THE LOST PROMISE OF *M47*

RAFE ANDREWS

I INTRODUCTION

As a signatory to the *Convention Relating to the Status of Refugees* and its *Protocol Relating to the Status of Refugees* (together, the '*Refugee Convention*'),[1] Australia is obliged not to refoule (that is, send) 'people to countries where they have a well-founded fear of persecution for reasons of race, nationality, political opinion or membership of a particular social group'.[2] This obligation has been found to be imbued into the scheme of Australia's Migration Act 1958 (Cth) ('*Migration Act*').[3]

There are over 50 people in Australia being held indefinitely – potentially for the rest of their lives – because, while they have been assessed as genuine refugees, they cannot be released, as they are the subject of adverse security assessments by the Australian Security Intelligence Organisation ('ASIO'). Having been assessed as a threat to Australia, other countries are naturally wary of accepting them, but they cannot be sent to their home countries (in these cases, the only country which is positively obliged to take them). This is the situation in which the Plaintiff found himself in *M47 v Director-General of Security* [2012] HCA 46 ('*M47*').

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1 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954); *Protocol Relating to the Status of Refugees*, opened for signature 31 January, 1967, 606 UNTS 267 (entered into force 4 October 1967).

2 Department of Immigration and Citizenship ('DIAC'), Submission No 32 to Joint Select Committee on Australia's Immigration Detention Network, Parliament of Australia, September 2011.

3 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161, 178–80 [54]–[59] ('*NAGV*'); *Plaintiff M61/2010E v Commonwealth*(2010) 243 CLR 319, 339 [27] ('*Offshore Processing Case*'); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 189 [90] ('*Malaysia Declaration Case*'); confirmed in *M47* [222] (Hayne J).

Security assessments made by ASIO are rightly an important part of determining applications for protection visas to stay in Australia. However, the system has serious problems. Most of the refugees in this situation have been in immigration detention for over a year, some as long as four years,[4] with no foreseeable resolution. Plaintiff M47 has been in immigration detention since 30 December 2009.[5] There is a tragic danger to having an almost impossible-to-review decision that can render a person virtually stateless. There is no mechanism for assessing the assessment at the base of the detention: non-citizens are excluded from the operation of most of the protections in *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*') Part IV for assessments made in relation to the *Migration Act*.[6]

Relevantly under the *Migration Act*, an officer must detain an unlawful non-citizen (by section 189), until removed or granted a visa (by section 196), such removal having to take place as soon as reasonably practicable after a valid application for a protection visa has been finally determined (by section 198). Problematically for Plaintiff M47, similarly to the stateless Ahmed Al Kateb of *Al Kateb v Godwin*,[7] since he could not be removed or granted a visa, he fell between two stools. The issue that ought to be at the heart of *M47* is whether the Commonwealth Parliament is competent to pass legislation that can, by unsturdy statutory implication alone, permit the Executive to detain people when there is no reasonable prospect of the purported purpose of their detention being fulfilled.

First, I put forward the facts of the case. Secondly, I outline the point on which the matter turned in the High Court. Thirdly, I deal with Justices Gummow and Bell's return to the statutory interpretation analysis undertaken by Gleeson CJ in *Al Kateb*. Finally, I turn to the question that ought not to have been ignored by the Court: the implications of Chapter III of the *Constitution* for the indefinite detention of genuine refugees on the basis of ASIO adverse security assessments. I discuss the approaches that may be taken when this

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4 Ben Saul, Attachment 1 to Submission No 130 to Joint Select Committee on Australia's Immigration Detention Network, Parliament of Australia, September 2011, 18.

5 *M47* [2012] HCA 46, [4] (French CJ), [374] (Crennan J).

6 *ASIO Act* s 36. Assessment made for the purposes of sub-s 202(1) of the *Migration Act 1958* (Cth) (relating to deportation of non-citizens) are excepted.

7 (2004) 219 CLR 562 ('*Al Kateb*').

issue almost inevitably returns to the High Court, and suggest a return to a categorical immunity to non-criminal detention based on 'quasi-guilt' as in *Lim*[8] and as put by Gummow J in *Al Kateb* and *Woolley*, with the central issue being the deprivation of liberty.[9] The issues of procedural fairness and the argument from the *Communist Party Case* were both also largely ignored by the High Court, but are beyond the scope of this piece.

Detention on the basis that a person is a security threat, by the unreviewable determination of an ASIO officer, is as close to an Executive determination of guilt as modern Australia presents, with the least oversight by the court (compared with other forms of preventative detention in Australia),[10] and the most cause for concern. The indefinite detention of refugees for the purpose of deporting them is understandable; but when no deportation is foreseeable, that justification falls away, and the remaining reason for their detention is that they have been assessed *guilty* of being a threat.

