Introduction

1

Introduction

> The claim to equality before the law is in a substantial sense the most fundamental of the rights of man.
>
> Hersch Lauterpacht, *An International Bill of the Rights of Man* (1945)[1]

> 'The power to admit, exclude and expel aliens was among the earliest and most widely recognized powers of the sovereign state', and the power remains 'undoubted'. But unless [it] is understood to be a constitutional principle, or the instrument of constitutional principle, the power will crumble, eroded by newly enforceable constitutional principles of equality before the law, and by rights as ancient as liberty (immunity from coercion or imprisonment) . . .
>
> John Finnis, *Law Quarterly Review* (2007)[2]

1.1 Introduction

The executive issues a removal order against a non-citizen, who is then detained pending removal. But that person cannot be removed. There may be a legal restriction on his or her return to the country of nationality, or there may be no other country prepared to accept him or her. What then? Is detention still authorised? In this book I consider judicial responses to this question in Australia, the United Kingdom and Canada, and the legal implications and reverberations of those responses.

The key judicial decisions discussed and analysed in this book postdate 11 September 2001. They have exposed a deep divergence of opinion between final courts of appeal which share a common legal heritage, particularly on issues of liberty and equality as fundamental as those considered here. My purpose is to analyse these cases in terms of both judicial method and the underlying legal principles relied upon by the courts. My central argument is that at heart the decisions

[1] *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 (*Belmarsh*) [45] (Lord Bingham), citing Hersch Lauterpacht, *An International Bill of the Rights of Man* (New York, Columbia University Press, 1945).

[2] John Finnis, 'Nationality, Alienage and Constitutional Principle' (2007) 123 *LQR* 417, 417 (footnotes omitted).

in these cases turned on judicial views on a set of issues concerning the scope of the liberty interest in democratic societies.

The issues traversed in the cases have achieved currency and gained urgency in the period since 11 September 2001. The judicial divergences that have emerged between the national courts in this period appear stark when examined in the context of a legal family that has been accustomed to sharing a great deal.[3] But there is little that is new or unique about the current dilemmas Commonwealth courts are facing in this field. The issues with which the courts are grappling concern older, and persisting, questions about the nature and place of the rights of non-citizens within our societies. I start, therefore, with an examination of a case which predated, by just a few months, the events of 11 September 2001. The case, *Zadvydas*,[4] was a judgment of a common law final court of appeal outside the Commonwealth, namely the United States Supreme Court. But the reasoning in the *Zadvydas* judgments, of both the majority and minority, clearly exposes the fault lines of a jurisprudential conflict subsequently ventilated, in very different ways, in the three Commonwealth final courts of appeal. The decision serves as a point of reference in those Commonwealth decisions.

In *Zadvydas*, the United States Supreme Court consolidated two cases of detention, concerning Mr Zadvydas and Mr Kim Ho Ma, for argument and decision. At issue before the United States Supreme Court was the question whether authorisation to detain beyond a statutory 90-day 'removal period' was subject to an implied limitation that the detention be no longer than reasonably necessary to effect removal to another country.[5] The relevant statutory provision read:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section[s] . . . or who has been determined by the Attorney-General to be a risk to the community or unlikely to comply with the order for removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).[6]

Mr Zadvydas, of alleged Lithuanian parentage, came to the United States in 1948, aged 8, from a displaced persons camp in Germany. He had a substantial criminal record. In 1994 the Immigration and Naturalization Service (INS) ordered his deportation to Germany. Germany refused to accept him as a non-German national. Lithuania denied his application for Lithuanian citizenship. The Fifth Circuit had held that Mr Zadvydas's detention 'did not violate the Constitution because his eventual deportation was not "impossible", good-faith efforts to remove him from the United States continued, and his detention was subject to periodic administrative review'.[7]

[3] Canada is a mixed jurisdiction, with Quebec a civil law jurisdiction. The Scottish legal system combines common and civil law elements.

[4] *Zadvydas v Davis*, 533 US 678 (2001).

[5] ibid, 706.

[6] Immigration and Nationality Act, 8 USC §1231(a)(6).

[7] *Zadvydas* (n 4) 685.

Mr Kim Ho Ma was born in Cambodia in 1977, and came to the United States aged 7 from refugee camps in Thailand and the Philippines. Following a conviction for manslaughter he was sentenced to 38 months' imprisonment, and released into immigration custody after serving two years. A Federal District Court determined that there was no 'realistic chance' that Cambodia would accept Mr Ma. The Ninth Circuit had concluded that the statute did not authorise detention for more than a 'reasonable time' beyond the 90-day statutory removal period. It had further held that what amounted to a 'reasonable time' was to be determined with reference to the statute's purpose of facilitating removal. The government appealed Mr Ma's case to the Supreme Court.

The Court split 5:4 on the question of whether the statute authorised indefinite detention pending removal. Breyer J delivered the Opinion of the Court.[8] Kennedy J and Scalia J each delivered a dissenting judgment.[9] The *Zadvydas* judgments chart divergent understandings of the liberty interests of non-citizens and of the nature of the immigration power.

Breyer J, writing the Opinion of the Court, anchored his reasons in the Due Process Clause of the Fifth Amendment, which provides in part: 'No person shall . . . be deprived of . . . liberty . . . without due process of law.' He reasoned that to interpret the statute to allow indefinite detention would 'raise a serious constitutional problem'.[10] Accordingly, 'interpreting the statute to avoid a serious constitutional threat, we conclude that, once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute'.[11]

Breyer J's starting premise was that government detention violates the Due Process Clause unless it is ordered in a criminal proceeding with adequate procedural protections, or there is a special justification that outweighs the constitutionally protected interest in freedom from physical restraint.[12] The only such justification for detention appropriately confined to non-citizens is 'ensuring the appearance of aliens at future immigration proceedings'.[13] This justification is often referred to in the *Zadvydas* judgments by the shorthand of 'flight risk'.

Breyer J also addressed the government's argument that there was a second 'special justification', distinct from and independent of the objective of facilitating removal, for indefinite detention measures confined to non-citizens – 'preventing danger to the community',[14] or 'the dangerousness rationale'.[15] He acknowledged that dangerousness might serve as a rationale for indefinite administrative detention, of both citizens and non-citizens, but only in special circumstances, and those special circumstances were not present in *Zadvydas*. Critically, the Court held that the special circumstances required to establish the

[8] Stevens, O'Connor, Souter and Ginsburg JJ joined the Opinion of the Court delivered by Breyer J.
[9] Thomas J joined Scalia J's judgment. Rehnquist CJ joined Kennedy J's judgment.
[10] *Zadvydas* (n 4) 699.
[11] ibid.
[12] ibid, 690.
[13] ibid.
[14] ibid.
[15] ibid, 691.

dangerousness rationale were not made out simply because the detainee was a dangerous non-citizen subject to removal.

The Court held that a dangerousness rationale for detention is only applicable where a statute is confined to an especially dangerous class, and that was not the case here. Further, where the detention is potentially indefinite, there are additional requirements. The dangerousness rationale only justifies indefinite detention if there is 'some other special circumstance . . . that helps to create the danger'.[16] The Court and dissents disagreed on whether alienage amounts to a 'special circumstance' sufficient to justify indefinite detention on 'dangerousness' grounds. The Court stated that it does not. An alien detainee's removable status 'bears no relation to a detainee's dangerousness'.[17] The Court held that alienage, or an alien's vulnerability to removal, does not supply an additional factor sufficient to establish the dangerousness rationale for indefinite detention.

Breyer J also addressed a third, distinct government argument that 'alien status itself can justify indefinite detention'.[18] This argument was derived from *Shaughnessy v Mezei*,[19] a 1953 case in which Mr Mezei, a non-citizen seeking return to the United States where he had lived for 25 years, was denied entry, and detained for years pending ultimately unsuccessful attempts at removal. Breyer J distinguished *Shaughnessy* on the basis that the detainees in the present case had effected entry into the United States. They were not subject to the 'no-entry' fiction operative in *Shaughnessy*. The detainees' legally acknowledged presence effected a change in their legal position sufficient to distinguish *Shaughnessy*.[20]

In the result, the Court interpreted the statute to authorise detention only for as long as removal was reasonably foreseeable.[21] This reading flowed from the Court's understanding of the statute's 'basic' purpose as being to 'assur[e] the alien's presence at the moment of removal'.[22] The immigration statute only per-

[16] ibid, 691.
[17] ibid, 691–92.
[18] ibid, 692.
[19] *Shaughnessy v United States; ex rel Mezei*, 345 US 206 (1953). Mr Ignatz Mezei was the husband of a United States citizen and had resided in the United States for 25 years. He returned to visit his mother in Romania, spending time in Hungary. On his return to the United States, the Attorney-General ordered that Mr Mezei be excluded without a hearing, based on confidential information. He tried repeatedly to leave the United States, but because no country would take him he remained in detention in the New York City Harbour. For subsequent historical evidence indicating that the Attorney-General's suspicions about Mr Mezei were misguided, and based on what was suspected to be weak and questionable evidence at the time, see Charles D Weisselberg, 'The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei' (1995) 143 *University of Pennsylvania Law Review* 933.
[20] The Court's acceptance of a distinction between the liberty interest of those who have lawfully entered the United States and those who have entered unlawfully is criticised in Scalia's dissent. For further criticism of this point from a different perspective see T Alexander Aleinikoff, 'Detaining Plenary Power: The Meaning and Impact of *Zadvydas v Davis*' (2002) 16 *Georgetown Immigration Law Journal* 365, 366, 373–78; Linda Bosniak, 'A Basic Territorial Distinction' (2002) 16 *Georgetown Immigration Law Journal* 407.
[21] *Zadvydas* (n 4) 699.
[22] ibid.

mitted detention to that end.[23] To hold otherwise would be to treat the 'alien's removable status' as determinative of liberty rights.[24]

Kennedy J, in dissent, held that to interpret the statute as contended for by the Court 'defeats the statutory purpose and design'.[25] He held that the statutory text was intractable, and so the Court was not at liberty to choose between a constitutionally questionable and a constitutionally acceptable interpretation. His disagreement with the Court centred on his response to the argument for dangerousness as a rationale for the indefinite detention of non-citizens.

