DETENTION WITHOUT TRIAL
Is there no limit?

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A series of recent decisions by the High Court of Australia upholding, and arguably considerably extending, the power of the Executive Government to detain people without trial has generated serious concerns about the impact of these rulings on basic democratic rights and civil liberties. Such concerns have already been registered in the *Alternative Law Journal*, with attention being drawn to the ominous implications of these decisions for the 'war on terrorism'.[1]

These early warnings may have underestimated the scope of the shift undertaken by the High Court. A further examination of the judicial reasoning involved suggests that it is now appropriate to ask what, if any, limits exist on Executive detention without trial. This question is by no means confined to the immediate context of the mandatory detention of so-called 'unlawful non-citizens'.

In three sets of judgments handed down on 6 August 2004, the High Court declared that the Federal Government can detain rejected asylum seekers indefinitely — perhaps for life — regardless of their inability to be deported to any other country and irrespective of the intolerable conditions inside the government's immigration detention centres.

In the cases of *Al-Kateb*[2] and *Al Khafaji*,[3] by a 4–3 majority, the court ruled that the government could use the 'aliens' power (s 51(xix)) of the *Australian Constitution*) to impose detention for as long as the government deemed it necessary. The judges held that, even if deportation were not possible, indefinite detention did not unconstitutionally impose punishment without trial. In the third case of *Behrooz*,[4] by 6–1, the court declared that the conditions of incarceration in the country's remote camps — no matter how harsh and inhumane — could not provide a defence to a charge of escaping from immigration detention.

The underlying thrust of these rulings was reinforced four months later by *Re Woolley*,[5] where the Court decided unanimously that, despite the special physical, emotional and legal vulnerability of children and notwithstanding the protections enshrined in international law, children were no exception to the power of detention.

The immediate impact of the decisions in *Al-Kateb* and *Al Khafaji* was to throw at least a dozen former detainees into a legal and political black hole.[6] Previously, and after years of imprisonment, they had been released into the community, subject to certain reporting conditions, by the Federal Court, which ruled in several cases that it was unlawful to hold them for deportation when there was no prospect of any other country accepting them in the foreseeable future.[7]

Likewise, in *Re Woolley*, the High Court seems to have closed the last door on any hopes raised by earlier decisions of the Family and Federal Courts. In *MIMIA and B & Anor*,[8] the Court had already overturned the Family Court's invocation of its welfare jurisdiction to order the release from immigration detention of members of the Bakhtiyari family.[9] In *Re Woolley*, the Court ruled that the ongoing incarceration of children was lawful, despite being condemned by the UN Human Rights Committee and the Australian Government's own Human Rights and Equal Opportunity Commission for violating international law, including the United Nations *Convention on the Rights of the Child* and the *International Covenant on Civil and Political Rights*.[10]

While the cases concerned the imprisonment of asylum-seekers, they have a broader significance for the relationship between state power and democratic rights and freedoms. They represent a departure from established Australian constitutional law concerning the ambit of Executive power. They substantially broaden the scope for the Commonwealth government to impose detention without trial. Members of the minority in *Al-Kateb* and *Al Khafaji* warned that the logic of the decision could be extended to other federal powers, not just immigration. Justice Kirby said the majority view had 'grave implications for the liberty of the individual in this country which this court should not endorse'.[11] Justice Gummow noted that the government could potentially now lock up bankrupts, for example, supposedly to protect society.[12]

The human dimension

Ahmed Ali Al-Kateb, a stateless Palestinian, arrived in Australia without valid papers in December 2000. He sought asylum because he suffered persecution in Kuwait, where he had lived most of his life. Long-term residency or birth in Kuwait did not create a right of citizenship or permanent residence there. His application for a protection visa was rejected and, having exhausted his rights of appeal, he applied to be removed from Australia in August 2002. However, neither Kuwait nor Israel would allow him to enter (he sought to be removed to Gaza, but Israel refused this request). As a result, he had been incarcerated for four years by the time the High Court heard his case.

REFERENCES

1. T Penovic, 'The separation of powers: Lim and the 'voluntary' detention of children' (2004) 29 *AltLJ* 222; M Groves, 'Immigration Detention vs Imprisonment: Differences explored' (2004) 29 *AltLJ* 228; A Reilly, 'Immigration detention: Pushing the boundaries' (2004) 29 *AltLJ* 248.

2. *Al-Kateb v Godwin* [2004] HCA 37 (6 August 2004)('*Al-Kateb*').

