001) 205 CLR 399, 410 (Gaudron, McHugh, Gummow and Hayne JJ), 433 (Callinan J).
[140] (1996) 189 CLR 51.
[141] Ibid 66 (Brennan CJ), 76 (Dawson J). The same was said by Kirby J, then sitting in the New South Wales Supreme Court of Appeal in *Builders Labourers Federation v Minister for Industrial Relations* (1986) 7 NSWLR 372, 406.
[142] John Toohey, 'A Government of Laws and Not of Men?' (1993) 4 *Public Law Review*, 163.
[143] Ibid 169.
[144] Ibid 170.

application of 'right reason' in accordance with natural law. The second, reflected in the views expressed by judges and academics in New Zealand and the United Kingdom, is that the rule of law has evolved in such a way as to require not only that the law be administered in accordance with formal rules relating to the manner in which it is made and applied, but also that the law be consistent with human rights.

1 *Dr Bonham's case*

Taking the *Dr Bonham* route is conceptually uncomplicated – it involves the courts doing what they have always done, which is to declare what the common law is. This means that the courts could say that they were replacing the common law doctrine of legislative supremacy by the common law doctrine reflected in *Dr Bonham*. Such a step would not be as alien to Australian constitutionalism as might be supposed. Writing extrajudicially in an article entitled *The Common Law as the Ultimate Constitutional Foundation*, Dixon J stated that the common law 'is the source of the authority of the Parliament at Westminster' and thus, as the title of the article stated, the ultimate foundation of the Commonwealth Constitution.[145] He further stated that although a court must give effect to an Act of Parliament, 'the principle of parliamentary supremacy was a doctrine of the common law'[146] – which, given that the courts determine what the common law is, means that the courts could change the common law by stating that there are limits to what law Parliament can enact.

2 *A broad view of the rule of law*

Taking the rule of law approach is more complicated and involves paying attention to how the Constitution works in practice. A notable feature of the decision in *R (Jackson) v Attorney General,*[147] is that except for Steyn LJ's mention of the incorporation into United Kingdom law of the European Convention on Human Rights,[148] those members of the court who stated that absolute adherence to parliamentary sovereignty was no longer consistent with the rule of law did not refer to any specific development in the law itself as justification for their position. The only reason for the change must therefore have been a result of developments in the way public power was being wielded and the effect those developments had on the balance between the courts on the one hand and Parliament on the other. In other words, one could argue that just as in the 17th and 18th centuries political developments led to the need to restrain an overmighty Crown, resulting in a shift in power from the Crown to Parliament, the risk to liberty made evident by the consequences (both actual and potential) of an unrestrained Parliament now necessitates another shift, this time from Parliament to the courts in the specific circumstance where Parliament undermines fundamental human rights. Consistent with the evolutionary and incremental nature of English constitutional law, one cannot fix a precise date at which this new view of the rule of law became established, less still any specific event that precipitated it. All we have is the evidence from the *Jackson* decision that, at some point, views changed and that that change has now been articulated by the courts.

Turning to Australia, there is ample evidence to show why here too it is necessary for the courts to adopt a broad view of the rule of law and why the narrow view, which offers protection only to the purely formal aspects of the doctrine, is no longer sufficient.

Apart from the fact that the Commonwealth Constitution offers protection for only a handful of rights, as a consequence of which rights are frequently breached (discussed in Part V), the institutional structure the Constitution creates an ideal environment for the unrestrained exercise of legislative and executive power, to the extent that the claim that the Constitution embodies representative and responsible government no longer rings true.[149]

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[145] Owen Dixon, 'The Common Law as the Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240, 242.
[146] Ibid.
[147] [2006] 1 AC 262.
[148] Ibid [102].
[149] For a full discussion of the extent to which the Commonwealth Constitution fails adequately to provide either for representative or for responsible government see Bede Harris, 'Representative