For Kennedy J, protection of the community is a freestanding justification for the indefinite detention of non-citizens: 'The authority to detain beyond the removal period is to protect the community, not to negotiate the aliens' return.'[26] Outlining a dangerousness rationale for the indefinite detention of non-citizens, Kennedy J stated: 'The risk to the community exists whether or not the repatriation negotiations have some end in sight; in fact, when the negotiations end, the risk may be greater.'[27] His rationale for indefinite immigration detention was grounded in his characterisation of the immigration power: 'the motivation to protect the citizenry from aliens determined to be dangerous is central to the immigration power itself.'[28]

Kennedy J's position distinguished between the detention of dangerous non-citizens and equally dangerous citizens. He provided reasons for a lack of equivalence between the two classes. He noted that non-citizens in immigration custody may well have '[u]nderworld and terrorist links' that are 'overseas, beyond our jurisdiction to impose felony charges'.[29] He also emphasised the United States' vulnerability to 'hostile' overseas interests making 'strategic' use of their nationals. He portrayed judicially mandated release based on the prospects of removal as playing into the hands of such interests, enabling them to 'force dangerous aliens upon us' by refusing their return.[30]

But at base, Kennedy J held that the reason for distinguishing between citizens and aliens was that 'a removable alien does not have the same liberty interest as a citizen does'.[31] He stated: 'The Court cannot bring itself to adopt this established proposition.'[32] More accurately, Kennedy J and the Court were in fundamental disagreement as to the nature of the 'established proposition' Kennedy J referred to. The Court agreed that a non-citizen is vulnerable to removal in a way a citizen is not, and may have his or her liberty limited to facilitate removal. Yet it did not

[23] ibid, 697. Aff'd *Clark v Martinez*, 543 US 371 (2005), 378, 386.
[24] *Zadvydas* (n 4) 691–92.
[25] ibid, 707.
[26] ibid, 708.
[27] ibid. See also 709.
[28] ibid, 713.
[29] ibid, 714.
[30] ibid, 711–12.
[31] ibid, 717.
[32] ibid.

consider that 'removable status' in and of itself, absent a reasonably foreseeable prospect of removal, sufficed to authorise detention of non-citizens.[33]

Kennedy J objected to the Court's view that authority to detain might turn on a judicial review of the viability of removal. He held that the Court's interpretation 'causes systemic dislocation in the balance of powers', raising serious concerns about 'the Court's own view of its proper authority'.[34] The courts should not intrude into 'sensitive negotiations with foreign powers'.[35] In a phrase that surfaced in subsequent Commonwealth judgments, Kennedy J indicted judicial evaluation of the prospects of removal as putting 'foreign relations . . . into judicially supervised receivership'.[36] Removal negotiations were characterised as a matter of delicate foreign relations in which the courts have no business getting involved.

Kennedy J did not deny that the Due Process Clause has a bearing on the legality of immigration detention. As 'persons within our jurisdiction', Mr Zadvydas and Mr Ma were entitled to its protections.[37] Kennedy J held that the Due Process Clause precludes 'arbitrary or capricious' detention.[38] By this, Kennedy J meant that such 'detention cannot be justified as punishment nor can the confinement or its conditions be designed in order to punish'.[39] '[A]rbitrary and capricious' detention can be avoided by procedural means. Kennedy J held that the necessary protections were supplied by the procedures used to determine 'removable status' and the internal administrative procedures for review of detention. He did, however, leave open the possibility that the constitutional protection against 'arbitrary and capricious' detention might mean that the adequacy of procedures and judicial safeguards for establishing that detention is justified could be tested by a habeas court.[40]

In summary, Kennedy J saw dangerousness as a freestanding rationale for an indefinite detention regime confined to non-citizens, independent of a justification for government detention based on 'effectuating an alien's removal'.[41] He portrayed the dangerousness rationale as provided for by statute and unaffected by constitutional considerations. Further, he characterised the likelihood of removal as a matter for executive evaluation. In his view, judicial review of the prospects of removal went beyond the Court's 'proper authority'.[42]

Scalia J agreed with Kennedy J's interpretation of the statute but took a more radical position on the possibility of court-ordered release. Scalia J held that there

[33] The categories of non-citizens who could be detained under the relevant statutory provision extended well beyond the dangerous. Kennedy J addressed his judgment to the cases of Mr Zadvydas and Mr Ma before the Court: see *Zadvydas* (n 4) 725.

[34] ibid, 705.

[35] ibid.

[36] ibid, 712, 725. See *Al-Kateb v Godwin* [2004] HCA 37, (2004) 219 CLR 562, [285] (Callinan J).

[37] *Zadvydas* (n 4) 718.

[38] ibid, 721.

[39] ibid.

[40] This was left open in *Zadvydas* (n 4) 724–25. And see *Demore v Kim*, 538 US 510 (2003), 532–33 (Kennedy J).

[41] *Zadvydas* (n 4) 697 (Opinion of the Court).

[42] ibid, 705.

are no situations in which the courts can order the release of a non-citizen pending removal. Where authorisation to be in the United States ends, so does any constitutional right to liberty.

> [The] claim can be repackaged as freedom from 'physical restraint' or freedom from 'indefinite detention,' . . . but it is at bottom a claimed right of release into this country by an individual who concededly has no legal right to be here. There is no such constitutional right.[43]

He held that the binary of authorised/unauthorised is determinative of a non-citizen's liberty. The absence of a 'legal right to be here' is conclusive. Contrary to the Court, in dissent Scalia J reasoned that there is no difference between the situation of the inadmissible alien 'stopped at the border' in *Shaughnessy*,[44] and an alien subject to a final order of removal. Neither has any right of release into the country.[45]

To summarise, the Court's interpretation of the statutory power to detain pending removal was driven by constitutional concerns about indefinite, non-punitive detention grounded in a dangerousness rationale. The Court held that authority to detain is defined and limited by the purpose of facilitating removal. The Court provides for release on conditions and return to custody where those conditions are violated.[46] For Kennedy J, the Constitution mandates procedural review, which is afforded by existing internal administrative processes. Scalia J viewed judicially mandated release as conclusively precluded by the fact that the aliens in question had no right to be in the United States.

Before leaving *Zadvydas*, I note one troubling legacy of the Opinion of the Court, namely the Court's provisional allowance for a 'terrorism exception' to its reasoning. The Court stated that it did not 'consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security'.[47] The Court's caveat raised the question whether, when pressed, the courts would expand their understanding of the purposes of immigration detention, such that a foreign terrorist suspect would be held in immigration detention despite the absence of any real prospect of removal in the reasonably foreseeable future.

Kennedy J criticised the Court for the incoherence the terrorism exception introduced into its analysis. He reasoned that the Court's terrorism exception appeared to base authority to detain on an assessment of risk, independent of any consideration of the prospects of removal. But such an exercise was exactly what was precluded by the Court's reasoning.[48] 'The Court ought not to reject a

[43] ibid, 702–03.

[44] *Shaughnessy v Mezei* (n 19). To speak of Mr Mezei as 'stopped at the border' is to invoke the US 'entry fiction'.

[45] *Zadvydas* (n 4) 703.

[46] ibid, 699–700.

[47] ibid, 696.

[48] ibid, 714–15. See also Aleinikoff (n 20) 378–79.

rationale in order to deny power to the Attorney General and then invoke the same rationale to save its own analysis.'[49] I agree with Kennedy J's criticism of the Court on this point. He squarely raised a question that is central to the subsequent Commonwealth jurisprudence on indefinite detention. To what extent do national security concerns license the expansion of an 'immigration' rationale for detention? The central tenet of my argument, based on a critical analysis of the case law, is that, contra Kennedy J, there is no justifiable basis for a 'terrorism exception' of the form suggested by the Court.

This book centres on how the highest appellate courts in Australia, the United Kingdom and Canada have responded to government claims to possess a power to detain non-citizens indefinitely. In these countries (and others),[50] the issue of the legality of the indefinite detention of non-citizens has generated some of the key public law decisions of the last decade. *Al-Kateb*, the *Belmarsh* decision and *Charkaoui* continue to be central to discussions about public law and rights in these jurisdictions.[51] Their legal significance and consequences extend well beyond the subject matter of indefinite detention pending removal.

These decisions outline a continuum of legal positions on the legality of the indefinite detention of non-citizens. The High Court of Australia upheld the indefinite detention of any non-citizen subject to a removal order.[52] The United Kingdom House of Lords held that indefinite detention pending removal was incompatible with enacted rights.[53] The Supreme Court of Canada subjected indefinite detention to procedural constraints, without condemning it as an unlawful violation of a non-citizen's rights.[54]

The decisions starkly evidence the tension between a right to liberty, coupled with a principle of equality before the law, and a commitment to the differential treatment of citizens and non-citizens that is central to border control. The decisions are polarising in their effect. Government claims to legal authority to indefinitely detain non-citizens in the jurisdiction without lawful authority, and more so judicial rulings upholding those claims, have been registered with shock. The High Court of Australia's *Al-Kateb* decision was and is the most dramatic manifestation of this. Its prominence as a spectacular failure of rights protection appears undiminished as the years go by.[55] The shock goes not simply to the sense

[49] *Zadvydas* (n 4) 715.

[50] For another example within the Commonwealth see *Zaoui v Attorney-General* [2005] 1 NZLR 577 (NZCA and NZSC).

[51] *Al-Kateb* (n 36); *Belmarsh* (n 1). Belmarsh is the name of the prison where the detainees were held. *Charkaoui v Canada (Minister of Citizenship and Immigration)* 2007 SCC 9, [2007] 1 SCR 350.

[52] *Al-Kateb* (n 36). Some statutory regimes, such as the Australian Migration Act 1958, distinguish between 'removal' and 'deportation' provisions. This distinction is not relevant to my argument, and throughout the book the terms are used interchangeably.

[53] *Belmarsh* (n 1).

[54] *Charkaoui* (n 51).