II THE FACTS IN *M47*

The Plaintiff, a Sri Lankan national, applied for a protection visa while in immigration detention. A delegate of the Minister for Immigration and Citizenship decided the Plaintiff had a well-founded fear of persecution on the basis of his race and political opinions and that, if returned to Sri Lanka, there was a real chance he would be subject to abduction, torture and death.[11] Having determined therefore that the Plaintiff was a genuine refugee, the delegate set in train procedures including an ASIO assessment. Under the *Migration Regulations 1994* (Cth), Schedule 2, clause 866.225(a), an applicant cannot be granted a protection visa unless, inter alia, public interest criterion 4002 ('PIC 4002') is satisfied. (PIC 4002, set out in Schedule 4 Item 4002,

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8 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ('*Lim*').

9 *Al Kateb* (2004) 219 CLR 562, 612 [137]; *In Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 ('Woolley'); see also Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 286.

10 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 ('*Kable*'); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 ('*Fardon*'); *South Australia v Totani* (2010) 242 CLR 1 ('*Totani*'); *Wainohu v New South Wales* (2011) 243 CLR 181 ('*Wainohu*').

11 *M47* [2012] HCA 46, [5] (French CJ).

requires that the applicant 'is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security [within the meaning of section 4 of the ASIO Act]'.) The Plaintiff was refused a protection visa, despite being a genuine refugee, because ASIO had assessed him to be directly or indirectly a risk to security, and thus he did not satisfy PIC 4002.

The Refugee Review Tribunal confirmed this,[12] in the limited sense that is permitted to them in this context. Since the RRT cannot review or enquire into ASIO's assessment, and since the assessment's mere existence impedes the grant of the visa, the Tribunal's confirmation was inevitable. It is evidence only that the delegate correctly went no further, and not really any kind of merits review.[13]

As a result of claims that the Plaintiff was denied natural justice in his original assessment, ASIO conducted a further interview, with the Plaintiff legally represented; ASIO issued a new assessment in 2012, which was also adverse to the Plaintiff.[14]

III THE DECISIVE POINT IN *M47*

The *Migration Act* section 31(3) provides for prescription by the regulations of criteria for visas, including protection visas. Section 504(1) provides that regulations may be made 'not inconsistent with this Act'. A majority of the High Court (French CJ,[15] Hayne,[16] Crennan[17] and Kiefel JJ,[18] in separate judgments) held that the relationship between PIC 4002 and the provisions in sections 500–503 of the *Migration Act* spelt invalidating inconsistency for the former.

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12 Ibid [155] (Hayne J).
13 Ibid [386] (Crennan J).
14 Ibid [379] (Crennan J); [415] (Kiefel J).
15 Ibid [71].
16 Ibid [206], [221].
17 Ibid [399].
18 Ibid [458]–[459].

For French CJ,[19] this was primarily because the condition sufficient to support the assessment that PIC 4002 involved, impermissibly subsumed the national security criteria in Articles 32 and 33(2) of the *Refugee Convention*.[20] That is, PIC 4002 is wider in scope than the scheme in the *Migration Act*, negating important elements of it regarding protection visas and the statutory application of the parts of the *Refugee Convention* that disentitle a refugee from protection obligations on the basis of national security and threat to the Australian community.[21] PIC 4002 provides no guiding threshold level of threat for it to be activated. It effectively shifts the decision-making power to refuse to grant a visa based on the disentitling conditions in the *Refugee Convention* to an ASIO officer, whose decision is unreviewable and forces the Minister to act on that assessment, precluding the operation of the Minister's power under the Act, inconsistently with the scheme for merits review in section 500.[22]

For Hayne J, the key factor was that if PIC 4002 were valid, the refusal to grant a protection visa in these circumstances would always be made relying on it, and not relying on Articles 32 or 33(2) and applying section 501, leaving section 500(1)(c) otiose.[23] PIC 4002 is therefore inconsistent with a reading of the Act by which all its provisions are given effect.[24]

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19 Ibid [65].

20 Articles 32 and 33(2) relevantly deal with expulsion and refoulement of refugees. Under Art 32, the Contracting State agrees that they shall not expel a refugee lawfully on their territory save on grounds of national security or public order. Except where compelling national security reasons require, the refugee shall be allowed a hearing to clear themself and to appeal and be represented before the competent authority. Art 33(1) sets out the requirement not to refoule refugees; Art 33(2) says that 'the benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'.

21 *M47* [2012] HCA 46, [71].

22 Ibid [66], [71].

23 'Courts have pointed out that they are not at liberty to consider any word or sentence as superfluous or insignificant': D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis, 7th ed, 2011) 49 [2.26].

24 *M47* [2012] HCA 46, [206], [221].