So far as representative government is concerned, the fact that the Constitution provides no guarantee of equality of voting power[150] has left Parliament free to create an electoral system for the House of Representatives which, in common with any system based on single-member electorates, is both unfair to individual voters and produces results that do not reflect the will of the voting population as a whole. The effect of a person's vote on the composition of the House is entirely dependent on the random circumstance of where their vote is cast relative to electorate boundaries. Election results are significantly distorted in that they do not reflect the relative support of parties nationwide, frequently enable a government to win power with a minority of first preference votes and can even lead to a government obtaining power with fewer votes than the opposition. Parliament is dominated by two major blocs, with minor parties rarely able to obtain representation despite the fact that they might gain a significant number of votes nationwide, to the extent that the system of government is best described as a duopoly rather than a democracy. The fact that, in comparison to countries such as the United Kingdom and New Zealand, the Commonwealth Parliament has a small number of seats relative to the voting population, has the effect of magnifying the distortion of results. So far as the Senate is concerned, the fact that an equal number of seats is allocated to each State means that the influence wielded by each voter varies widely according to which State they are registered in, to the extent that a voter in Tasmania has 13 times the influence of a voter in New South Wales. If democracy is defined as government in accordance with the will of the voters, the system created by Parliament can be described as democratic only to a very qualified extent. The Constitution vests an overwhelming preponderance of power in Parliament, and supporters of that distribution argue that the will of the people, as expressed through Parliament, provides optimal protection for rights. It is therefore ironic that, in a constitutional order where so much reliance is placed on representative democracy, the electoral system fails to achieve what is surely the most fundamental objective of a democratic system, which is accurately to reflect the national will. The arguments of those who support the current system of democratic supremacy would have more force if the Constitution did, in fact, guarantee true democracy.[151] As Toohey J noted, writing extrajudicially[152]

> the will which judicial review may frustrate is that of a current majority of members of a legislature. This does not necessarily coincide with the will of a majority of citizens.

The following observation about British politics by Allan would be equally true of politics in Australia today, requiring only the substitution of the words 'House of Representatives' for 'House of Commons':[153]

> [i]mportant freedoms are at the mercy of a temporary majority of the House of Commons, generally manipulated by the executive government, which cannot even claim the support of a clear majority of the electorate.

Next, although the Constitution is supposedly based on responsible government, in reality the doctrine no longer operates. As former Clerk of the Senate, Harry Evans, stated[154]

Democracy and Responsible Government - Two Australian Constitutional Myths' (2015) 13 *Canberra Law Review* 3 and Bede Harris, *Constitutional Reform as a Remedy for Political Disenchantment in Australia* (Springer, 2020) 65-71, 145-9.

[150] *Attorney General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; *McGinty v Western Australia* (1996) 186 CLR 40. For a full discussion see Bede Harris, 'Does the Commonwealth Electoral Act Satisfy the Requirement That Representatives Be 'Directly Chosen' by the People?' (2016) 9 *Journal of Politics and Law* 78.

[151] In this regard see also Feldman, above n 136, 6-7.

[152] Toohey, above n 142, 172.

[153] T R S Allan 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' (1986) 44 *Cambridge Law Journal* 111, 116.

[154] Harry Evans, 'The Australian Parliament: time for reformation' (Address to the National Press Club, Canberra, 24 April 2002) <https://australianpolitics.com/2002/04/24/harry-evans-parliamentary-reform-speech.html>

> Responsible government was a system which existed from the mid-19th century to the early 20th century, after which it disappeared. It involved a lower house of parliament with the ability to dismiss a government and appoint another between elections. This system has been replaced by one whereby the government of the day controls the lower house by a built-in, totally reliable and "rusted on" majority. Not only is the government not responsible to, that is, removable by, the lower house, but it is also not accountable to it. The government's control of the parliamentary processes means that it is never effectively called to account…

Lack of executive accountability is facilitated by the rigidity of party discipline, which is far stricter in Australia than in other Westminster democracies,[155] and which means that a government can always rely on both its front and back bench not to hold it accountable. The duopolistic political order created by the electoral system ensures that no government minister has ever been subject to penalties for refusing to answer questions out by a parliamentary committee, even in circumstances where the opposition controls the relevant chamber. The fact that today's opposition is tomorrow's government means that opposition parties are unwilling to establish the precedent of a government minister being compelled to answer questions and being subject to sanctions if they do not. Crucial conventions upon which the Westminster system depends, for example the rule that ministers, not their staffers or public servants must take responsibility for malfeasance or maladministration, are no longer followed.[156] The impunity with which the executive defies the legislature can be illustrated by reference to some of the more infamous examples of recalcitrance, including John Howard's refusal to allow political advisors employed in his office and in that of the then defence minister Peter Reith to appear at the inquiry into the Children Overboard affair,[157] the prohibition against a defence force officer appearing before the inquiry into what knowledge ADF personnel had of torture of Iraqi prisoners at Abu Ghraib,[158] and the prohibition against public servants appearing before the inquiry into the AWB scandal.[159] Then Minister for Migration, Scott Morrison, refused to answer questions posed by a Senate committee on migration matters[160] and officials from the Department of Immigration and from Operation Sovereign Borders refused to answer a Senate committee question as to whether the government had paid people smugglers to return asylum-seekers to Indonesia.[161]