[55] See, for example, the prominence and frequency of references to the *Al-Kateb* decision in arguments for a bill of rights, particularly in the context of the Australian National Human Rights Consultation held in 2009: see National Human Rights Consultation Committee, *Report on the Consultation into Human Rights in Australia* (September 2009), 267–69. See also, eg, Caroline Henkels, 'Mandatory Detention of Asylum Seekers in Australia: Would a Bill of Rights Make a Difference?'

that a long-hallowed civil right – the right to personal liberty – has been effaced. There is a sense that something not easily reducible to any isolated right, a conception of human dignity or humanity, affirmed in the idea that those subject to the law should be entitled to its protection, has been undermined. A similar assessment of the incompatibility of indefinite detention pending removal with fundamental justice is conveyed in the stature and constitutional significance the *Belmarsh* decision has attained.[56]

An opposing evaluation is offered by those who see the viability of immigration control, and beyond that the modern liberal democratic state, undermined by successful legal challenges to the indefinite detention of non-citizens.[57] The legal authority of the government to accord different, and more attenuated, rights protections to non-citizens, to the extent contemplated in the measures under challenge, is seen as integral to border control and the constitution and proper functioning of the community. This concern with border control may draw on a deeper affirmation of the importance of a distinction between citizen and non-citizen.[58]

In each of the jurisdictions studied, I argue for the availability and desirability of an interpretation of the legal materials that precludes the indefinite detention of non-citizens. Detention is lawful if it is proportionate to the infringement of the detainee's liberty interest, as judged against the purpose of facilitating the non-citizen's removal.[59] Indefinite detention fails this proportionality test and as such is an unlawful infringement of a non-citizen's rights. The law of Australia and Canada, as well as the United Kingdom, had and has ample legal resources to support a ruling that indefinite detention is unlawful. Such a ruling on indefinite detention best serves the idea of law as an effective limit on power. Immigration powers to admit, exclude and expel non-citizens can, and do, persist in jurisdictions that firmly reject indefinite detention. What is needed is better integration of these immigration powers with the rights of non-citizens, not the denial of meaningful rights to non-citizens.

If the law of Australia, Canada and the United Kingdom support a judgment that indefinite detention is unlawful, the question arises as to why this assessment has not prevailed in every jurisdiction. The full particulars of the answer lie in numerous legal debates within each jurisdiction, the subject matter of this book. But underlying these particulars, the answer lies in deep-seated assumptions

(2006) 4 *Human Rights Research Journal* 1; Alice Rolls, 'Avoiding Tragedy: Would the Decision of the High Court in *Al-Kateb* have been Any Different if Australia had a Bill of Rights like Victoria?' (2007) 18 *Public Law Review* 119; Janina Boughey, 'The Use of Administrative Law to Enforce Human Rights' (2009) 17 *Australian Journal of Administrative Law* 25; Hon Michael McHugh AC, 'A Human Rights Act, the Courts and the Constitution' (2009) 11 *Constitutional Law and Policy Review* 86; Dan Meagher, 'The Significance of *Al-Kateb v Godwin* for the Australian Bill of Rights Debate' (2010) *Constitutional Law and Policy Review* 15.

[56] See ch 5, s 5.1 and ch 6, s 6.7.

[57] Finnis (n 2), discussed in ss 1.4 and 1.5 below.

[58] ibid.

[59] A 'broad-brush' concept of proportionality is employed here. It is sketched in s 1.3 below.

about the legal significance of a person not being a citizen. These assumptions shape judicial reasoning in the central case studies and throughout the relevant jurisprudence. I argue that what grounds the divergences in legal reasoning within each jurisdiction is the 'intellectual frame of mind with which we approach constitutional questions regarding regulation of aliens'.[60] A judge's understanding of citizenship, or more particularly the legal position of non-citizens, serves as the 'intellectual filter'[61] through which arguments about the legality of non-citizens' detention are run, rendering the government arguments for indefinite administrative detention deeply disturbing to some judges' conception of the rule of law, and untroubling to others.

This chapter provides the foundation for the subsequent legal discussion and analysis in chapters two to nine. An initial aspect of this groundwork is a discussion in section 1.2 of the shared principles that inform the legal analysis in each jurisdiction. Two opposing judicial positions that define the fault lines of the debate on the legality of indefinite detention are outlined in section 1.3. Sections 1.4 and 1.5 consider a developed, and influential, attempt to justify a stark hierarchy of liberty rights between citizens and non-citizens, namely that offered by John Finnis in a 2007 article in the *Law Quarterly Review*.[62] Section 1.6 explains my choice of jurisdictions and outlines some of the basic differences between them. Section 1.7 provides the plan of the book.

1.2 Shared Principles

The law in Australia, the United Kingdom and Canada recognises principles of liberty and equal protection of the law. I argue that indefinite detention pending removal is incompatible with these constitutional principles. Detention in the absence of criminal conviction, and disproportionate to a legitimate non-punitive purpose, infringes the liberty rights of non-citizens.

The starting point is a general prohibition on administrative detention, and in particular long-term or indefinite administrative detention. Any exception to this general prohibition calls for special justification, as required by the Court in *Zadvydas*. Turning to the particulars of immigration detention, the starting premise is that a non-citizen subject to a removal order retains a right to liberty. A non-citizen's liberty right is not conclusively revoked by the issuance of a removal order. It is, however, qualified in a way that a citizen's right to liberty is not. In Australia, the United Kingdom and Canada, the courts have held that non-citizens' rights to liberty and equal protection of the law are respectively qualified

[60] T Alexander Aleinikoff, 'Citizens, Aliens, Membership and the Constitution' (1990) 7 *Constitutional Commentary* 9, 25–26 fn 62. For the purposes of discussion, 'alien' is synonymous with 'non-citizen'.

[61] ibid, 25–26 fn 62.

[62] Finnis (n 2).

and shaped by non-citizens' vulnerability to removal. 'While an alien who is actually within this country enjoys the protection of our law, his or her status, rights and immunities under that law differ from the status, rights and immunities of a . . . citizen in a variety of important respects.'[63] The most important respect in which an alien's 'status, rights and immunities' diverge from those of a citizen is 'the vulnerability of the alien to exclusion or deportation'.[64] Corresponding to this vulnerability on the part of a non-citizen is a government power of deportation. Ordinarily, a non-citizen against whom a valid deportation decision is issued can be legally removed from the jurisdiction, the usual destination being his or her country of citizenship. Primarily, the cases analysed in this book address circumstances in which there is a legal, or practical, impediment to removal, leading to indefinite detention. Judicial attempts to integrate a non-citizen's vulnerability to removal with the principle of equal protection of the law generate the jurisprudence under discussion.

I argue that detention measures confined to non-citizens pending removal are only legitimate to the extent that they are proportionate to the goal of facilitating removal. As Wilsher has identified, in order for proportionality analysis to enter the picture, value judgments have to be made about the legitimate purposes of immigration detention.[65] Key considerations here are one's conception of equality of persons and its application to non-citizens. The area of controversy is not whether governments are allowed to discriminate between citizens and non-citizens 'unfairly'. No one claims that they are. What is in dispute is what amounts to 'unfair' discrimination. The difference between the judgments on this question, namely what amounts to 'unfair' discrimination, is dependent on how the government purpose of immigration control is understood and, more particularly, its relation with constitutional principles of liberty. Judges who give sanction to indefinite detention pending removal reason that immigration purposes justify such detention. I argue that the putative immigration purposes that sustain detention without prospect of removal both negate any meaningful liberty interest on the part of the non-citizen and radicalise the distinction between the liberty rights of citizens and non-citizens, in a direct challenge to the concept of equality before the law.

By way of contrast, detention for the purpose of facilitating removal can be rendered compatible with the continuing subsistence of the detainee's liberty right. This compatibility is ensured by way of proportionality analysis. I have adopted a relatively 'pared back' concept of proportionality in this book, requiring that detention be 'reasonably necessary' to achieve that purpose. This captures the basic link between proportionality and fundamental rights,[66] and accommodates

[63] *Chu Kheng Lim v Minister of Immigration, Local Government and Ethnic Affairs* [1992] HCA 64, (1992) 176 CLR 1, [26] (Brennan, Deane and Dawson JJ).

[64] ibid.

[65] Daniel Wilsher, *Immigration Detention: Law, History, Politics* (Cambridge, Cambridge University Press, 2012) 335. Wilsher talks of '*reasonable* goals' rather than legitimate purposes.

[66] On proportionality as the logical corollary of the recognition of fundamental rights see Paul Craig, *Administrative Law*, 7th edn (London, Sweet & Maxwell, 2012) para 21-017.

the case law from the United Kingdom, Canada and Australia.[67] This test, while 'broad-brush', is sufficient to delineate the primary differences in judicial approach to indefinite detention pending removal. In adopting this minimalist conception of proportionality, directed to the permissible duration of detention, I do not mean to suggest that it is adequate to ensure the legality of detention pending removal.[68] Nor do I disagree that the concept of proportionality is inevitably shaped by matters of local context – namely text, doctrine, the vagaries of the cases in which its form is hammered out, and the prevalent legal and political culture.[69]

A commitment to equality exerts pressure on the legal analysis at two points. It informs the identification of the permissible purposes of immigration detention, as introduced above, and it underpins the proportionality analysis. Stated baldly, equality of treatment requires that differences in treatment be sufficiently clearly related to legitimate government purposes.[70] That is, there must be an adequate connection between a legitimate purpose and the class of persons affected. The adequacy of this connection is tested by means of a proportionality analysis. To frame the issue in rule of law terms, a commitment to the rule of law entails, at a minimum, that the government cannot discriminate unfairly between persons 'by selective application of general principles it claims to honour'.[71] In this book, I show how the judgments that give legal sanction to indefinite detention pending removal are characterised by the selective application of general legal principles.

In the cases discussed, judges take a position on a continuum. At one end of the continuum are those who hold indefinite detention of non-citizens to be unjustifiably discriminatory. They hold that legitimate immigration purposes do not authorise indefinite detention, which accordingly amounts to arbitrary and discriminatory treatment of non-citizens. At the other pole are judges who sanction indefinite detention as an unproblematic instance of non-citizens' 'exceptional' vulnerability to removal.

In the following section, I provide an initial outline of two competing judicial responses to the indefinite administrative detention of non-citizens. Throughout

[67] More particularly, this broad-brush account of proportionality accommodates Australia, where the relevant constitutional test of proportionality is whether a measure is 'reasonably capable of being seen as necessary' to immigration processing or removal: see further ch 2, pp 50–52. In Australia (and Canada) proportionality is usually discussed in the constitutional context, as opposed to an administrative law setting. See eg Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85 (with reference to Australia).