For Crennan and Kiefel JJ, the key factor was that a decision to refuse a protection visa relying on PIC 4002 shifted the power of determining the visa application into the hands of an ASIO officer, and thereby neither the substance nor the actual making of the assessment were reviewable, contrary to the scheme of the *Migration Act* when the Minister relies on Articles 32 and 33(2) of the *Refugee Convention*.

While both Crennan and Kiefel JJ focused on both these aspects, Crennan J emphasised the conflict with the Refugee Convention (as embodied in the Act) and the unreviewable nature of ASIO's decisions.[25] Justice Kiefel [26] emphasised that PIC4002 removed from the consideration of the Minister, or the Minister's delegate him- or herself, whether a visa should be denied on the grounds of national security, a process which PIC 4002 impermissibly prematurely concludes.[27] The Minister 'could be informed by an assessment of ASIO', but should not be pre-empted in that consideration by regulation.[28]

The majority held that because the application for a protection visa had not, in law, been finally determined since it had been prevented by the invalid PIC 4002, the Plaintiff's continued detention for the purpose of assessing his application was lawful pursuant to section 196.[29]

IV STATUTORY INTERPRETATION BY GUMMOW AND BELL JJ: RETURNING TO GLEESON CJ IN *AL KATEB*

In separate judgments, Gummow, Heydon and Bell JJ[30] disagreed with the majority that PIC 4002 was ultra vires the regulation-making power in section 31(3). Justices Gummow and Bell held that it is plain that section 36(2) (creating the protection visa class) does not purport to cover completely and exclusively the criteria for granting such a visa.[31] According to Gummow J, Articles 32 and 33 of the *Refugee Convention* do not deal with the criteria for the existence of refugee status, focused as they are on circumstances where

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25 Ibid [396]–[399], [401].

26 Ibid [456]–[459].

27 Ibid [459].

28 Ibid [456].

29 Ibid [28], [72] (French CJ), [225] (Hayne J), [404] (Crennan J), [460] (Kiefel J).

30 Ibid [136]–[138] (Gummow J), [322] (Heydon J), [487]–[489] (Bell J).

31 Ibid [136] (Gummow J), citing *Cullis v Ahern* (1914) 18 CLR 540, 543.

someone already otherwise recognised as a genuine refugee may be denied certain protections on national security grounds (whereas, for example, Article 1F denies refugee status in the first place to certain classes of serious criminals).[32] Proceeding *a fortiori* from the position of Article 1F's 'immediate effect on the existence of protection obligations engaging section 36(2)' (and therefore on the grant and cancellation of a visa), Gummow J saw it as too large a step to read the power to prescribe criteria given by section 31(3) as foreclosed by the operation of the antecedent criteria for protection obligations.[33]

According to Bell J, PIC 4002 is valid.[34] To stipulate (in common with other types of visas)[35] that a protection visa applicant be cleared of being a threat to national security is not on its face inconsistent with the Minister separately having the power to make a decision to 'rely on' national security grounds in Articles 32 and 33 to refuse to grant a protection visa.[36] Justice Bell rejected Justice Hayne's characterisation of PIC4002 as leaving no work for the scheme of the Act sections 500–503, since the visa could be refused on character grounds quite separate from an adverse assessment by ASIO.[37] (ASIO applies no character tests, and no character consideration is itself a sufficient ground for an adverse assessment, although some element of character may be relevant if it has some bearing on a security consideration.[38])

Justice Heydon believed that if the sole regulation making power were the general one in section 504, PIC 4002 would be ultra vires, but that since it was

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32 'Article 1F relates to persons who have committed crimes against peace, war crimes, crimes against humanity or serious non-political crimes outside the country of refuge, or who have been guilty of acts contrary to the purposes and principles of the United Nations', to whom the *Refugee Convention* and its attendant protections 'shall not apply': *M47* [2012] HCA 46, [16].

33 Ibid [131]–[132], [136]–[138].

34 Substantially agreeing with Gummow J, who in turn explicitly agreed with Bell J: ibid [138].

35 Ibid [488] fn 470.

36 Ibid [487].

37 Ibid [488]–[489].

38 ASIO, Submission No 153 to Joint Select Committee on Australia's Immigration Detention Network, Parliament of Australia, September 2011, 2.

dependent on section 31(3), which authorises criteria for visa categories to be made by regulation, of equal importance to those in the Act.[39]