3. *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* [2004] HCA 38 (6 August 2004)('*Al Khafaji*').

4. *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous* [2004] HCA 36 (6 August 2004)('*Behrooz*').

5. *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* [2004] HCA 49 (7 October 2002)('*Re Woolley*').

6. After a brief review, following the High Court decisions, the Immigration Minister used her discretionary power under the *Migration Act* to grant Mr Al-Kateb and Mr Al Khafaji bridging visas, giving them temporary permission to live in Australia. However the claims of 13 others, including an asylum seeker who had been held in detention for six years, were rejected. See M Shaw, 'Stateless detainees get bridging visas in review', *The Age*, 1 September 2004, 7. See also Parliamentary Library, Research Brief no. 1 2004–05, 'The High Court and indefinite detention: towards a national bill of rights?' www.aph.gov.au/library/pubs/RB/2004-05/05rb01.htm> at 4 April 2005.

7. In *Minister for Immigration and Multicultural Affairs and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, the Full Federal Court held that the continued detention of an unlawful non-citizen was unlawful where that person had requested removal from Australia, but there was no real likelihood or prospect of that person's removal in the reasonably foreseeable future.

8. *Minister of Immigration and Multicultural and Indigenous Affairs and B & Anor* (2004) 206 ALR 130.

9. A Sifris and T Penovic, 'Children in Immigration Detention: The Bakhtiyari family in the High Court' (2004) 29 *AltLJ* 217.

Al-Kateb challenged the legality of his continued detention, seeking a writ of habeas corpus. He argued that, as he could not be removed to another country, his incarceration had become punitive and was therefore beyond the scope and purpose of the *Migration Act 1958* (Cth), which requires, by ss 189 and 196, that all refugee applicants be detained until they are either granted a visa or deported. In addition, he argued that his detention was unconstitutional, as a usurpation of judicial power, because only courts could order punitive imprisonment.

Similar arguments were mounted by Abbas Mohammad Hasan Al Khafaji, an Iraqi who was recognised as a refugee fleeing persecution in Iraq. He was refused a protection visa on the ground that he had a right to reside in Syria, where he once lived. However, that supposed right proved to be a chimera for Al Khafaji because Syria refused to admit him, leaving him in a legal limbo.

Mahran Behrooz, an Iranian refugee, had been detained at the Woomera Detention Centre in the South Australian desert for nearly two years when he escaped, along with two others. After he was captured, he was charged with escaping from immigration detention, a criminal offence carrying a maximum sentence of five years. Behrooz justified his actions on the basis that the conditions of his incarceration were so gross, harsh and inhumane that they were an illegal form of imprisonment, under the *Constitution* and international law. In his trial the government blocked the admission of evidence regarding conditions at Woomera, insisting it was irrelevant.

Nevertheless, the evidence placed on the record included a report by Professor Richard Harding, Inspector of Custodial Services in Western Australia, condemning the detention centres as an 'absolute disgrace'. Harding's report said the centres were 'in the middle of no-where' involving 'gross overcrowding, broken toilets, unprivate conditions, lack of medical and dental facilities'. He described Curtin Detention Centre as 'almost intolerable', adding that, 'such evidence as exists indicates things are little better at the other centres'.[13] Advice had been given to the Immigration Minister to close Woomera 'to help avert a human tragedy of unknowable proportions'. A psychiatric nurse stated in a report 'that the detainees felt that they were treated like animals, medication was fed through wire mesh to detainees and there was a pervasive belief that suicide was the only way out'.[14]

With only Kirby J dissenting, the High Court ruled 6-1 that the harshness of conditions was irrelevant to the validity of the detention, and therefore provided no defence. Justice Kirby held that the circumstances of the appellant's detention could be a form of punishment not sanctioned by a court of law and therefore could be unconstitutional. Justice Kirby also considered that the detention of Behrooz could be in breach of international law. If his detention was unlawful, the appellant had a defence available to him in answer to the criminal charge of escaping. In rejecting this proposition, Gummow, McHugh and Heydon JJ cited with approval an opinion by Scalia J in *Wilson v Seiter*[15] in which the US Supreme Court overturned earlier decisions that a prison inmate was constitutionally entitled to medical treatment.