[68] In particular, I do not directly address the proportionality of the initial decision to detain. It is considered indirectly, by reason of its relationship to the proportionality of the time spent in detention. Indefinite detention will be harder to sustain where a person is detained 'regardless of personal circumstances, regardless of whether he or she is a danger to the [national] community, and regardless of whether he or she might abscond': *Al-Kateb* (n 36) [29] (Gleeson CJ). For an application of proportionality to immigration detention in its entirety see Wilsher (n 65) ch 7.

[69] See eg Claudia Geiringer, 'Sources of Resistance to Proportionality Review of Administrative Power under the New Zealand Bill of Rights Act 1990' (2013) 11 *New Zealand Journal of Public and International Law* 123.

[70] TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford, Oxford University Press, 2001) 3.

[71] ibid, 2.

the book, I analyse the jurisprudence on indefinite administrative detention of non-citizens with reference to these two responses.

1.3 Two Judicial Responses to Indefinite Detention of Non-Citizens

The case studies I consider are, for the most part, instances of detention of non-citizens subject to a removal order.[72] I am centrally concerned with *direct* challenges to claims of legal authority to detain non-citizens indefinitely – that is, challenges to the power to detain in the circumstances as opposed to challenges to the deportation decision on which detention is predicated. To the extent that I address the scope of the power to deport, I do so to consider its implications for authority to detain.

In these cases, judges responded to indefinite detention pending removal in one of two ways. All judges held that authority to detain was based, at least in part, on the premise that it facilitated deportation. However, they differed on what amounted to a sufficient connection between detention and deportation. Judges who ruled against the legality of indefinite detention adopt a variant of the proposition that only a real prospect of removal in the reasonably foreseeable future justifies detention of a non-citizen subject to a removal order. They held that the relevant statutory provisions did not authorise indefinite detention, or that they did, but were therefore incompatible with enacted rights. Conversely, judges who upheld a statutory power of indefinite duration reasoned that the *possibility* of removal sufficed to justify immigration detention.

The first type of judicial response, illustrated by the Opinion of the Court in *Zadvydas*, holds that indefinite administrative detention of non-citizens is not sufficiently connected to the legitimate government purpose of facilitating removal. This type of judicial response implements what I call a 'rights-protecting' model of immigration detention, where the right protected is liberty. In the clearest instances of this model, detention is not reasonably necessary for deportation unless deportation is 'reasonably foreseeable'; that is, there has to be a real prospect of removal in the reasonably foreseeable future.[73] Where a court or independent tribunal reaches an adverse decision on the viability of removal, the connection between detention and deportation is held to be too tenuous to

[72] Some of the cases do not fit this characterisation. See eg *Lim* (n 63) and *Plaintiff M47/2012 v Director General of Security* [2012] HCA 46, (2012) 86 ALJR 1372, in which the decisions were addressed to detention during processing of an application for a visa (in the latter case only on the reasoning of the majority).

[73] See eg *Zadvydas* (n 4) 699 (Opinion of the Court). This reasonable foreseeability requirement is, in Commonwealth jurisprudence, most famously associated with the case of *Hardial Singh*: *R v Governor of Durham Prison, ex parte Singh* [1984] 1 All ER 983. See ch 5, s 5.2 and, for a development of the *Hardial Singh* principles in later British jurisprudence, ch 7, s 7.8.

support an authority to detain. Thus, the rights-protecting model applies a proportionality requirement to the duration of detention for deportation purposes.

The second type of judicial response, illustrated by the dissents in *Zadvydas*, sanctions the indefinite administrative detention of non-citizens. This type of response implements what I call a 'rights-precluding' model of immigration detention, where the right precluded is the right to liberty of a non-citizen against whom a deportation order has been issued. Under this model, detention is authorised provided the government is making efforts to remove the non-citizen and as long as removal remains a future prospect. A bona fide attempt to remove the non-citizen is all that is required of the detaining government, which is presumed to be doing its best in a world of complicated international relations. On this model, the judicial role in review of authority to detain is, at most, to ensure that the government continues to pursue removal in good faith.

Judges who apply the rights-precluding model may also adopt a second justification for indefinite administrative detention of non-citizens, namely removal from the 'community'. The more tenuous the possibility of removal, the more prominent this second justification becomes. In rare cases, such as the dissenting judgment of Kennedy J in *Zadvydas*, judges openly rely upon isolation from, or protection of, the national community as an independent rationale for the indefinite administrative detention of non-citizens.[74] Where the rights-precluding model is adopted, use is usually made of both the first and second justifications, with the second reinforcing the first.

The prospects of removing a non-citizen will often be uncertain. The rights-protecting and rights-precluding models of immigration detention represent two different responses to this uncertainty. The judges agree that there is no current reasonable prospect of removal. They disagree as to what constitutes a sufficient justification for detention. On the rights-protecting model, a court is prepared to order release on the basis that it is not satisfied that there is any prospect of removal in the reasonably foreseeable future. It is *possible* that circumstances will change such that the non-citizen will be able to be removed, but in the meantime, it is not appropriate for the non-citizen to be detained. Where the prospects of removal are doubtful, it is the state's authority to hold a non-citizen in immigration detention that gives way.

Conversely, judges who align with the rights-precluding model give determinative weight to the possibility that circumstances might change. Even if there are no present prospects of removal, things may look very different in the future.[75] The rights-precluding judge is not prepared to rule against authority to detain as long as there remains a *possibility* of removal. The existence of a future possibility of

[74] See eg *Al-Kateb* (n 36) [45] (McHugh J), [247], [255] (Hayne J) (Heydon J concurring). See ch 3, s 3.3.

[75] *Al-Kateb* (n 36) [229] (Hayne J): 'the most that could ever be said in a particular case where it is not now, and has not been, reasonably practicable to effect removal, is that there is *now* no country which will receive a particular non-citizen whom Australia seeks to remove, and it cannot *now* be predicted when that will happen.'

removal, being necessarily speculative, can be very hard, if not impossible, for a detainee to refute. Underlying this position is the view, sometimes express and sometimes implicit, that the citizenry should not bear any risk associated with a non-citizen's continued presence. The citizenry does not need to tolerate risks from non-citizens and can place a non-citizen in indefinite detention to avoid any such risk.

The two models subscribe to the same underlying constitutional values of liberty and equal treatment. It is not the presence or absence of legal values that defines them, but the application of those values. Exponents of both approaches understand themselves to be upholding core values of legality. I argue, however, that the rights-precluding model applies general principles selectively to uphold indefinite detention.

Nor do the models lead to diametrically opposed results. This can be illustrated by an initial comparison between the House of Lords' decision in *Belmarsh* and the Canadian Supreme Court case of *Charkaoui.* For reasons elaborated in chapters six and nine respectively, I characterise *Belmarsh* as a rights-protecting decision, and *Charkaoui* as a rights-precluding decision. This characterisation is based on the respective court's determination on the substantive rights at issue. *Belmarsh* held that indefinite administrative detention pending removal is discriminatory against non-citizens and is incompatible with Britain's rights commitments. *Charkaoui* held that such detention is not in itself discriminatory nor otherwise in contravention of the Canadian Charter. However, *Charkaoui* also put in place a 'procedural solution' to indefinite detention that did assist some of the detainees. To the extent that *Charkaoui*'s procedural protections substitute for substantive limits, leading to 'exit' from the detention regime, there is a degree of convergence in result between the two models.

Why would a judge work within a rights-precluding model? Each judge works with 'a *personal* conception of the nature of the law, society and the state'.[76] The choice of model reveals fault lines in thinking about law and the rule of law.[77] I argue that, in the key cases on indefinite detention, the legal materials present a number of 'constructional choices', choices that can usefully be characterised as a choice between the two models outlined.[78] The meaning of the statutory text at issue in these cases was not 'intractable',[79] but emerged from an interactive process of interpretation that moved between the text and 'the political point of legal order'.[80]

To understand the conception of the rule of law associated with each model, I refer to the categories employed by David Dyzenhaus in *The Constitution of Law*,[81]

[76] David Feldman, 'Public Law Values in the House of Lords' (1990) 106 *LQR* 246, 246.

[77] ibid. See also Max Harris, 'Public Law Values in the House of Lords – In an Age of Counter-Terrorism' (2011) 17 *Auckland University Law Review* 119.

[78] On the phrase see *Momcilovic v R* [2011] HCA 34, [50] (French CJ). The phrase is adopted in the submissions of the plaintiff in *Plaintiff M47/2012* (n 72). On *Plaintiff M47* see ch 4, s 4.4.

[79] cf *Al-Kateb* (n 36) [241] (Hayne J).

[80] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge, Cambridge University Press, 2006) 8.

[81] ibid.

namely judges who ascribe to a substantive conception of the rule of law on the one hand, and constitutional positivists on the other. These categories speak to different conceptions of the judicial role. A judge adopting a substantive conception of the rule of law does not see their interpretive duty as

> first to determine the content of the positive law without relying on their own moral sensibilities and, second, to apply that content. Rather, their duty is to determine the content of the law in accordance with the aspirations of (ideal) legal order.[82]

For such judges a key function of the law is to act as a windbreak: 'The law restrains and civilises power.'[83] An integral element of the judge's role is to ensure, to the best of her or his ability, that the law performs this function. In doing so, the judiciary draws on a substantive conception of the rule of law. The content of that ideal can be briefly outlined:

> [L]egislation must be capable of being interpreted in a way that it can be enforced in accordance with the requirements of due process: the officials who implement it can comply with a duty to act fairly, reasonably and in a fashion that respects the equality of all those who are subject to the law and independent judges are entitled to review the decisions of these officials to check that they do so comply.[84]

The judicial role requires judges to clearly and publicly state when there is a departure from substantive legality, looking to 'a kind of justice located within the law, justice in the administration of the law'.[85] The rights-protecting model of immigration detention is a doctrinal expression of this substantive conception of legality. Conversely, adoption of the rights-precluding model tends to align with what Dyzenhaus identifies as 'constitutional positivism'.[86]

Constitutional positivists view it as democratically illegitimate, absent a clear endorsement in the constitutional or statutory text, for courts to introduce into legal analysis a 'cross-current of judicial opinion' protective of rights.[87] Nor is it simply a matter of textual endorsement. A constitutional positivist will be uneasy when there is explicit endorsement of an abstract ideal such as liberty or equality in the constitutional or statutory text, responding by narrowing and confining the scope of such liberty. The role thrust upon them by such provisions is in tension with an understanding of the judicial role as the application of determinate legal rules. They deny or downplay the need for recourse to substantive legality as part of the interpretive exercise.[88]

'Constitutional positivism' is a compromise between an understanding of law as the application and interpretation of determinate legal rules and a common law

[82] ibid.