Instead, Gummow and Bell JJ returned to the question in *Al Kateb*: whether sections 189 and 196 authorise the Plaintiff's detention. Thereby M47, as an 'unlawful non-citizen', must be taken into immigration detention, to be removed from Australia as soon as reasonably practicable, and 'until' that removal he must remain in immigration detention.[40] Justice Gummow argued that the interpretation undertaken by the majority in *Al Kateb* appeared to read 'until' as 'unless', ignoring the temporal quality of the condition. If the legislation were framed in this express way (with the necessary intendment that an unlawful non-citizen must be detained 'unless' one of the defined circuit-breakers occurs), the conclusion may be that the Act authorises the Plaintiff's detention (subject to the arguments below in Part V).[41] However, the Act does not expressly say that an unlawful non-citizen must be kept in immigration 'permanently or indefinitely', and reading section 196 as if it said 'until' presumes that removal as soon as reasonably practicable is even possible. There being a studied difference in statutory interpretation between a mere assumption and a necessary implication,[42] the question is which construction the Court should adopt. On the one hand, the Parliament could be found to have necessarily intended that if it is never practicable to remove the detainee, 'the detainee must spend the remainder of his or her life in detention'.[43] On the other hand, that if removal 'ceases to be a practical possibility', the detention is suspended (although the duty of removal remains) since its immediate purpose has been swept away.[44] Justice Gummow found that the first interpretation is not supported by language of such 'irresistible clearness' required by a long line of authorities, to overcome the principle of

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39 *M47* [2012] HCA 46, [316].

40 Ibid [113].

41 Ibid [114].

42 As in *Carr v Western Australia* (2007) 232 CLR 138, [11]–[12] (Gleeson CJ), [130]–[134] (Kirby J).

43 *M47* [2012] HCA 46, [117].

44 Ibid adopting Gleeson CJ in *Al Kateb* (2004) 219 CLR 562, 575 [14].

legality and depart from fundamental rights and principles.[45] In this, Gummow J[46] (and Bell J[47]) adopted the reasoning of Gleeson CJ in *Al Kateb*.[48]

For Bell J, while PIC 4002 is valid, and the *Migration Act* does not preclude the Plaintiff's removal to a safe third country otherwise than under Articles 32 and 33,[49] his detention is unlawful because the inference to be drawn from the facts is that there is no likely prospect let alone reasonable practicality in finding a safe third country willing to take him.[50] Citing *Koon Wing Lau v Calwell*,[51] Bell J pointed to provisions of the *War-time Refugees Removal Act 1949* (Cth) that were read down with a temporal limitation, where if read literally they would have permitted a deportee to be held in custody for the term of their natural life. If the deportee could not be placed on a boat 'within a reasonable time', they 'would be entitled to [their] discharge on *habeas*'.[52] As Gummow J did, in overcoming the convention against overturning a recent precedent on a matter

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45 *Potter v Minahan* (1908) 7 CLR 227, 304; *Wall v The King; Ex parte King Won [No 1]* (1927) 39 CLR 245; *Bropho v Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Smith v The Queen* (1994) 181 CLR 338; *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30]; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [20] (Gleeson CJ); *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 582 [17]; *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 622 [182]. See also generally D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis, 7th ed, 2011) 187–8 [5.28].

46 *M47* [2012] HCA 46, [117].

47 Ibid [528].

48 'In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.': *Al Kateb* (2004) 219 CLR 562, 577 [19].

49 *M47* [2012] HCA 46, [509]–[511].

50 Ibid [515], [524].

51 (1949) 80 CLR 533.

52 Ibid 581.

of statutory interpretation,[53] Bell J found fault with the failure of McHugh and Callinan JJ in *Al Kateb* to refer at all to the doctrine of the principle of legality.[54] Applying that fundamental principle, Bell J adopted the reasoning of Gleeson CJ (and, on the temporal issue, Gummow J) in *Al Kateb*. The fundamental rights in question are not confined to Australian citizens. The word 'practicable' connotes that which can actually be achieved, and the qualification 'reasonably' implies a judgment of a suitable period. This, and the temporal aspect above, both bolstering the strong presumption embodied in the principle of legality, was for Bell J more than enough to conclude that where removal from Australia is judged impossible for the foreseeable future, the obligation in section 196 is suspended.[55]

V CHAPTER III

In *M47*, some judges on the High Court noted certain constitutional issues, but did not decide them. The Court should have engaged with them. There was little to prevent such a discussion.[56]

Not least, this discussion could have come from Gummow and Bell JJ (both of whom declined to address the submissions[57]). Given the strong principle of statutory interpretation whereby a court will favour a construction resulting in constitutional validity over one that results in invalidity (which Heydon J discusses, albeit dismissing the factor[58]), it would have weighed in favour of their preferred construction of the statute. This was partly put in oral submissions by Mr Kirk SC for the intervening party S128/2012, who argued

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53 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 439–40.

54 *M47* [2012] HCA 46, [119] citing *Coco v The Queen* (1994) 179 CLR 427, 437.

55 *M47* [2012] HCA 46, [534].