In *Re Woolley*, four children aged 7, 11, 13 and 15 of Afghani nationality, had been in detention for more than three years since arriving in Australia with their parents in January 2001. Pending the outcome of their father's appeals against their denial of protection visas, they had been released from the Baxter Detention Centre on temporary protection visas. On behalf of the children it was argued that the *Migration Act* did not authorise the indefinite detention of children, in particular because they did not have the same capacity that adult asylum seekers supposedly had to voluntarily end their detention by seeking removal from Australia. Alternatively, if the Act did authorise their detention, it was argued that the Act was constitutionally invalid, either because it was beyond the scope of the 'aliens' power or because it amounted to punishment without trial. Given leave to intervene, the Human Rights and Equal Opportunity Commission referred the Court to numbers of articles and reports pointing to the damaging mental health effects of long term immigration detention on children.[16] Nevertheless, the High Court upheld the validity of the detention.

Legal precedents undermined

The High Court rulings undermine or call into question important legal precedents, and suggest a new dismissive approach to international law, in particular the *International Covenant on Civil and Political Rights*.

A general constitutional limit on Executive detention

Since the Magna Carta of 1215, the English constitutional system, which Australia inherited, has curtailed the power of the Executive to detain people. Indeed, a desire to guarantee freedom from

10. *Bakhtiyari v Australia*, Human Rights Committee Communication No 1069/2002 (2003); Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention*, (2004).

11. [2004] HCA 37 [148].

12. Ibid [133].

13. Per Kirby J, [2004] HCA 36 [96].

14. Ibid at [97].

15. 501 US 294 (1991).

16. Per Gummow J, [2004] HCA 36 [120]

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arbitrary imprisonment lies at the core of the doctrine of separation of powers. In ruling that Guantanamo Bay detainees, including two Australians, David Hicks and Mamdouh Habib, could seek writs of habeas corpus in US courts the US Supreme Court noted that democratic conceptions dating back to the Magna Carta were at stake.[17] The majority judgment, delivered by Stevens J, suggested that:

> Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint.[18]

In the Australian context, this desire to protect freedom is expressed primarily through the separation of the judicial power in the *Constitution*, which is entrusted exclusively to the courts by ch III. To a lesser extent, it is inherent in the notion that the heads of power granted to the Commonwealth by s 51 of the *Constitution* do not authorise measures, such as punitive or arbitrary deprivation of liberty, unless these measures can be shown to be reasonably necessary to the exercise of those powers.

In previous cases, the High Court has insisted that with rare exceptions (such as mental health committals and quarantine restrictions) deprivation of liberty can only occur by order of a court following a finding of guilt in criminal proceedings. In their joint judgment in *Chu Kheng Lim v Minister for Immigration* ('*Lim*'),19 Brennan, Deane and Dawson JJ stated:

> [P]utting to one side the exceptional cases ... the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.[20]

From this proposition, the High Court in that case drew the conclusion that, apart from the exceptional cases, there exists, for citizens, 'at least in times of peace, a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth'.[21]
By upholding the system of mandatory immigration detention initiated by the Labor government, the High Court in *Lim*, in effect, declined to extend that constitutional immunity to non-citizens. Nevertheless, *Lim* provided ample authority for the statement made by Kirby J in his dissenting judgment in *Al-Kateb* that:

> 'Indefinite detention at the will of the Executive, and according to its opinions actions and judgments, is alien to Australia's constitutional arrangements'.[22]

In *Al-Kateb*, Gummow J noted that unless ch III was interpreted as relevantly restricting the power of the Executive to impose detention without trial, the reasoning of the majority could open the door for wide-ranging use of various heads of Commonwealth legislative power, not just the immigration and aliens powers, to administratively detain people.

> [I]t could not seriously be doubted that a law providing for the administrative detention of bankrupts in order to protect the community would be a law with respect to bankruptcy and insolvency (s 51(xvii)), or that a law providing for the involuntary detention of all persons within their homes on census night would be a law with respect to census and statistics (s 51(xi)). If such laws lack validity, it is not by reason of any limitation in the text of pars (xvii) and (xi) but by the limitation in the opening words of s 51, 'subject to this Constitution', which attract any limitation required by Ch III.[23]

Yet, it is precisely this approach that was taken by the majority in *Al-Kateb*, and underscored by the judgments in *Re Woolley*. In the latter case, McHugh J explicitly rejected the above propositions cited from *Lim*. They went 'too far' by stating that detention by the Executive was always penal or punitive. Accordingly, the conclusion that citizens enjoyed a constitutional immunity from Executive detention could not stand. 'Whether detention is penal or punitive must depend on all the circumstances of the case', he suggested.[24] Although it was unnecessary for the decision at hand, McHugh J embarked on a discussion about the possibilities of laws being characterised as 'protective' rather than punitive:

> The most obvious example of a non-punitive law that authorises detention is one enacted solely for a protective purpose ... Protective laws ... may also have some deterrent aspect which the legislature intended. However, the law will not be characterised as punitive in nature unless deterrence is one of the principal objects of the law and the detention can be regarded as punishment to deter others. Deterrence that is an intended consequence of an otherwise protective law will not make the law punitive in nature unless the deterrent aspect itself is intended to be punitive.[25]

This passage has chilling implications in the context of the 'war on terrorism'. It can be read as indicating that the Federal Government could validly obtain the power to indefinitely detain people on the pretext of combating terrorism, even if the detention had

17. *Rasul v Bush; Al Odah v United States* (2004) 542 US (Cases no. 03–343, 03–334).

18. Quoting Jackson J in *Shaughnessy v United States ex rel. Mezei*, 345 US 206, 218–9 (1953) (dissenting opinion).

19. (1992) 176 CLR 1.

20. Ibid 27.

21. Ibid 28–9.

22. [2004] HCA 37 [146].

23. Ibid at [133].

24. [2004] HCA 49 [58].

25. Ibid [61].

a 'deterrent' aspect — so long as the relevant legislation asserted that its primary purpose was to protect the community. Justice McHugh argued that any protection of citizens from Executive detention arose not from the separation of the judicial power by ch III, but from the fact that, apart from the 'aliens' power, few heads of federal legislative power were expansive enough to authorise Executive detention. Yet, he also observed that the defence power — one of the powers that arguably could constitutionally underpin counter-terrorism legislation — was probably an exception to that limitation.[26]

Previous rulings on immigration laws

While upholding the legality of detention for the purpose of deportation, two previous High Court authorities had specifically limited such power. In 1949, *Koon Wing Lau v Calwell*[27] established that the (previous) *Migration Act* provisions providing for detention were constitutionally valid because they did not create or purport to create a power to keep a deportee in custody for an unlimited period but implied a purpose of deportation. Therefore, the deportee would be entitled to be set free on application for habeas corpus if the detainee was not deported within a reasonable period. Moreover, such purpose was not to be ascertained by resort to legislative or Executive opinion as to the attainability of that purpose.

In *Lim,* the High Court ruled that if detention went beyond what was reasonably necessary for deportation, it would assume the character of unconstitutional punishment. The important principle in *Lim*, for present purposes, was that where the Executive detains (as opposed to a court), the authority to detain 'takes its character' from the parliament's power (such as it has) to exclude, admit or deport aliens, of which detention is an incident. Beyond exercising a power to detain for such incidental purpose, detention exceeds this power. Arguably then, incarceration that is unlimited by some temporal constraint exceeds the bounds of Executive power, because it cannot objectively be considered as detention for the purpose of removal. In *Al-Kateb*, Gummow J summarised this aspect of the decision in *Lim* as follows:

> A majority of the court in *Lim* accepted the proposition that the power of the Parliament to authorise, and that of the Executive to implement, the detention of aliens is limited by reference to the purpose of that detention. In their joint judgment, Brennan, Deane and Dawson JJ held that laws authorising the administrative detention of aliens will only be valid 'if the detention which they require and authorize is 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'.[28]

However, the majority, and in particular McHugh and Callinan JJ, rejected the application of these authorities to Mr Al-Kateb. Justice McHugh declared that *Lim* offered no assistance to the appellant, restating his position in *Lim* that:

> [A] law requiring detention of aliens for the purpose of deportation or processing of applications would not cease to be one with respect to aliens even if the detention went beyond what was necessary to effect those objects. That is because any law that has aliens as its subject is a law with respect to aliens.[29]

On this view, the aliens power has no, if any, limits. Indeed, the majority held that so long as the stated purpose of detention was deportation or exclusion from the Australian community there was no temporal limitation. Such detention, irrespective of duration, was for protective purposes (protection of the Australian community) and not punitive.

Justice McHugh concluded: 'Under the aliens power, the Parliament is entitled to protect the nation against unwanted entrants by detaining them in custody.'[30] Although he conceded that the outcome of the particular case was 'tragic', his judgment was more akin to a political speech in favour of indefinite detention in general, drawing pointed analogies between the detention of 'aliens', prisoners of war and people considered to be a threat to national security during war time, and using language such as 'protection of the community from undeserved infiltration'.[31] In a similarly political tone, Callinan J suggested that detention could be used for other purposes, in addition to deportation, in order to prevent non-citizens gaining any benefits or basic rights associated with citizenship:

> It may be the case that detention for the purpose of preventing aliens from entering the general community, working, or otherwise enjoying the benefits that Australian citizens enjoy is constitutionally acceptable. If it were otherwise, aliens having exhausted their rights to seek and obtain protection as non-citizens would be able to become de facto citizens.[32]

Justice Hayne (with whom Heydon J agreed) bluntly observed that immigration detention could easily be equated with punishment because detention centres have 'many, if not all, of the physical features and administrative arrangements commonly found in

26. Ibid [63].

27. (1949) 80 CLR 533.