In this environment of lack of governmental accountability, abuse of power – for example as occurred in the Haneef affair, when Dr Haneef was unlawfully detained[162] – and corruption in the allocation of public money – as exemplified by the sports grants scandal[163] – readily occur. Investigations into such events are conducted by government appointees in accordance with terms of reference carefully crafted by the government to exclude key questions from being considered. Those conducting investigations may be prevented from accessing relevant documents or interviewing witnesses[164] and when reports are concluded they are often not published.[165] The obvious lack of transparency and accountability inherent in the practice of

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[155] Frank Bongiorno, 'Politicians' inability to speak freely on issues that matter leaves democracy all the poorer' *The Conversation,* 21 June 2016.
[156] Judy Madigan, 'Ministerial responsibility: reality or myth?' (2011) 26 *Australasian Parliamentary Review* 158.
[157] P Walters, 'A fearless public servant' *The Australian* (Sydney), 17 August 2004.
[158] Australian Broadcasting Corporation, *The World Today* 1 June 2004.
[159] Samantha Maiden, 'Gag in Senate illegal, clerk warns' *The Australian* (Sydney), 12 April 2006.
[160] Australian Broadcasting Corporation, 'Immigration Minister Scott Morrison defies Senate order to release information about Operation Sovereign Borders.,' *ABC News* 19 November 2013.
[161] Australian Broadcasting Corporation, 'Senior officials refuse to answer questions on payments to people smugglers.' *ABC News,* 5 February 2016.
[162] Bede Harris, *Constitutional Reform as a Remedy for Political Disenchantment in Australia* (Springer, 2020) 5-6.
[163] Ibid 12-13.
[164] Ibid 6.
[165] Christopher Knaus and Josh Taylor, 'Sports rorts: Coalition blocking release of Phil Gaetjens' secret report, citing cabinet exemption' *The Guardian* (Online), 18 July 2021

governments investigating their own wrongdoing could be remedied by the establishment of an independent anti-corruption commission, but this is a step which the current government has persistently blocked.[166]

We are drawn therefore to the conclusion that the structure established by the Constitution is minimally democratic and barely responsible. Although the structural causes of these developments have existed since the Constitution came into force, there can be no doubt that the evolution of political practice, particularly over the last quarter century, has accelerated the pace at which virtually unbridled power is concentrated in the hands of the government, which in turn has created an environment in which breaches of human rights have been able to occur. The failure of the text and structure to impose adequate restraint on parliamentary and executive power means that self-imposed restraint derived from the rule of law provides the only barrier to abuses of human rights, but the increasing willingness of governments to depart from that convention – or, as one might put it, their unwillingness to play the game subject to conventional norms – means that they have breached the underlying compact between the executive and legislature on the one hand and the courts on the other, and that therefore the argument made in the United Kingdom to the effect that a correction in the balance between the branches of government is now necessary if the rule of law (in the broadest sense) is to be upheld, applies with equal force in Australia.

D *Identifying fundamental rights*

Australian constitutional law textbooks are largely devoid of critical discussion of the question of what values underpin the Constitution. Most state that the drafters of the Constitution did their work on the assumption that the Constitution was founded on 19th century British constitutionalism, including the idea that Parliament was not constrained by values external to the law. This meant that when the Australian colonists debated their constitutional arrangements, they thought there to be nothing wrong in providing that the States should be allowed to keep in force laws which restricted the franchise based on gender, race and property-ownership. Nor did they consider there to be anything wrong in rejecting a proposal that the Constitution should contain a right to due process, it being argued that since such a right could be read as requiring equality before the law, it would prevent the Commonwealth from discriminating against Asian and Indigenous people.[167]

In this values-free environment, how would judges create a common law bill of rights? Academic writers have cautioned that in order to avoid uncertainty and subjective choice by individual judges some theoretical framework would need to be developed in accordance with which rights would be identified.[168] This would be true irrespective of whether a court relied on natural law underlying *Dr Bonham's Case* or an expanded rule of law concept.