56 Counsel for the Defendants admitted that 'as Chief Justice French pointed out in *Wurridjal* and as flows through the jurisprudence in this area, a somewhat more liberal approach is taken to the reopening of constitutional questions than statutory questions for the obvious reasons that statutory questions can be revisited by the Parliament if it chooses to do so': Transcript of Proceedings, *M47* [2012] HCATrans 145 (19 June 2012) 4855 (S P Donaghue SC). See also *M47* [2012] HCA 46 [525]–[527], [533] (Bell J).

57 [104], [105], [115] (Gummow J), [533] (Bell J).

58 [337]–[343].

that the constitutional considerations raised in *M47* 'might lead one back to that constructional choice to support the minority position in *Al Kateb*'.[59]

But moreover, the reason *M47* should have served as an opportunity for a rebalancing of the particular bent that this line of law developed around 2004 is that, as Leslie Zines said, '[l]urking beneath the disagreement in the immigration detention cases is the basic issue of the weight to be given to the protection of Chapter III'.[60] It is not only an issue that affects Australia's treatment of particularly vulnerable refugees and stateless persons (although, if it were confined to that, that would hardly be unimportant), but also the nature of the powers the Parliament and Executive could exercise with respect to anyone within its reach.

It is clear the plurality in *Lim* recognised the import of their Chapter III doctrine beyond immigration, by analogising the framing of the scheme of the *Migration Act* as if it were applied to citizens.[61] In *Lim*, the involuntary detention of a citizen is characterised as punitive; it therefore 'exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt',[62] and under the *Commonwealth Constitution*, that function can only be exercised by a Chapter III court. Because all of the grants of legislative power in the *Constitution* are subject to the judicial power, it is beyond the legislative power of the Australian Parliament to give the Executive an arbitrary power to detain citizens, even if the power is set out in terms that seek 'to divorce such detention in custody from both punishment and criminal guilt'.[63]

Although the *Lim* doctrine speaks about the involuntary detention of citizens, the protections of Chapter III do not bind by reference to notions of citizenship. The protections of Chapter III hinge on the interaction between the various arms of government under the *Constitution*. An arrogation of judicial power by Parliament to the Executive is offensive to the *Constitution in se*, no matter at

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59 Transcript of Proceedings, *M47* [2012] HCATrans 145 (19 June 2012) 2445–50 (J K Kirk SC).

60 Leslie Zines, *The High Court and the Constitution* (Foundation Press, 5th ed, 2008) 288.

61 *Lim* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

62 Ibid.

63 Ibid.

whom it is aimed, as Chapter III 'gives practical effect to the assumption of the rule of law upon which the *Constitution* depends for its efficacy'.[64] When it comes to non-citizens, the High Court has consistently recognised that the grant of power in section 51(xix) of the *Constitution* includes the power to legislate to detain aliens *for the purpose* of expelling or deporting them.[65] In *Lim*, this 'limited authority to detain an alien' was said not to infringe Chapter III of the *Constitution*, because it is 'neither punitive in nature nor part of the judicial power of the Commonwealth', but instead takes its character from the Executive power to admit, reject or deport migrants, of which the power to detain is incidental.

It should be clear, therefore, that when that power is no longer active because there is no reasonable prospect of deportation (and especially, as Callinan J said, where the Executive no longer has the purpose of deporting), the incidental power to detain is no longer supported.

It follows that once the detention of an alien is no longer supported as an incident of the Commonwealth's power to remove or deport aliens, the detention is ultra vires the non-judicial power to detain.

While the general principle has deteriorated,[66] it would be a mistake to think that Chapter III does not apply to immigration cases. In *Lim*, while the power to detain immigrants to deport them was a valid incident of the aliens power, other bases for detention were ruled impermissible. Insofar as the Commonwealth Parliament purported, through legislation, to imbue the Executive with an unreviewable power to detain, and seeking to exclude the power of the courts to supervise and correct error (the provision said that immigrants should not be released even at the order of a court), it is acting ultra vires.

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64 *Thomas v Mowbray* (2007) 233 CLR 307, 342 [61] (Gleeson CJ), citing *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 351–2 [30].

65 *Lim* (1992) 176 CLR 1, 32 (Brennan, Deane and Dawson JJ).

66 Jeffrey Steven Gordon, 'Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from Non-Criminal Detention' (2012) 36 *Melbourne University Law Review* 41, 42; Stephen McDonald, 'Involuntary Detention and the Separation of Judicial Power' (2007) 35 *Federal Law Review* 25.