28. [2004] HCA 37 [128].

29. Ibid [41].

30. Ibid [74].

31. Ibid [47], [55–61]. The phrase is from a White Australia-era case, *O'Keefe v Calwell* (1949) 77 CLR 261, 278.

32. Ibid [289].

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prisons'.[33] Justice Hayne attempted to distinguish immigration detention from punishment by drawing on Hart's definition of punishment, which suggests that it must be imposed for an offence against legal rules.[34] Justice Hayne concluded that as immigration detention was not imposed for an offence, it was not truly punitive. This line of reasoning is entirely circular, given that the scheme of administrative detention embodied in the *Migration Act* is designed to make it unnecessary for the immigration authorities to bring alleged 'unlawful non-citizens' before a court and prove that they have committed an offence.

Justice Hayne went so far as to argue that even if indefinite detention became punitive, it would nevertheless be constitutional because the detainee had brought the consequences upon himself:

> It is essential to confront the contention that, because the time at which detention will end cannot be predicted, its indefinite duration (even, so it is said, for the life of the detainee) is or will become punitive. The answer to that is simple but must be made. If that is the result, it comes about because the non-citizen came to or remained in this country without permission.[35]

This conclusion not only flies in the face of constitutional principle, but also the traumatic and life-threatening conditions in which asylum seekers seek refuge,[36] as well as the reality that Al-Kateb could find no other country to enter.

The Executive cannot judge itself

Since 1951, when the Menzies Government attempted to outlaw the Australian Communist Party, the High Court has rejected the proposition that the Executive can set the limits of its own power. Against a backdrop of global anti-communism,[37] the Communist Party Dissolution Bill recitals claimed that its measures were required for the 'security and defence of Australia' in the face of a dire threat of violence, insurrection, treason, subversion, espionage and sabotage.[38] The High Court, however, rejected the use of these recitals to validate the Government's claim to be exercising the defence, incidental and Executive power of the Commonwealth. The judges invoked the legal doctrine that the Commonwealth Government and parliament cannot unilaterally assert constitutional bases for legislation by simply stating that its purpose was covered by Commonwealth heads of power.

In their dissenting judgments in *Al-Kateb*, Kirby and Gummow JJ emphasised the importance of this proposition. In the words of Kirby J: 'As in the Communist Party case, this requirement has proved an important, even vital, protection for individual liberty'.[39] Justice Gummow stated:

> [I]t cannot be for the executive government to determine the placing from time to time of that boundary line which marks off a category of deprivation of liberty from the reach of Chapter III. The location of that boundary is itself a question arising under the Constitution or involving its interpretation.[40]

In *Al-Kateb* and *Al Khafaji* the Government simply asserted that the purpose of the detention was deportation — despite the uncontested fact that deportation was not possible in the foreseeable future. Despite the strong warnings issued by Kirby and Gummow JJ, the majority uncritically accepted this assertion.

Legislation must be interpreted consistently with basic rights

It is an established rule in common law countries that statutes will not be interpreted as abrogating fundamental rights and freedoms unless clearly stated. Where legislation is ambiguous or silent on the issue, it will be interpreted to make it consistent with these rights. Given the fundamental significance of the right to personal liberty, there is a strict common law presumption that imprisonment is unlawful unless there is clear legal authority for the person's detention.[41]

In *Al-Kateb*, together with Kirby and Gummow JJ, Gleeson CJ said the *Migration Act* did not contemplate the circumstances of stateless people who could not be deported. Yet, the majority — McHugh, Callinan, Hayne and Heydon JJ — ruled that the Act's wording explicitly authorised such detention. In his dissenting judgment, Gleeson CJ explained the foundation of the legal principle as follows:

> Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment ... In 1908, in this court O'Connor J referred to a passage from the fourth edition of *Maxwell on Statutes* which stated that '[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness'.
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> A statement concerning the improbability that parliament would abrogate fundamental rights by the use of general

33. Ibid [264].

34. HLA Hart, *Punishment and Responsibility* (1968) 5.

35. [2004] HCA 37 [268].