Gummow J, writing extra-judicially, advanced a number of arguments against the idea of a judicially-created common law bill of rights,[169] *inter alia* that it would not be consistent with the understanding of the law at the time the Constitution was adopted, that the Constitution over-rode the common law, that it was uncertain how fundamental rights were to be identified,

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<https://www.theguardian.com/australia-news/2021/jul/18/sports-rorts-coalition-blocking-release-of-phil-gaetjens-secret-report-citing-cabinet-exemption>

[166] Australian Broadcasting Corporation, 'Scott Morrison defends blocking proposed federal corruption commission after MP crosses the floor,' *ABC News,* 25 November 2021.

[167] *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1898, 687 (Isaac Isaacs) and 690-91 (Patrick Glynn). See Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights* (Random House Australia, 2009) 59 and Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (University of New South Wales Press, 2009) 24-6.

[168] Anne Twomey, 'Fundamental Common Law Principles as Limitations upon Legislative Power' (2009) 9 *Oxford University Commonwealth Law Journal* 47, 70-1; Williams and Hume, above n 43, 48.

[169] William Gummow, 'The Constitution: Ultimate Foundation of Australian Law?' (2005) 79 *Australian Law Journal* 167, 176.

that the common law should not be fixed at a particular point in time, that the common law was not the product of universal reason but was rather the result of human choice and that it was unclear how to distinguish between 'good' and 'bad' rules of the common law. A discussion of these arguments is useful because it can highlight what are, with respect, misunderstandings about the nature of the common law bill of rights project.

First, proponents of a common law bill of rights would accept the argument by Gummow J that that the creation of a common law bill of rights would not be consistent with the drafters' understanding of the relationship between the text of the Constitution and the common law. This is indeed why the theory of implied rights is of such limited usefulness in enhancing human rights protection. As the courts have emphasised, the doctrine of implied rights depends on a finding that such rights have some basis in the text of the Constitution, and so the courts have declined to recognise only such rights as are strictly necessary to permit the Constitution to function, which currently is limited to the implied freedom of political communication, the limited right to due process and a right to vote. But this is of little importance to the argument in favour of a common law bill of rights, because those rights would be independent of, and unconstrained by, the assumptions underpinning the Constitution.

It is also conceded that the drafters operated on the basis that, to the extent that there might be anything in the Constitution that was contrary to common law, the Constitution, as a statute, would over-ride the common law. The point is that because common law bill of rights theory is founded on the idea that the common law can over-ride statute and that the courts are not constrained by the text of the Constitution, the Constitution, to that extent, does not matter. The Commonwealth Constitution is, after all, just another statute of the United Kingdom Parliament and so, consistent either with *Dr Bonham's Case* or with the new conception of the rule of law, can be over-ridden just like any other. Furthermore, the development of a common law bill of rights would not involve freezing the common law at any point in time – as has always been the case with the common law, rules relating to fundamental rights would evolve over time in accordance with understanding of their content as they are applied to novel fact situations.

Finally, as to the question of how fundamental rights would be identified for inclusion in the new common law doctrine, the quest is not one governed by judicial subjectivity as was feared by Zines who said that the content of common law rights would depend on personal values[170] or Winterton, who raised the spectre of as many common law bills of rights as there are judges.[171]

As a starting point it is important to state what the basis of such rights would *not* be, and that is community values. As Winterton correctly pointed out, if the courts used a common law bill of rights to over-ride the will of Parliament that supposedly reflects community values, it cannot rationally be argued that the courts could refer to community values as justification for their course of action, as fidelity to community values would draw them in a circle back to the will of Parliament.[172] This also serves to demonstrate that the justification for a common law bill of rights has nothing to do with democracy. Democracy is not, as is often mistakenly thought, a source of rights – rather it is one of many rights dependant on an underlying value. Democracy itself is not in itself a value – it is simply a mechanism for law-making. Any claim that there is a *right* to a democratic form of government is logically dependant on some value

[170] Leslie Zines 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166, 180-4.
[171] Winterton, above n 102, 234.
[172] Ibid.

that is both external - and superior - to, democracy.[173] This was elegantly put by Poole who, commenting on extra-judicial writing by Sir John Laws,[174] stated as follows:[175]

> [Laws] accepts that democracy is the best form of politics in that it best respects the cardinal value of individual autonomy: by according citizens an equal voice in the law-making process, democracy presupposes that individuals are of equal worth. But Laws is at pains to point out what he sees as the secondary or derivative nature of democracy. Democracy is not good in and of itself, as it were, but by virtue of the fact that it is the mode of politics that accords most closely with the cardinal value of autonomy. The ideals of the good constitution are, for this reason, Laws argues, 'logically prior to democracy.' (References omitted).