A The Plaintiff's Submission

The Plaintiff argued that the matter of validity of non-judicial detention arises from the nature of the constraint on the relevant grants of power, in that they are subject to Chapter III. There were three steps to the framing of their argument here. First, 'the proposition that other than exceptional cases detention can only be [a] consequential step on the adjudication of criminal guilt of citizens of past acts'.[67] Secondly, 'exceptional cases which include detention of an alien must be for a limited purpose and must retain the connection between detention and purpose'.[68] Finally, it was argued that the connection will be broken if it can be shown that the measure 'is not limited to what is reasonably capable of being seen as necessary for that legitimate purpose'.[69]

The Plaintiff submitted that by following this test, the Court should construe the detention scheme of the *Migration Act* in the way Gummow and Bell JJ did (following the minority of Gleeson CJ, Gummow and Kirby JJ in *Al Kateb*), because if it were not construed in that way, 'serious questions respecting validity' could arise.[70] It was 'unnecessary to go further and conclude that those "serious questions" would in fact result in invalidity if the Act were not construed in the manner for which the plaintiff contends', because 'this Court has had regard to the constitutional limits in rejecting a construction of a

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67 Transcript of Proceedings, *M47* [2012] HCATrans 144 (19 June 2012) 1390–405 (R M Niall SC), relying on *Fardon* (2004) 233 CLR 575, 80 (Gummow J).

68 Ibid 1395.

69 Ibid 1400. See also *Lim* (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ). See also, apparently adopting the test: *AI-Kateb* (2004) 219 CLR 562, 660 [294] (Callinan J); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, 14 [21]–[22], [25] (Gleeson CJ), 51–52 [133]–[134], 60 [163]–[165] (Gummow J), 84 [260] (Callinan J) ('*Woolley*'); *Fardon* (2004) 233 CLR 575, 653–4 [215] (Callinan and Heydon JJ); *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 527 [118]–[119] (Kirby J), 559 [218] (Callinan J) ('*Behrooz*'); *Kruger v Commonwealth* (1997) 190 CLR 1, 162 (Gummow J) ('*Kruger*') (on detention generally). Cf *AI Kateb* (2004) 219 CLR 562, 647–8 [252]–[256] (Hayne J, Heydon J concurring), 584 [45] (McHugh J); *Woolley* (2004) 225 CLR 1, 33 [78] (McHugh J), 77 [227]–[228] (Hayne J, Heydon J concurring); *Behrooz* (2004) 219 CLR 486, 541–2 [171] (Hayne J), expressing doubt about *Lim*.

70 Plaintiff M47/2012, 'Submissions of the Plaintiff (Revised)', Submission in *M47* [2012] HCA 46, 12 June 2012, 15 [69].

statutory provision which "would put it in peril" of being invalid', and that that was at least the case here.[71] Justice Heydon alone engaged with this question, and rightly dismissed it: risk of invalidity is not a convention or guide to statutory interpretation, only actual invalidity.[72] Risk is too vague a rule of thumb to guide construction. If a provision is purely 'at risk' of invalidity, and that were to guide construction (even though it may prove valid, on testing), it could potentially push courts to read valid statues as if invalid. In context, the words 'put in peril' of being invalid means 'would render the provision invalid [if it were to operate on a construction other than the one arrived at]'.[73] However, I contend that that misstep in submissions is irrelevant here, as the provision *can* be said to be actually invalid; Justice Heydon's point only confirms that the validity of the detention scheme under Chapter III needed to be given attention.

B The Defendants' Submission

1 Contrary to the *Lim* Doctrine

The Defendants contended that, 'contrary to' the *Lim* doctrine, Chapter III 'does not create any rule that, exceptional cases aside, detention may lawfully be imposed "only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt"'.[74] Instead, they adopted the comments of Gaudron J in *Kruger*, that:

> Once exceptions are expressed in terms involving the welfare of the individual or that of the community, it is not possible to say that they are clear or fall within precise and confined categories. More to the point, it is not possible to say that, subject to clear exceptions, the power to authorise detention in custody is necessarily and exclusively judicial power. Accordingly, I adhere to the view that I tentatively expressed in *Lim*, namely, that a law authorising detention in custody is not, of itself, offensive to Chapter III.[75]

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71 Ibid.

72 [338]–[339].

73 Citing *New South Wales v Commonwealth* (2006) 229 CLR 1, 161 [355] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*WorkChoices Case*'); *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237, 267 (Dixon J).

74 Director-General of Security and Others, 'Submissions of the Defendants', Submission in *M47* [2012] HCA 46, 13 June 2012, 29 [103].

75 *Kruger* (1997) 190 CLR 1, 110.