[83] Murray Gleeson, *The Rule of Law and the Constitution: Boyer Lectures* (Sydney, ABC Books, 2000) 1.

[84] Dyzenhaus (n 80) 12–13.

[85] ibid, 12.

[86] ibid, 22, 68–71.

[87] AV Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*, 2nd edn (London, Macmillan, 1904) 398.

[88] Dyzenhaus (n 80) 70.

legal order whose shape and nature are not fully captured by that understanding.[89] In the absence of a substantive conception of legality to guide adjudication on detention of non-citizens, judges have recourse to a range of proxies for legislative intent. In the areas of immigration and national security these proxies involve an assumption that judicial review, to the extent that it has any purchase at all, should be minimal. Statutory powers are read broadly against background assumptions that government should have a relatively free hand in the immigration area.

Judges who are constitutional positivists in the area of non-citizens' rights are not constitutional positivists in all matters. A judge who openly draws on a substantive conception of legality with respect to some subjects may hold that such an approach has little or no application when it comes to immigration and national security. In those areas, his or her reasoning becomes more insistent on implementation of a constitutional positivist position, and on efforts to expunge, as legally irrelevant, the influence of rights on the interpretive process.

In the cases analysed in this book, a judge's choice of constitutional positivism, or a more substantive conception of legality, correlates with his or her view of the legal subject. A judge's view of the legal subject has implications for the understanding of 'fairness, reasonableness and equality' he or she brings to their work.[90] For a judge working with a more substantive conception of legality, the meaning of these concepts is likely to be heavily influenced by the idea of the individual as a bearer of rights as this idea has been developed in the post-World War II human rights project. This human rights project reinforces a pre-existing common law tradition that held that those who are answerable to the law are entitled to its protection.[91] The common law on alienage, immigration and security is complex and contradictory. The human rights project powerfully reinforces those aspects of the common law attentive to the human autonomy of the detainee.

A rights-precluding judge works with a much 'thinner' legal subject.[92] The availability of procedural protections and rights tends to turn on a 'classification exercise'.[93] Citizens get rights or protections, non-citizens do not. 'Reliance upon on/off status or classifications . . . eliminate[s] possible inquiries as to the impact of decisions on individuals, in particular, impacts that intensify with time.'[94] The individual detainee's plight disappears from view, except perhaps to note their contribution to their own predicament; 'what matter[s], instead, [is] expedience in executing the administration's program'.[95]

There is no stark dichotomy of normative considerations underlying the rights-precluding and rights-protecting models. Rather, each model tends more or less strongly towards opposite normative poles. Nevertheless, the above account of

[89] ibid, 69.
[90] ibid, 13.
[91] See Windeyer J's judgment in *Ex parte Lo Pak* (1888) 9 NSWLR 221, 245.
[92] On the 'thin' legal subject see Robert Leckey, *Contextual Subjects: Family, State and Relational Theory* (Toronto, University of Toronto Press, 2008) ch 5.
[93] ibid, 173.
[94] ibid.
[95] ibid.

contrasting models furnishes an initial set of coordinates with which to begin mapping the case law.

1.4 'Nationality-Differentiated Risk-Acceptability'?

In this section I move from outlining models of judicial response to indefinite detention to consider the normative stance on citizenship that underpins them. The models address distributive questions. To what degree do non-citizens share in the liberty interests and attendant protections of citizens? To what extent and for what reasons are they excluded from such protections? The models are a set of legal commitments that inform a judge's response to the central concern of this book, namely the relative priority and weight to be accorded to a state's power 'to admit, exclude and expel aliens' on the one hand, and constitutional principles of liberty and equality on the other.

The literature on the indefinite administrative detention of non-citizens returns to the idea that 'The problem of the indefinitely "irremovable" foreigner . . . is a boundary problem of the intersection of . . . two building blocks of our constitutional scheme'.[96] The building blocks are the state's power to 'admit, exclude and expel aliens' on the one hand, and constitutional principles of liberty and equality on the other.[97] The central difference between the two models of immigration detention introduced above is the priority they accord to these 'building blocks'.

In the rights-protecting model, legal authority to detain a non-citizen subject to a removal order is defined by the purpose of facilitating removal. If the non-citizen's removal is frustrated, that purpose no longer obtains and cannot be used to justify detention. The model accepts that authority to detain non-citizens is subject to legal qualification. These legal qualifications emanate, by a variety of doctrinal routes, from a non-citizen's liberty interest.

Conversely, the rights-precluding model tends to emphasise that it is integral to a state's sovereign power to decide who enters, and remains in, its territory. Any qualification of this power is seen as a threat to the state. As noted in the second epigraph quoted at the beginning of this chapter, the fear is that, if qualified, the state's sovereign power will 'crumble, eroded by newly enforceable constitutional

[96] Finnis (n 2) 445; see also 417. See *A v Secretary of State for the Home Department* [2004] EWCA Civ 1123. [234] (Laws J): 'First, we are dealing, as I said at the outset, with the tension between two constitutional fundamentals: the abhorrence of executive detention and the State's duty to safeguard its citizens and its own integrity.' For reference to equality as a 'building block of democracy' see *Matadeen v Pointu* [1998] UKPC 9, [1999] 1 AC 98, 109, [8] (Lord Hoffmann). For other express academic statements registering this tension, though drawing different conclusions from Finnis, see eg Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton, Princeton University Press, 2006) 38; Catherine Dauvergne, 'Security and Migration Law in the Less Brave New World' (2007) 16 *Social & Legal Studies* 533, 545; Kate Nash, *The Cultural Politics of Human Rights: Comparing the US and UK* (Cambridge, Cambridge University Press, 2009) ch 3.

[97] Finnis (n 2) 417.

principles of equality before the law, and by rights as ancient as liberty (immunity from coercion and imprisonment)'.[98] Any resident non-citizen is simply a 'guest' and the host is free to revoke the invitation at will. Deportation is a refusal by the government to harbour persons it does not want. Tension between a state's powers of exclusion and expulsion of non-citizens and constitutional rights is avoided by denying that non-citizens subject to a removal order hold these rights.

In this section, I consider John Finnis's justification for the rights-precluding model, set out in his 2007 article 'Nationality, Alienage and Constitutional Principle'.[99] I focus on Finnis for a number of reasons. He analyses the three decisions – *Al-Kateb*, *Belmarsh* and *Charkaoui* – at the centre of the discussion of the legality of indefinite detention in their respective jurisdictions. While his analysis of the legal positions that result from each of these decisions is, I think, correct, his evaluation of those positions is the antithesis of my own. I argue for a 'rights-protecting' approach to detention pending removal, as that approach is outlined in section 1.3 above. Finnis defends the contrary 'rights-precluding' approach. In the course of doing so, Finnis articulates clearly the moral/political rationale for the sharp distinction between the liberty rights of citizens and non-citizens expressed in the rights-precluding approach. In this he makes explicit what is often only implicit in the rights-precluding judgments and provides me with a foil. Moreover, the position he adopts is not 'academic' in the pejorative sense. His position has shaped government argument in the courts. The imprint of his 2007 article is evident in the United Kingdom's legal argument before the European Court of Human Rights in *A v United Kingdom*, the final instalment of the *Belmarsh* litigation.[100] In that case, the United Kingdom ran a new argument, not advanced at any stage of the domestic *Belmarsh* litigation. The government adopted Finnis's line of argument.[101]

Finnis argues that a citizen's right to be protected against risk trumps a non-citizen's right to liberty. He further argues that a lower tolerance for the risks posed by non-citizens is necessary to define a group, those with formal legal citizenship, amongst whom can develop the solidarity that enables the social goods of the modern liberal democratic state.

Finnis's paper is, centrally, an argument for the existence of a 'constitutional principle' which he labels 'nationality-differentiated risk-acceptability'. This constitutional principle is argued to justify the legal position that I have called the rights-precluding model. The principle's formulation comes to rest in Finnis's statement that

[98] ibid.

[99] ibid. Some of the following analysis of Finnis's article draws on Rayner Thwaites, 'The Security of Citizenship? Finnis in the Context of the United Kingdom's Citizenship Stripping Provisions' in Fiona Jenkins et al, *Allegiance and Identity in a Globalised World* (Cambridge, Cambridge University Press, forthcoming 2014).

[100] *A v United Kingdom* (2009) 49 EHRR 29.

[101] See ch 7, s 7.2.

> the presence in the community of an alien who, individually considered, can fairly be said to present some genuine *risk*, even relatively slight, to the rights of others, or to national security, public safety, the prevention of crime, the protection of health or morals or maintenance of l'ordre public, or to anything else of 'public interest in a democratic society', *need not be accepted*.[102]

Such risk can permissibly be obviated by detention ancillary to removal, which is unambiguously taken to extend to indefinite immigration detention.[103]

There are three components to Finnis's argument for his constitutional principle: it has explanatory force in relation to current law (the explanatory argument); it has historical support (the historical argument); and there is a compelling normative case for the principle (his rationale for the rights-precluding model). I propose to address the explanatory and historical arguments here, in the Introduction. But the more fundamental question is whether the underlying principle he advances for the rights-precluding approach is defensible. That question is best assessed when the judgments that are informed by, and the judgments that reject, that principle have been considered. In chapter ten, drawing on the study of the judgments and broader legal developments in the book, I argue for the rejection of Finnis's principled basis for the rights-precluding approach.

The judgments I categorise as rights-precluding see immigration as governed by a set of assumptions that do not operate in the general law: expansive conceptions of executive power, minimal judicial review and the attenuated operation of constitutional norms protective of the individual. These background assumptions tend to permeate the reasoning in rights-precluding judgments. In the judicial reasoning considered in this book they are largely implicit. Finnis makes them explicit, foregrounding a candidate for a principle that underlies and encapsulates these assumptions – his constitutional principle of nationality-differentiated risk-acceptability.