What theory would judges draw on identifying the rights that a common law bill of rights would protect? Space does not permit an exegesis on the jurisprudential theories that underlie human rights. It suffices to say that the argument that there is no objective basis to human rights can be refuted by reference to Kantian theory, which founds rights on the autonomy and equality of each person implied by the overarching value of dignity,[176] and which has been adopted by modern philosophers such as Fuller,[177] Raz[178] and Waldron,[179] and which also formed the basis of the dignitarian school of jurisprudence of Laswell and McDougal.[180] Interestingly, the Kantian idea of individual autonomy was suggested as the foundational value for the development of constitutional common law rights by the English judge Sir John Laws, writing extra-judicially.[181] Another theory which provides jurisprudential justification for the objective existence and definable content of human rights can be justified by reference to Rawls' theory of imagining people in the original position behind a veil of ignorance who would rationally adopt rules based on respect for fundamental rights.[182]

The most obvious sources in which these theories have received concrete form are, of course, the numerous international human rights documents – the *Universal Declaration of Human Rights*,[183] the *International Covenant on Civil and Political Rights*,[184] the *International Covenant on Economic, Social and Cultural Rights*[185] and the *United Nations Declaration on the Rights of Indigenous Peoples*[186] to name only the most prominent – all of which, it should be noted, Australia has signed. In addition to this, one would expect the courts to draw on documents such as the *Canadian Charter of Rights and Freedoms* contained in the *Constitution Act* (1982) and the Bill of Rights contained in the *Republic of South Africa Constitution Act 108 of 1996*, as well as the case law in which those documents have been interpreted.

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[173] Bede Harris, *Constitutional Reform as a Remedy for Political Disenchantment in Australia* (Springer, 2020) 90-5.
[174] John Laws, 'The Constitution: Morals and Rights' (1996) *Public Law* 622.
[175] Poole, above n 133, 448.
[176] Immanuel Kant, *Groundwork of the Metaphysic of Morals* (Herbert Paton, trans, Routledge Classics, 2005) [trans of *Grundlegung zur Metaphysik der Sitten* (first published 1785)] 114-5, 161-2. For a general discussion of autonomy, including Kant's contribution, see Joel Feinberg, *Harm to Self* (Oxford University Press, 1986) 27-51.
[177] Lon Fuller, *The Morality of Law* (Yale University Press, 1964), 162.
[178] Raz, above n 129, 221.
[179] Jeremy Waldron, 'How Law protects Dignity' (2012) 71 *Cambridge Law Journal* 200.
[180] Harold Lasswell and Myers McDougal, 'Legal Education and Public Policy: Professional Training in the Public Interest 52 (1943) *Yale Law Journal* 203, 207; Harold Lasswell and Myers McDougal, 'Criteria for a Theory About Law' 44 (1971) *Southern California Law Review* 362, 393 and Myers McDougal, Harold Lasswell and Lung-Chu Chen, *Human Rights and World Public Order* (Yale University Press, 1980).
[181] Laws, above n 174, 623.
[182] John Rawls, *A Theory of Justice* (1972, Clarendon Press) 17–22, 60, 136-42, 303.
[183] GA Res 217A (III), UN Doc A/810 at 71 (10 December 1948).
[184] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[185] Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[186] GA Res 61 / 295 (13 September 2007).

Of course, a common law bill of rights would not emerge fully formed as the result of a single court decision. It would develop incrementally as cases arose. This would have the benefit of giving legislators and the executive the opportunity, when either enacting or applying law, to be mindful of the same international human rights documents the courts would refer to, and thereby to anticipate, and thus avoid, breaches of the rights they protect. Politicians would become mindful of human rights in a way that they never have before, and would act with abundant caution in order to avoid infringing rights, so as to minimise the risk that legislation or executive action would be invalidated. The mere prospect of judicial review of legislation would have a powerful educative effect and would act as a deterrent against parliamentary over-reach. Interestingly, the degree to which Parliament and the executive would need to moderate their conduct would be a measure of the truth or falsity of the argument raised by some opponents of a bill of rights to the effect that Australia does not need a bill of rights because the government does not infringe them. Given the evidence of the extent to which, as outlined in Part V, Parliament already has infringed rights, the reality is that the development of a common law bill of rights would require politicians would have significantly to change their approach to their exercise of power.

E *Applying the new doctrine to migration detention*

What would be the result if a court was to recognise a common law constitutional right to liberty of the person and was called upon to determine whether that right was breached by mandatory detention under ss 189 and 196 of the *Migration Act 1958* (Cth)? As discussed earlier, s 189 of the Act requires that an officer who knows or reasonably suspects that a person is an unlawful non-citizen to detain that person. Section 196(1) states that such a person must be kept in immigration detention until removed from Australia, deported or granted a visa.