The Defendants claim to buttress this with the idea that as the concept of criminal guilt is indeterminate, it 'therefore provides an unsatisfactory foundation for any constitutional immunity from detention otherwise than in accordance with a judicial determination of criminal guilt'.[76] Considering they cite Gummow J in *Fardon* for this,[77] and Gummow J is far from Justice Gaudron's position on this line, it is not clear how helpful that submission is. In *Fardon*, Gummow J also said:

> It is not to the present point … that federal legislation … may provide for detention without adjudication of criminal guilt but by a judicial process of some refinement. The vice for a Chapter III court and for the federal laws postulated in submissions would be in the nature of the outcome, not the means by which it was obtained.[78]

In *Kruger*, Gaudron J came to the conclusion that 'the existence of so many acknowledged exceptions to the immunity … and the fact that those exceptions serve so many different purposes tell against the implication of a constitutional rule that involuntary detention can only result from a court order'.[79] Instead Gaudron J acknowledged if there was an immunity like the one posited by the plurality in *Lim*, it was that 'subject to certain exceptions, a law authorising detention in custody, divorced from any breach of the law, is not a law on a topic with respect to which section 51 confers legislative power'.[80]

A lack of neatness in the exceptions to the *Lim* principle should not be the reason for a preference for Justice Gaudron's argument over Justice Gummow's. It is a feature of most aspects of Chapter III problems that 'the qualifications … and recognition that there are innominate powers make it difficult to identify those functions that are exclusively judicial by mere reference to the indicia of judicial power'.[81] Indeed, immediately after decrying the number of exceptions inherent in the *Lim* principle, Gaudron J excepted the

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76 Director-General of Security and Others, 'Submissions of the Defendants', Submission in *M47* [2012] HCA 46, 13 June 2012, 29 [104].

77 Ibid 29 n 184.

78 *Fardon* (2004) 233 CLR 575, [85].

79 *Kruger* (1997) 190 CLR 1, 110.

80 Ibid 111.

81 James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths, 2010) 213.

defence, quarantine, aliens, influx-of-criminals and possibly the race power from her formula.

Yet as Gummow J noted in *Al Kateb*, it would be logically consistent with Justice Gaudron's test in *Kruger* and also with Justice McHugh's analysis in *Lim*, that a law for the administrative detention of bankrupts in order to protect them from their debtors or the community from them would be a law with respect to bankruptcy and insolvency[82] or that a law detaining people in their houses on census night would be a law with respect to census and statistics.[83] If such laws are invalid, it is because of the limitation in the words of section 51 that the powers are 'subject to this *Constitution*', not because of any limitation in the words 'bankruptcy and insolvency' or 'census and statistics'.[84]

2 Exclusion and Segregation

In the alternative, the Defendants submitted that if the *Lim* doctrine applies, then M47 is detained for the purpose of removal, but that further, if his removal is not reasonably likely in the foreseeable future, the detention remains valid because the exception to *Lim* extends to being incidental to the power to exclude and segregate non-citizens from the Australian community.[85]

The defendants cite Gleeson CJ in *Woolley*[86] to support the view that the exception to *Lim* extends to 'segregating' (as a form of 'exclusion') aliens from the Australian community (the concept of which Gummow J attacked in the same case). However, this seems to oversell Chief Justice Gleeson's arguments, which do not extend that far. While his Honour explained *Lim* on the basis that the 'power of exclusion' supported detention, Gleeson CJ characterised that

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82 *Commonwealth Constitution* s 51(xvii).

83 *Commonwealth Constitution* s 51(xi).

84 *Al Kateb* (2004) 219 CLR 562, 611 [133] (Gummow J).

85 Director-General of Security and Others, 'Submissions of the Defendants', Submission in *M47* [2012] HCA 46, 13 June 2012, 29–30 [106]. See, eg, *Al Kateb* (2004) 219 CLR 562, 584 [45] (McHugh J), 648 [255] (Hayne J); *Woolley* (2004) 225 CLR 1, 31 [72] (McHugh J), 75 [222] (Hayne J).

86 Director-General of Security and Others, 'Submissions of the Defendants', Submission in *M47* [2012] HCA 46, 13 June 2012, 29–30 [106], citing *Woolley* (2004) 225 CLR 1, 13 [19].

power as one to keep those persons separate from the community 'while their visa applications were being investigated and considered'.[87]

More to the substance of the point, even if the power included 'exclusion', carrying some further meaning of segregating immigrants (or unlawful non-citizens) from the Australian community (a concept Gummow J in *Woolley* showed was comprehensively flawed by its indeterminacy[88]) whether segregation is incidental to the aliens power is distinct from whether it infringes the constraint of Chapter III. The inclusion of the Orwellian euphemism of 'exclusion' from the Australian community being somehow different to the incidental power to detain pending removal does not assist the Defendants. It still must be 'pending removal', or it is no longer detention for that purpose.[89] Nobody accepts that Parliament has power to allow the Executive to detain indefinitely any non-citizen in Australia, so as to 'exclude' rather than so as to 'expel', without a visa and hold them for the rest of their life, free of any reasonable prospect or purpose of removing them (with perhaps the honourable exception of Heydon J, see below Part V(C)). The purpose cannot be divorced from the power being to *remove* aliens; it is not a plenary power to do whatever the Government pleases with aliens, free of Chapter III.