The constitutional status of the principle is central to Finnis's account. He states that 'constitutional principles and rights prevail over ordinary norms of statutory interpretation; the presumption that statutes do not overturn these rights and principles qualifies the ordinary subordination of common law to parliamentary authority'.[104] In other words, his constitutional principle is equivalent to fundamental common law rights. It is presented as functioning in the same way as such rights in statutory interpretation. The difference is that what is being asserted is not an individual's right or liberty, but a right on the part of a state – the right to exercise a power to exclude, admit and deport aliens.

Finnis makes clear that the reason for arguing that his concept has the status of 'constitutional principle' is to ensure equivalence between the state right asserted

[102] Finnis (n 2) 423.

[103] The requirement of individual consideration would seem to rule out mandatory detention regimes, such as that which has operated in Australia since 1992, though the breadth of the grounds for removal from the community gives rise to some uncertainty on this point.

[104] Finnis (n 2) 417.

and fundamental common law rights of individuals. As emphasised in the epigraph, the power to admit, exclude and expel aliens needs to have the status of constitutional principle if it is to avoid erosion by the current constellation of fundamental rights.[105]

At a number of points in the case law, particularly in relation to the Australian material, the nature of the argument between the rights-protecting and rights-precluding judges initially appears to turn on acceptance or rejection of the legitimacy of constitutional values sourced in the common law. On this characterisation of the debate, rights-protecting judges allow for a constitutionalism that does not originate in statutory or constitutional text, but which forms a set of background assumptions against which those texts are read. And on this characterisation, rights-precluding judges insist on express statutory or constitutional endorsement of normative values. In the absence of such endorsement, such values are to be expunged from judicial reasoning as lacking the necessary democratic legitimacy.

What can be learned from Finnis's account is that the conventional way the debate is depicted, as outlined in the preceding paragraph, misstates the real conflict at a level of principle. Finnis argues for the acceptance of 'nationality-differentiated risk-acceptability' as a constitutional counterweight to common law presumptions in favour of rights. This is not an argument against the legal relevance of values in interpretation. It is an argument for a different set of values. Finnis's account suggests that it is not so much the presence or absence of common law values in the interpretive framework that is at issue; rather, it is the content of those common law values.

Finnis's case for the constitutional status of his principle is in the first instance developed through an argument for its historical grounding. The historical argument is directed at showing how the principle coheres with, and grows out of, the common law legal orders in question. In making this argument, Finnis acknowledges a prominent common law tradition with which his constitutional principle had to contend. He notes: 'foreigners within the realm (speaking always of non-enemy aliens) enjoy the subject's common law right to freedom from every act of a government servant or agent which if done by a private person would be a tort.'[106] On this characterisation of the common law position, the question is not

[105] See n 2. The two principles nominated by Finnis in the second epigraph to this chapter, 'equality' and 'liberty', were central to the reasoning in *Belmarsh* (n 1). Finnis goes on to make additional reference to Art 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 211, Eur TS 5 (ECHR), on respect for private and family life. United Kingdom government proposals to limit Art 8 review were included in the Queen's Speech 2013 (Parliament, 8 May 2013).

[106] Finnis (n 2) 419. For a discussion of the contemporary legal significance of this principle see Karen Knop, 'Citizenship, Public & Private' (2008) 71 *Law & Contemporary Problems* 309. Statements that the non-citizen (or the non-enemy alien) was not an outlaw were intended to encapsulate this principle. The term, and concept, 'outlaw' is employed repeatedly in the contemporary case law, in order to reject the concept: see eg *Lim* (n 63) and *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* [2003] FCAFC 70, (2003) 126 FCR 54, discussed in ch 2, ss 2.3 and 2.4 respectively.

'does the non-citizen have a right to remain?', but 'did the respondent/defendant have legal authority to remove him?'[107]

Finnis accepts that positive statutory authority was at one point in time required for any such action, referring to Dicey's position that if foreign anarchists suspected of plotting to blow up the Houses of Parliament could not be put on trial, there was 'no means of arresting them, or of expelling them from the country'.[108] He then states: 'But when Dicey last passed this passage for the press in 1908, the law had begun to leave him behind.'[109] Finnis argues that his principle rose to prominence in the twentieth century. The legal form it took was unclear. He submits that this principle was inherent in a pre-existing prerogative of expulsion which has simply been given statutory support. In that way the twentieth century statutes are enlisted as a source of constitutional principle.

In relation to the argument from the prerogative, Finnis maintains that the Privy Council decisions of *Attorney-General for Canada v Cain*[110] and *Johnstone v Pedlar*[111] had supplied 'constitutional foundations' for the expulsion of suspected foreign terrorists. These authorities either left open, or adverted to, the possible existence of a relevant prerogative power. He supplements his case for a prerogative of expulsion with reference to Holdsworth.[112] The central theme of his account is that since the beginnings of the twentieth century there has been an increasingly vigorous assertion of a 'power of the State' to expel, and that the rise of this power has clarified or confirmed what was previously ambiguous – that is, that the presence of a non-citizen within the jurisdiction is conditional on their proper conduct. A non-citizen is liable to removal or exclusion for 'recalcitrant failure to assimilate his conduct, in matters of weight, to the particular conceptions of common and public good that are embodied in our constitution and law'.[113] On Finnis's account, the presumption had shifted from the need for statutory authority to remove (in the absence of which forcible removal would be false imprisonment) to a presumption of authority to remove.

The argument from legislation holds that twentieth-century immigration statutes defined a 'constitutional scheme' with 'two legal constitutional principles, each resting on a moral-constitutional principle'.[114] Of these 'legal constitutional principles', the first is that non-enemy aliens present within the realm have all the rights and obligations of citizens, subject to their vulnerability to removal; the second is that a citizen cannot be excluded from the realm. The moral-

[107] Knop (n 106). See also Christopher Vincenzi, 'Aliens and the Judicial Review of Immigration Law' [1985] *PL* 93, 96–97.

[108] Finnis (n 2) 419, citing AV Dicey, *Introduction to the Study of the Law of the Constitution*, 1st edn (1885) 239–40; 7th edn (1908) 226–27.

[109] Finnis (n 2) 420.

[110] *Attorney-General for Canada v Cain* [1906] AC 542.

[111] *Johnstone v Pedlar* [1921] 2 AC 263.

[112] Finnis (n 2) 420 fn 17, citing Holdsworth, *History X*, 393–400.

[113] ibid, 418.

[114] ibid, 422.

constitutional principle on which these legal principles are said to rest is 'nationality-differentiated risk-acceptability'.

As a closing point, Finnis suggests that the detention of foreign terrorist suspects should be conceptualised in terms of the wartime detention of enemy aliens. He develops this point with reference to the foreign terrorist suspects before the House of Lords in *Belmarsh*. He does not claim that the foreign terrorist suspects in *Belmarsh* were 'enemy aliens'.[115] He does, however, suggest a possible analogy between the indefinite administrative detention of foreign terrorist suspects and the wartime internment of foreign nationals. In his final footnote on detention, appended to a statement that the constitutional principle warrants non-citizens being 'kept apart from the community by humane detention or control', Finnis writes:

> The liability of enemy aliens – a category not considered in this article, and hitherto conceived of as nationals of a state at war with ours – to statutorily authorised detention in time of war might be understood as a form which that liability to removal reasonably takes when circumstances prevent (or make unreasonable) actual removal.[116]

This characterisation prepares the way for wartime internment as a precedent for detention of non-citizens subject to removal orders. This use of wartime internment cases is a recurrent tendency in the rights-precluding judgments on detention of non-citizens.[117]

1.5 Criticisms of 'Nationality-Differentiated Risk-Acceptability'

Finnis derives a general principle of nationality-differentiated risk-acceptability from the existence of powers of expulsion and immigration detention in relation to non-citizens on the one hand, and the prohibition on the banishment of citizens on the other. The principle is then fed back into the analysis to license expansive readings of the relevant powers over non-citizens. A basic problem with this reasoning is that the generalisation Finnis arrives at to explain those legal positions – his moral-constitutional principle of nationality-differentiated risk-acceptability – has at least one competing justification that also claims to explain the same set of facts: that offered under the rights-protecting model. The

[115] ibid, 419. Finnis noted, with reference to Coke, that 'the supposed incapacity of aliens to pursue personal actions at law was limited . . . to enemy aliens: subjects of a state at war with the crown'. For a contemporary reaffirmation of the incapacity of enemy aliens to pursue personal actions, with an emphasis on the view that 'there is no warrant for extending it [the status of enemy alien] to modern armed conflict not involving war in the technical sense', see *Amin v Brown* [2005] EWHC (Ch) 1670, [46].

[116] Finnis (n 2) 445 fn 109.

[117] See *Al-Kateb* (n 36) [55]–[61] (McHugh J); *A v Secretary of State for the Home Department* [2002] EWCA Civ 1502, [2004] QB 335, [112]–[131] (Brooke LJ).

competing explanation might be stated this way: the nation does not have to accept from foreigners the same degree of risk it accepts from its nationals, and may obviate the risk posed by foreigners by their deportation, to the extent that another country can be found to which it is appropriate to remove the non-citizen, and this removal, and processes ancillary to it, does not disproportionately impinge on the non-citizen's fundamental rights. Finnis's concern is that under the weight of these qualifications, the power to admit, exclude and expel aliens 'will crumble'. But he does not offer any reason why we should think of the power as brittle in this way.[118] The better view is simply that the power has to accommodate the principle that legislation should be interpreted consistently with fundamental rights, whether that obligation is sourced in common law, international human rights jurisprudence or constitutional doctrine.

Turning to his historical argument, as outlined above, Finnis's derivation of his constitutional principle appears to have two bases: an argument from the prerogative and an argument from legislation. What links the two arguments is the idea that the relevant legislation inherited and continued a set of understandings about the appropriate division of constitutional responsibilities in immigration. The argumentative utility of keeping in play the idea that the rights of exclusion or expulsion may be, or even just may have been, prerogative powers is that it lends weight to those powers,[119] making them seem like part of the order of things, since time immemorial.[120] Further, it links immigration with major prerogative powers in the area of defence and foreign policy, colouring it as an area in which extensive deference to the executive is appropriate, a position already encountered in Kennedy J's judgment in *Zadvydas*.[121]

An initial problem with Finnis's argument is that the case for the existence of any prerogative of expulsion or exclusion in the last 300 years is weaker than he suggests.[122] The decisions that he held provide the 'constitutional foundations' for the expulsion of foreign terrorists, *Attorney-General for Canada v Cain* and *Johnstone v Pedlar*,[123] are best regarded as simply having announced a new exclusionary principle that had not previously existed at common law:[124]

> the position from an historical examination of the cases appears to be that there are no cases supporting the existence of this supposed prerogative for more than 200 years

[118] This response to Finnis developed through a conversation with Audrey Macklin. See also Gerald Neuman, *Strangers to the Constitution* (Princeton, Princeton University Press, 1996) 124.