36. M Head, 'Refugees, Global Inequality and the Need for a New Concept of Global Citizenship' [2002] *Australian International Law Journal* 57.

37. See K Lindsay, *The Australian Constitution in Context*, LBC, Sydney, 1999, 72–6. For the political and social context of the Communist Party case, see G Winterton, 'The Significance of the Communist Party Case,' (1992) 18 *Melbourne University Law Review*, pp 630–58.

38. *Communist Party Dissolution Act 1950* (Cth) Preamble.

39. [2004] HCA 37 [155].

40. Ibid [140].

41. *Liversidge v Anderson* [1942] AC 206, 245.

> or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament.[42]

In the context of the migration legislation it was clear that there was an underlying assumption that the relevant 'unlawful non-citizen' (the language used instead of the old term 'alien') was capable of being deported. In fact, the relevant provisions had not contemplated the circumstance of stateless persons who could not be deported.

The majority circumvented this principle of statutory interpretation by boldly asserting that there was no ambiguity. Such a view is impossible to reconcile with the actual provisions and indeed with the view of the three jurists who dissented. As Gleeson CJ concluded in considering the provisions of the Act:

> The Act does not say what is to happen if, through no fault of his own or of the authorities, he cannot be removed. It does not, in its terms, deal with that possibility. The possibility that a person, regardless of personal circumstance, regardless of whether he or she is a danger to the community, and regardless of whether he or she might abscond, can be subjected to indefinite, and perhaps permanent, administrative detention is not one to be dealt with by implication.[43]

Respect for international law

In *Al-Kateb*, the majority signalled a willingness to move away from the now traditional principle that courts will, where possible, interpret legislation in the light of international law. As with basic common law rights, the assumption is that parliament would not violate international law, so that any intention to do so must be clearly and expressly stated in the legislation. In his dissenting judgment, Kirby J made numerous references to the previously recognised desirability of similarly interpreting the *Constitution* according to international laws and conventions:

> The Australian Constitution was understood and applied in 1945 in a completely different international context from that prevailing today ... Whatever may have been possible in the world on 1945, the complete isolation of constitutional law from the dynamic impact of international law is neither possible nor desirable today. That is why national courts, and especially national constitutional courts such as ours have a duty, so far as possible, to interpret their constitutional texts in a way that is generally harmonious with the basic principles of international law, including as that law states human rights and fundamental freedoms.[44]

It is not possible to deal at length with those questions in this article, but it must be noted that no other member of the court adopted the approach taken by Kirby J. Indeed, McHugh J devoted a large portion of his judgment to stridently criticising Kirby J's reasoning. Justice McHugh not only denounced Kirby J's constitutional doctrine as 'heretical' but also dismissed even the notion of interpreting ordinary legislation in the light of international law as 'based on a fiction'.[45]

Conclusion

The High Court decisions mark a radical shift in the legal-constitutional framework. The practical effect of the decisions assumes a positively Kafkaesque dimension: segregation by incarceration, without trial for any offence, at the will of the state, for an indefinite period, perhaps for life, in harsh, inhuman conditions.[46] Although three members of the Court, including the Chief Justice and Gummow J, whose record is that of customarily being at the core of the Court's majority, dissented in *Al-Kateb*, Gleeson CJ and Gummow J did so primarily on the narrow grounds of statutory interpretation, not on constitutional principle. They found that the *Migration Act*, as currently drafted, did not specifically support the prolonged detention of an entire class of people. If it wished, the Federal Government could overcome these objections by moving amendments to the legislation, and by drafting future legislation in this and other spheres, such as 'counter-terrorism', to explicitly authorise indefinite detention.

This is all the more concerning given the bipartisan agreement that exists between the Liberal–National Party coalition and the Labor Party on these issues. It was the Labor Government that first introduced the system of mandatory detention of unlawful non-citizens in 1992. And the Labor Party has supported every piece of so-called anti-terrorism legislation enacted since 2001, including the ASIO detention measures.

While couched in purely legal terms, the rulings objectively represent the judiciary's imprimatur for the realignment of legal and political power sought by the Howard Government, which has already exploited the 'war on terror' to introduce unprecedented measures of a police-state character. These include detention without trial for interrogation, jail terms for 'associating' with alleged terrorists and wide-ranging and subjective

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42. [2004] HCA 37 [19–20].
43. Ibid [21].
44. Ibid [174–175].
45. Ibid [63].
46. F Kafka, *The Trial*, 1957.