As a first step, it would be necessary for the court to specify what the elements of the common law right are. Liberty of the person is a composite term which has two aspects – procedural and substantive. The procedural aspect is that any form of deprivation of liberty, irrespective of purpose, requires authorisation by a court, either prior to, or within a short period of, that deprivation occurring. Recognition of this aspect of the right would have the consequence of over-ruling *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[187] in so far as it countenanced any exceptions to the need for judicial authorisation. The practical effect on all people under any form of detention under Commonwealth, State or Territory law would be that their detention would need to be regularised by application by the detaining authority to a court of competent jurisdiction within a reasonable time (which would need to be defined in the judgment in which the new common law right had been recognised). Consistent with this, any statutory provision conferring a power of detention – such as, for example, s 189 of the *Migration Act 1958* (Cth) – would either be ruled invalid as written or, if its lawfulness was to be preserved, be interpreted as being impliedly subject to a requirement that the detaining authority make application to a court within a reasonable time for authority to detain.

The second, substantive, aspect of the right is that detention is lawful only if the detaining authority could prove reasonable grounds for it. Whether reasonable grounds exist would depend on an application of a proportionality test found in *McCloy v New South Wales*.[188] The first element of this test is that it must be shown that a constitutionally-protected right has been limited. Assuming that is the case, the onus then moves to the authority that has limited the right to prove that the law limiting the right is rationally connected to a legitimate interest. Next it must be shown that the law limits the right to no greater extent than is necessary to achieve the purpose. If there are other reasonably practicable ways which would have been equally effective in achieving that purpose but which would have had a less restrictive effect on the right, then the law will be found invalid. The practical effect of this is that when Parliament enacts a law which has the effect of limiting rights, it must take care to do so in a manner which restricts rights as little as possible. The third stage involves an inquiry

[187] (1992) 176 CLR 1.
[188] (2015) 257 CLR 178, [2] – [3] (French CJ, Kiefel, Bell and Keane JJ).

as to whether there is proportionality between the importance of the purpose to which the law is directed and the extent to which the law limits the right. This requires a balancing of the benefit conferred by the law against the degree to which the right is limited. This will obviously be a matter of degree – the greater the importance of the purpose served by the law, the greater the limitation of rights that will be found to be justified. Conversely, a law serving a purpose of relatively low importance will not warrant a significant limitation of rights.

Applying the first element of the *McCloy* test to detention under ss 189 and 196 of the *Migration Act 1958* (Cth), it is obvious that detention involves a limitation of the right to liberty of the person.

In applying the next element, relating to legitimate purpose, a court would be likely to find that detention *prima facie* does serve the legitimate purposes of enabling the executive to assess the legal, health and security status of those arriving in the country without a visa. It would also be found that detention is rationally connected to that purpose. Importantly, a factor which would *not* be a legitimate purpose would be deterrence which, as discussed earlier, is a purpose that governments have sought to achieve *de facto* even though deterrence lies outside what the courts have identified as the non-punitive purposes of migration legislation. Deterrence is an illegitimate purpose not only because it is inherently punitive, being one of factors that taken into consideration in imposing sentences for criminal offences, but also because when making a decision as to whether to exercise power in relation to a person, a decision-maker is required to consider only factors relevant to that person, and it amounts to the taking into account of an irrelevant factor to consider what effect that exercise of power will have on others.

It is when a court reached the requirement that a law must achieve its objective in a manner that is least restrictive of the protected right that the impact of the new common law constitutional right would become apparent. The fact that under s 189 detention is mandatory and that under s 196 its duration is bounded by the achievement of certain purposes rather than being limited either to a period that is reasonably necessary to achieve those purposes or to specific periods of time, means that the sections do not limit the right to the least extent necessary in order to achieve their legitimate purpose – in essence, as written, the provisions are too broad. In applying the least restrictive manner test a court would therefore be likely to read s 189 as authorising detention only for the purposes of verifying the identity of the migrant, assessing their legal status (including, obviously, whether they are seeking asylum), and determining whether they pose a health or security risk.[189] This is a far more specific set of criteria than those justifying detention under current case law.