[119] See Ian A Macdonald QC and Ronan Toal, *MacDonald's Immigration Law & Practice*, 7th edn (London, LexisNexis, 2008) para 1.8.

[120] See also James AR Nazfiger, 'The General Admission of Aliens under International Law' (1983) 77 *American Journal of International Law* 804, 805.

[121] See s 1.1.

[122] Finnis (n 2) 420: 'The issues, decided and undecided, rest today where the Privy Council left them in 1906 and 1921: there is constitutional authority, whether by prerogative or not, to exclude an alien in the interests of the community's well-being.'

[123] *Cain* (n 110); *Johnstone* (n 111).

[124] Robert Plender, *International Migration Law*, 2nd edn (Dordrecht, Martinus Nijhoff, 1988); Nazfiger (n 120); Vincenzi (n 107).

> after the revolutionary settlement of 1688. Then, in 1891, came *Musgrove v Chun Teeong Toy*, and, in 1906, *Attorney-General for Canada v Cain*. All of the dicta supporting the prerogative [and this includes the relevant dicta from *Johnstone v Pedlar*], in so far as any authority is provided, are based, either directly or indirectly, upon those two cases or upon Blackstone.[125]

But 'prerogatives, by their very nature, must be both of ancient origin and in receipt of continuing judicial recognition'.[126] Finnis also cites Holdsworth in support of a prerogative of exclusion and expulsion.[127] He does not record that 'many important constitutional writers have denied or doubted the existence of any prerogative in relation to friendly aliens, including Coke, Hale, Brougham, . . . Erskine May, Clarke, Craies, Oppenheim and de Smith'.[128]

Turning to Finnis's argument from statute, his derivation of broad 'legal constitutional principles' from an extensive, complex, and frequently amended statutory scheme is fraught with difficulty.[129] But there is a more basic problem. The reason why these statutes should have determined, or continue to determine, the content of unwritten constitutionalism is left undeveloped. The point can be made by a comparison between Finnis and the central object of his criticism, the majority of the House of Lords in *Belmarsh*.

In *Belmarsh*, Lord Bingham, like Finnis, allowed a 'historic right of sovereign states over aliens entering or residing in their territory', stating: 'Historically, this was the position.' Lord Bingham continued: 'But a sovereign state may by international treaty restrict its absolute power over aliens within or seeking to enter its territory, and in recent years states have increasingly done so.'[130] Both Finnis and Lord Bingham overplay the contrast between 'the historical position' and the legal position established under international treaty obligations. The difference is that where Lord Bingham reports his understanding of the historical position and supplies reasons for its adjustment and change, Finnis exerts himself to establish a

[125] Vincenzi (n 107) 105. See also at 97–98, 101–04.

[126] ibid, 105. Finnis quotes a statement from the 1906 Privy Council decision of *Cain* that is in turn, in its entirety, a quotation from Vattel. In a detailed historical analysis of how the statements of Vattel and other publicists of international law were used in foundational United States authorities on immigration law of the late 19th and early 20th centuries, Nazfiger concluded that 'the proposition that a state has the right to exclude all aliens is of recent origin', and where this proposition was recited it often amounted to no more than an unsupported maxim: Nazfiger (n 120) 807. The foundational United States authorities criticised by Nazfiger were influential in the development of early 20th-century Australian immigration jurisprudence, quoted by members of the *Al Kateb* majority: see ch 3, s 3.2.

[127] Finnis (n 2) 420 fn 17.

[128] Vincenzi (n 107) 105. The ellipsis is for Dicey, whom Finnis acknowledges held a contrary view.

[129] For a contemporary extra-judicial statement cautioning against talk of 'purpose' at the level of a complex statute, as opposed to the level of the relevant provisions, see Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 *Public Law Review* 26. For a discussion critical of selective utilisation of the policies and principles underlying immigration legislation, see Ninette Kelley, 'Rights in the Balance: Non-Citizens and State Sovereignty under the *Charter*' in David Dyzenhaus (ed), *The Unity of Public Law* (Oxford, Hart Publishing, 2004) 253, 266–67.

[130] *Belmarsh* (n 1) [69] (Lord Bingham).

reasoned foundation for reinvigoration of the historical position.[131] Attitudes toward the prerogative change, the nature (and existence) of constitutional principles shifts. What is needed is an argument as to why change should be embraced or resisted.

This section has endeavoured to show that questions about the differential treatment of non-citizens cannot be resolved by a particular reading of history. In particular this is because, as Lord Bingham suggested in *Belmarsh*, this ignores a major current of change within the constitutional framework. The result is that the argument for a clear hierarchy between the liberty rights of citizens and non-citizens, to the detriment of the latter, stands or falls at a more fundamental level of principle. I return to that argument in chapter 10, the Conclusion, following an analysis of the cases. For present purposes I simply register that his argument is one against the current trajectory of legal change, as he perceives it.

1.6 A Shared Commonwealth Legal Tradition?

1.6.1 Choice of Jurisdictions

My choice of jurisdictions is informed by what they share. Underlying the divergence in their constitutional frameworks is common membership of the common law family of the Commonwealth. In legal terms, the jurisdictions share much: 'They make similar assumptions about legal goals and values; they employ similar legal terms and concepts; they draw broadly on the same theorists, including AV Dicey; and they use similar legal techniques.'[132] Doctrinally, the jurisdictions branched out from a common base. The judgments analysed in this book recurrently make use of judgments in other common law jurisdictions with no discussion or reference to comparative law methodology.

Nonetheless, the relevant legal debates are clearly framed by specific elements of the constitutional and legal context in each of the three countries. Care has to be taken with assumptions of homogeneity.[133] The different national legal systems have necessarily diverged. A key 'catalyst' for that divergence is the influence of

[131] Further, in so doing, Finnis glosses over the potential, and highly relevant, complexities of 'the historical position', in particular the nexus between powers of deportation and detention. Even during the heyday of expansive executive discretion over immigration in the first half of the 20th century, it was far from clear that commentators of that period shared Finnis's confidence that a right of deportation was accompanied by extensive powers of immigration detention. On the courts' hostility to interference with personal liberty under immigration statutes, see eg John Willis, 'Statute Interpretation in a Nutshell' (1938) 16 *Canadian Bar Review* 1, 22–23; Moffatt Hancock, 'Discharge of Deportees on Habeas Corpus' (1936) 14 *Canadian Bar Review* 116.

[132] Cheryl Saunders, 'Constitution as Catalyst: Different Paths within Australasian Administrative Law' (2012) 10 *New Zealand Journal of Public and International Law* 143, 146.

[133] ibid.

the various national constitutional frameworks (introduced in the next section).[134] In this work, I continue within the common law tradition of referring to other common law jurisdictions without a comparative law methodology, mindful that this exercise calls for greater care than in the past. Where relevant, the use and misuse of foreign authority, including amongst the three jurisdictions studied, is discussed.

The United States has diverged from this Commonwealth unity to an extent that removes it from the common law family of the British Commonwealth. The relevant institutional and legal assumptions that operate within the United States are distinct from many of those shared between Australia, the United Kingdom and Canada,[135] and while there are references to United States material in the work (this chapter opened with *Zadvydas*), I do not make the United States an object of study.

A second reason for the selection of jurisdictions is my argument that, on analysis, the reasons for the differences between the rights-precluding and rights-protecting judgments are explained not by differences in the written constitutional frameworks, but on the more fundamental level of judicial approaches to questions of principle. Different judicial attitudes to non-citizens, immigration and the judicial role do more explanatory work in this area than the particulars of the doctrinal or constitutional framework in which the issues arise. There are alignments in judicial positions cutting across the three national jurisdictions that 'transcend in importance orthodox distinctions based on':[136] (a) a federal constitution but no enacted bill of rights (Australia), (b) an enacted but not entrenched bill of rights (the United Kingdom), and (c) a federal constitution and an entrenched bill of rights (Canada).[137] I am as interested in differences in judicial approach within a given jurisdiction as I am in differences between jurisdictions. In this, the work is as much a comparison of judges, or more accurately judgments, as it is of courts or jurisdictions.[138]

As introduced above, I argue that the jurisprudence is structured by two different judicial responses to the prospect of indefinite immigration detention: one leading to a finding that such detention is unlawful and one allowing for it. *Both* lines of judicial response were available in both Australia and the United Kingdom,

[134] The concept of 'catalyst' is intended to convey that the constitutional framework does not mandate a particular doctrinal development or outcome in a linear fashion, but may nonetheless be a key reason for those developments: ibid, 157.

[135] For succinct summaries of relevant distinctions between the United States on the one hand and the British Commonwealth on the other, see HP Glenn, *Legal Traditions of the World*, 3rd edn (Oxford, Oxford University Press, 2007) 248–55; Peter Cane, '2. The Institutional Framework of Public Administration' in Peter Cane, *Administrative Law*, 5th edn (Oxford, Oxford University Press, 2011) 22–46. The contrast in Cane is between public law under a presidential system and that under Westminster systems.

[136] Dyzenhaus (n 80) 5.

[137] ibid. Section 1.6.2 provides an introductory outline of these distinctions.

[138] Vicki C Jackson and Jamal Greene, 'Constitutional Interpretation in Comparative Perspective: Comparing Judges or Courts?' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Cheltenham, Edward Elgar, 2011) 599.

as evidenced by the existence of both rights-protecting and rights-precluding judgments. I argue that Canadian law contained the legal resources to support the rights-protecting model. Conversely, I outline the legal arguments that led the Canadian Supreme Court to give legal sanction to a rights-precluding approach in *Charkaoui*.