So far as the duration of detention is concerned, a court would depart from current case law by reading s 196 down to hold that detention would be lawful only for such reasonable period of time as is needed to achieve those purposes, because detention for longer than that would amount to a greater limitation on the right to freedom of the person than was necessary to achieve the purposes, and would therefore require the release of the detainee – a finding that would obviously mean the over-ruling of *Commonwealth of Australia v AJL20*.[190] What would be a reasonable time beyond which detention was unlawful would depend upon the facts of each detainee's case. Unlike under the current system of mandatory detention where, as has been noted by the courts,[191] a detainee's individual circumstances are irrelevant to the lawfulness of their detention, the least restrictive measures test would require that the specifics of each detainee's case be taken into account in assessing whether the legitimate purposes served by detention could be achieved by less restrictive means than keeping them in detention. In determining which less restrictive means would achieve the relevant purpose or purposes in any particular case, one would anticipate that a court would on the one hand take into account factors such as the flight risk presented by the detainee, the length of time it would take to resolve their legal status, whether they are suffering from communicable disease

[189] McAdam and Chong, above n 66, 102
[190] (2021) 391 ALR 562.
[191] *Al-Kateb v Godwin* (2004) 219 CLR 562, 574 (Gleeson CJ).

and their age, among others, while on the other the court would determine whether, taking those factors into account, the purposes of detention could be achieved by means such as community release and supervision, release with surety, surrender of travel documents, residence at designated location, a reporting obligation or electronic monitoring.[192] This would mean the over-ruling of *Al-Kateb v Godwin*[193] because the monitoring of a person such as the appellant in that case who could neither be granted a visa nor be sent to any other country could be achieved by one of these alternative means.

As can be seen from the above, in many, indeed probably most, instances, the least restrictive measures aspect of the *McCloy* test would be dispositive of detention cases, rendering an application of the proportionality stage of the test unnecessary. However, for sake of completeness it is necessary to discuss what would happen in a case where it was found that, in all the circumstances of a detainee's case, there were no less restrictive means of achieving one of the legitimate purposes of migration detention? It is difficult to imagine cases in which none of the measures falling short of detention would be unable to achieve its legislative purposes in the long term. However, one circumstance which might arise would be where a detainee suffered from a psychiatric illness of such seriousness that their health condition would a danger to themselves or others if they were released into the community. In such circumstances, an application of the least invasive measures test would lead to the conclusion that none of the alternative monitoring measures falling short of detention would be effective in achieving one of the purposes of detention – namely that of protecting the community from harm posed by a detainee's health condition. In such circumstances the least invasive measures test would lead to a result that there was no less invasive measure other than detention that could achieve that legitimate purpose. If a court then went on to apply the proportionality stage of the *McCloy* test, it would conclude that while ongoing detention amounted to a complete limitation of the right to freedom of the person, that would be outweighed by the importance of the need to protect both the detainee and society, noting of course that whether detention was justified in the future would depend on regular assessment of the state of the detainee's mental health from time to time. This is the same reasoning that would be adopted in cases where a court had to determine whether detention under mental health legislation constituted a justifiable limit on liberty of the person.

As is clear from the above, a migration regime which protected the right to liberty if the person and thus cast upon the detaining authority the onus of proving the reasonableness of detention in each individual case would have a dramatic effect on levels and duration of migration detention. [194]

F *Political consequences*

So far as the relationship between the branches of government are concerned, a decision by a court to declare an Act of Parliament invalid on the grounds that it disproportionately limited of a fundamental right would be revolutionary in the political sense and would doubtless lead to outrage in some quarters. However, the courts have previously successfully weathered the storms that erupted after decisions deemed controversial. In the wake of the decision in *Mabo v Queensland (No 2)*[195] Hugh Morgan, Managing Director of Western Mining Ltd said that 'The High Court has plunged property law into chaos and has given substance to the ambition of Australian communists and Bolshevik left for a separate Aboriginal state.'[196] The decision

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[192] McAdam and Chong, above n 66, 110-11.
[193] (2004) 219 CLR 562.
[194] In 2021 Independent MP Andrew Wilkie introduced the *Ending Indefinite and Arbitrary Immigration Detention Bill* to Parliament. Although the Bill was not proceeded with by the House, it provides a useful template for legislation which would conform to the right to individual liberty. The Bill can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Migration/ImmigrationDetentionBill>.
[195] (1992) 175 CLR 1.
[196] Hugh Morgan, *The Australian* (Sydney), 13 October 1992.