A third reason for the choice of jurisdictions is that the key cases on the legality of indefinite detention from these jurisdictions provide clear examples of three distinct points on the continuum of judicial responses to the issue. In *Al-Kateb*, a majority of the High Court of Australia upheld the legality of the indefinite detention of non-citizens, subject to the most marginal constitutional or legal constraints. The decision constitutes a clear example of a rights-precluding decision. In contrast, the UK House of Lords' decision in *Belmarsh* constitutes a clear example of the rights-protecting approach. The House of Lords ruled that detention for the purpose of deportation was necessarily of limited duration. The relevant statutory provisions were characterised as national security provisions and the decision to confine the detention provisions to non-citizens was held to be discriminatory. While the decision left the validity of the law unaffected, it clearly stated that the relevant statutory provisions were incompatible with the United Kingdom's rights commitments.

In *Charkaoui*, the Canadian Supreme Court postponed any decision on the lawful duration of detention of a non-citizen subject to a deportation order. The Court instead relied on procedural constraints to address any future violation of rights on a case-by-case basis. The legality of indefinite detention was upheld at the same time as procedural reforms required by the court inaugurated a series of legal developments that have placed the detention regime under increasing pressure. As I outlined in section 1.3 in the course of introducing the models, I contend that 'the procedural solution' mandated by the Canadian Supreme Court is rights-precluding. It is nonetheless qualitatively distinct from *Al-Kateb* in the level of legal protection provided to the detainees.

The issues of statutory and constitutional interpretation covered in this book arise in a diverse range of legal contexts and circumstances. The two models of immigration detention outlined above supply the jurisprudence with a constant pattern despite this diversity. This pattern amidst diversity grounds my claim that more than any particular rights framework what matters are judicial understandings of the legal position of non-citizens, understandings available in each of the jurisdictions considered.

1.6.2 Structural Differences

This book centres on legal developments in the indefinite administrative detention of non-citizens subject to a removal order in Australia, the United Kingdom and Canada. Here I introduce the legal framework in each jurisdiction, focusing on the presence or absence of enacted or entrenched guarantees of personal liberty.

Australia has a federal constitution (Constitution),[139] conferring enumerated heads of legislative power on the national government. Legislation can be invalid as contrary to the Constitution. There is neither an entrenched nor an enacted national bill of rights. The Constitution has been construed to imply a separation of judicial and non-judicial powers at the federal level. One implication of the separation doctrine is the general proposition that a person can only be detained by order of a court. This proposition is subject to exceptions, one of which is immigration detention. The issue that arises is whether administrative detention of a non-citizen subject to a removal order, where there is no real prospect of removal, can be justified as immigration detention, so falling within the exception. Constitutional reasoning has a direct bearing on statutory interpretation by way of a presumption that Parliament did not intend to pass beyond constitutional bounds.[140]

The United Kingdom has a statutory bill of rights,[141] the Human Rights Act 1998 (HRA 1998). The HRA 1998 gives effect to rights under the European Convention on Human Rights (ECHR),[142] including a right to liberty (Article 5) that is subject to an express exception for deportation purposes (Article 5(1)(f)).[143] The question that arises is whether administrative detention where there is no real prospect of removal can be justified as being for deportation purposes, and so fall within the exception to the liberty right. If detention in such circumstances is not 'with a view to deportation' this has the further consequence that the primary justification for confining the detention measures to non-citizens is not present. In the absence of an alternative justification, the measures would contravene the prohibition on discrimination under the HRA 1998.[144] In the United Kingdom, legislation cannot be invalidated.[145] The United Kingdom is also a State Party to the ECHR and is accordingly bound by decisions of the European Court of Human Rights (ECtHR).[146] The HRA 1998 gives legislative sanction to the courts adopting a strong interpretive approach to ensure compatibility with Convention rights (section 3). Where legislation cannot be interpreted consistently with Convention rights, the courts can issue a declaration of incompatibility (section 4). A declaration formally conveys

[139] Commonwealth of Australia Constitution Act 1900 (UK) (63 & 64 Vict c 12) (Constitution).

[140] *Lim* (n 63) 14 (Mason CJ).

[141] On the meaning of the 'United Kingdom': 'Technically, "United Kingdom" refers collectively to the three legal systems of England and Wales (which together constitute a single system), Scotland and Northern Ireland. "Great Britain" (or "Britain") refers collectively to England and Wales, and Scotland': Peter Cane, *Administrative Tribunals and Adjudication* (Oxford, Hart Publishing, 2009) 1 fn 2.

[142] See n 105.

[143] Under the HRA 1998, rights adopted from the ECHR and protocols have been given a statutory footing as 'Convention rights': HRA 1998, s 1. Among these Convention rights is that to liberty and security of the person (ECHR, Art 5). Under that article, an exception is made to the prohibition on deprivation of liberty for 'the lawful arrest or detention . . . of a person against whom action is being taken with a view to deportation': Art 5(1)(f).

[144] ECHR, Art 14.

[145] European Community law does, however, take precedence over inconsistent national law: European Communities Act 1972, s 2; *R v Secretary of State for Transport, ex parte Factortame Ltd* [1989] UKHL 1, [1990] 2 AC 85.

[146] ECHR, Art 46.

the court's view that a measure is incompatible with the relevant Convention right. Legislation found incompatible with a Convention right remains in full force and effect. Since one of the primary purposes of the HRA 1998 is to provide a successful litigant with a remedy, courts will strive to interpret legislation compatibly with Convention rights. Section 3 is the only means by which Convention rights can be protected without further intervention by Parliament or the government.[147] But the practical effect of a declaration should not be overlooked. Where a declaration of incompatibility has become final in its entirety,[148] Parliament has remedied the incompatibility identified, either by primary legislation or by a remedial order under section 10 of the HRA 1998,[149] or has taken steps to do so.[150]

Canada has both a federal constitution and an entrenched bill of rights, the Canadian Charter of Rights and Freedoms (Charter).[151] Liberty is a protected interest under the Charter and detention is precluded unless it is imposed 'in accordance with the principles of fundamental justice' (section 7) or 'can be demonstrably justified in a free and democratic society' (section 1). A legislative provision that infringes a Charter right and is not justified under section 1 will be invalid. A question that arises in the Charter context is whether detention of a non-citizen subject to a deportation order, in circumstances where there is no real prospect of removal, infringes section 7. If it is found to do so, then a further question arises as to whether it is justified under section 1. To the extent that the administrative detention of non-citizens in these circumstances is not authorised by the purpose of facilitating deportation, an alternative reason for its confinement to non-citizens is needed. In the absence of a satisfactory reason, the detention will be found to be discriminatory, in contravention of the equality right in section 15. As in the Australian context, constitutional reasoning has a direct bearing on statutory interpretation by way of a presumption that legislation complies with constitutional norms.

Finally, although there is no single common law position on statutory interpretation, the common law of each jurisdiction studied recognises a presumption against the legislative abrogation of personal liberty. This presumption can support an interpretive approach whereby a statutory power of detention for the

[147] I say 'or the government' as s 10 HRA 1998 provides for a 'fast-track' procedure whereby primary legislation may be amended by ministerial order, available when a s 4 declaration of incompatibility is issued.

[148] Meaning that the declaration was not subject to appeal, in whole or in part.

[149] See n 147 on s 10 HRA 1998.

[150] See Ministry of Justice, *Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government Response to Human Rights Judgments 2011–2012* (Cm 8432, 2012) annex A. The Ministry of Justice noted that, in the period between 2 October 2000 when the HRA 1998 entered into force and 31 July 2012, 27 declarations were made, 19 of which became final in their entirety (ie the declaration is not subject to appeal, in whole or in part). Of those 19, 11 have been remedied by later primary legislation, three have been remedied by remedial order under s 10 HRA, four related to provisions that had already been remedied by primary legislation at the time of the declaration, and the last was under consideration to determine how to remedy the incompatibility.

[151] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c 11 (Charter).

purposes of deportation will be read as not extending to indefinite detention, unless indefinite detention is explicitly provided for.[152]

1.7 Plan of the Book

The book falls into three Parts, divided by jurisdiction: Australia (chapters two to four), the United Kingdom (chapters five to seven), and Canada (chapters eight and nine). Within each part, discussion centres on a particular case study, namely the leading authority of the highest appellate court on the legality of indefinite detention pending removal: *Al-Kateb*, *Belmarsh* and *Charkaoui* respectively. In Part I on Australia, chapter two provides legal context, including key decisions, relevant to understanding and evaluating the High Court of Australia's decision in *Al-Kateb*. *Al-Kateb* is analysed in chapter three. And chapter four considers subsequent Australian legal developments that speak to the legacy of that decision or bear on its evaluation. The same pattern of analysis of the leading authority on indefinite detention, flanked by preceding context and subsequent developments, is repeated in relation to both the British and the Canadian Parts. This simple pattern belies a considerable difference in the materials consulted for each jurisdiction, a function of the different legal contexts and circumstances in which each decision was decided. In Part II, chapter five provides the legal context for the *Belmarsh* litigation. The *Belmarsh* litigation before the Special Immigration Appeals Commission, the Court of Appeal and the House of Lords is the subject of chapter six. Chapter seven addresses the wider periphery of immigration detention in the United Kingdom, in particular the regimes of preventive constraint known as control orders and terrorism prevention and investigation measures. In Part III, on Canada, chapter eight outlines relevant Charter jurisprudence on non-citizens, and litigation on the relevant detention regime, that preceded *Charkaoui*. Chapter nine analyses *Charkaoui* and subsequent cases on the Canadian detention regime.

Chapter ten, the Conclusion, brings together the findings of my review. Close analysis of the reasoning of the courts on the legality of indefinite detention pending removal, and related issues, enables me to return in the Conclusion to the underlying questions of principle posed at the outset. The answer to those questions is of practical import to non-citizens subject to indefinite detention pending removal. It bears on how courts adjudicate on whether such detainees should be released. It also speaks to a more general interest in determining the nature and scope of liberty rights in democratic societies. Who can be interned to protect who from what and for what reasons? The book holds a mirror up to the process of reasoning in final courts of appeal. It provides insights into the factors that lead

[152] Or if the provisions would be rendered wholly inoperative if not read as providing for indefinite detention.

judges to come to very different views on what is, in the final analysis, the same question. It also serves to illuminate a central dilemma about who is entitled to benefit from the rights that democratic societies pledge themselves to enshrine and protect.