recognising the implied right to political communication in *Australian Capital Television v Commonwealth (No 2)*[197] led government Senator Chris Schacht to accuse the court of 'playing politics'[198] and to refer to the judgment as containing 'political sophistry of the worst kind,'[199] while Minister for Justice Michael Tate said that the government would not allow the High Court to 'usurp the power of Parliament.'[200] One journalist described the decision as one which imposed 'weird and wonderful meanings on the provisions of the Constitution.'[201] Even more vituperative was the criticism the High Court endured in the wake of its decision on native title in *Wik Peoples v Queensland*,[202] when Queensland Premier Rob Borbidge, described members of the court as 'self-appointed kings and queens,'[203] the statements of Chief Justice Brennan as 'pathetic,'[204] and those of Justice Kirby as 'rantings and ravings,'[205] and that the judges of the court were held in 'absolute and utter contempt'[206] by many Australians.

However, to say that a decision by the court was 'revolutionary' in the political sense does not mean that it would amount to a 'constitutional revolution'. By declaring a new rule of the common law (or resurrecting an old one) the courts would be doing precisely what their role entitles to do, which is to enunciate a common law rule about the power of Parliament. What could the government ultimately do if a court declared that a statute was invalid for breaching a common law right? If the executive did not acquiesce in the judgment, it would be faced with a choice of appointing additional judges to the bench, replacing the existing courts with new one or simply defying the ruling – all of which certainly *would* amount to an unconstitutional revolution by the executive itself, depriving it of the argument that it was seeking to uphold the Constitution. What this reveals is that in the final analysis, although all three branches of the government must act in accordance with the law, it is the judicial branch that declares what the law is, which means that it is the judicial branch which is the most powerful of them, even if judges have hitherto been hesitant to acknowledge, and still less, act, in accordance with that reality. Yet, as the American judicial realist Jerome Frank noted[207]

> When judges and lawyers announce that judges can never validly make law, they are not engaged in fooling the public; they have successfully fooled themselves.

The maxim *ius dicere, non facere* therefore does not amount to a restriction on the power of the courts to the degree that one might think, because to say *is* to make.

VIII CONCLUSION

It is useful to end this article where it began – with the resignation of Sir Robert Tredgold from his position as Chief Justice of the Supreme Court of the Federation of Rhodesia and Nyasaland in 1960. It will be recalled that he resigned not because he was already required to apply legislation that was inconsistent with liberty of the person and which intruded upon judicial power, but rather in *anticipation* of such legislation being enacted. To many, this would seem an unnecessary, perhaps even dramatic, gesture. But I would argue that far from reflecting excessive judicial punctilio, Chief Justice Tredgold's resignation was a necessary and principled step, taken in order to avoid his judicial office being co-opted to serve as a cog in

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[197] (1992) 177 CLR 106.
[198] Margo Kingston, 'Parliament Must Reclaim Role On Rights – Costello,' *The Age* (Melbourne), 7 October 1992.
[199] 'An Implied Bill of Rights' *Australian Press Council News* (4) 1992.
[200] Commonwealth *Parliamentary Debates*, Senate Hansard, 7 October 1992, 1280 (Michael Tate).
[201] Les Hollings, 'Don't Let the Judges Govern,' *Sunday Telegraph* (Sydney), 4 July 1993.
[202] (1996) 187 CLR 1.
[203] Gervase Green, 'Senator defies PM in attack on court', *The Age* (Melbourne), 4 March 1997, 4.
[204] Ibid.
[205] Adrian Rollins, 'Attacks "undermine" the role of the High Court,' *The Sunday Age* (Melbourne), 9 March 1997, 11.
[206] James Woodford, 'Borbidge steps up attack on High Court,' *Sydney Morning Herald* (Sydney), 1 March 1997, 7.
[207] Jerome Frank, *Law and the Modern Mind* (Stevens & Sons, 1949) 115.

the machinery of an unjust legal order, even though, as he himself admitted, given that no other judge followed him and the legal system carried on unaffected, he overestimated the effect that his resignation would have.[208] What this article has sought to do is to argue that when faced with legislation that infringes fundamental human rights, judges in Australia face the same moral question as was faced by Tredgold CJ and later by judges in South Africa. I have argued that in answering that question, they have the choice either of resigning or of being open to the new approach to the rule of law that is evolving in other jurisdictions, and of crafting a new rule to the effect that, in certain circumstances, the common law is superior to the will of Parliament – a rule which can be justified either by looking to the law as it stood in the 17th century or by giving effect to that new understanding of the rule of law and the correct balance between branches of government that it requires.

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[208] Tredgold, above n 8, 234-5.