3 Proportionality

Finally, the Defendants argued that whether the detention is 'appropriate and adapted to' or 'proportionate' to the present prospect of removal, Chapter III is not breached if detention is for the purpose of refusing to admit the unlawful non-citizen to Australia, and if that purpose exists as a matter of fact, there is no room for a proportionality test.[90] In the alternative, if there is a proportionality test, it concerns the proportionality between the detention and its purpose, not the detention and the present viability of removal.[91]

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87 *Woolley* (2004) 225 CLR 1, 14–15 [26]–[27].

88 Ibid 52–5 [135]–[148].

89 As phrased by Gummow J in *Woolley* (2004) 225 CLR 1, 52 [137].

90 Director-General of Security and Others, 'Submissions of the Defendants', Submission in *M47* [2012] HCA 46, 13 June 2012, 30 [107].

91 Ibid 30 [108].

However, it is hard to see how proportionality could be irrelevant to purpose, since if the measure adopted is disproportionate to the achievement of its stated aim, it 'cannot be characterised as truly made in pursuance of that object'.[92] As Zines noted, the concept of proportionality is recognised as 'particularly relevant where it is necessary to have regard to a constitutional limitation or guarantee', and indeed, since the difference between punitive and non-punitive detention is admitted by all to be 'not always as clear as that between chalk and cheese', 'proportionality would appear to be a useful criterion to use'.[93] The fact is that while detention may be reasonably proportionate to the end of making that alien available to be removed, detention cannot be reasonably proportionate to a removal that is not reasonably in prospect, because a measure cannot be characterised as reasonably in pursuance of an impossible object.

In discussing proportionality, Heydon J reminds us that '[i]f the plaintiff had applied for entry to Australia while in Indonesia, he could have been excluded without any infringement of right'.[94] This is true, but specious: if the applicant had been denied entry to Australia from Indonesia, there would be no infringement of the proportionality principle because there would be no indefinite detention potentially for the rest of his life. Nobody denies the Government's right to deny people entry; the applicant denies the Government's right to hold him in custody for the rest of his life without charge, on ASIO's virtually unreviewable say-so.

C Justice Heydon's (Unasked-for) Exception

To Heydon J, none of this is a problem, because the categories of recognised exceptions to the *Lim* doctrine are not closed. So, Heydon J proposes another category, being:

> the detention of unlawful non-citizens who threaten the safety or welfare of the community because of the risks they pose to Australia's security. If it is possible to detain a diseased person because that person is a threat to the public health, why is it not possible to detain a person assessed to be a risk to

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92 Australian Human Rights Commission, Submission in *M47* [2012] HCA 46, 8 June 2012, 12 [34].

93 Leslie Zines, *The High Court and the Constitution* (Foundation Press, 5th ed, 2008) 289.

94 *M47* [2012] HCA 46, [348].

> Australia's security because that person is a threat to public health in a different way? The plaintiff did not advance any argument suggesting that that exception did not exist.[95]

While it is true the Plaintiff did not advance any argument that there was no such category of exception, neither did the Defendants argue that it existed.

According to Heydon J, the Plaintiff's submissions 'do not squarely face the problem' that unlike the appellant in *Al Kateb*, M47 has been assessed by ASIO as posing a risk to Australia's security. What bearing exactly this has on the constitutionality of the question is not clear except in the light of the Heydon J exception, which would apparently give ASIO its own constitutional carve-out to cause the permanent detention of any non-citizen without a visa (including those whose visa is revoked, ie, a non-citizen who *had* a visa until it was revoked by an ASIO adverse assessment). The exception as set by Heydon J makes no reference to removal. Therefore, under the exception, it would be constitutional (although not currently legislated for) to detain an alien for life not by an accident of statelessness or quasi-statelessness but simply because they are (basically unreviewably[96]) assessed as a threat.

A carve out of the *Lim* doctrine that permits the Executive to detain a person indefinitely (and apparently permanently) because they are assessed by the Executive as 'a threat to security' is a chilling prospect that strikes at the heart of the protections of Chapter III (which give practical effect to the assumption of the rule of law).[97] The proposal – which the Commonwealth was sensible enough not even to ask for – is unacceptable.

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95 *M47* [2012] HCA 46, [346].

96 See Keiran Hardy, 'ASIO, Adverse Security Assessments, and a Denial of Procedural Fairness' (2009) 17 *Australian Journal of Administrative Law* 39; Ben Saul, 'The Kafka-esque Case of Sheikh Mansour Leghaei: The Denial of the International Human Right to a Fair Hearing in National Security Assessments and Migration Proceedings in Australia' (2010) 33 *University of New South Wales Law Journal* 629

97 *Totani* (2010) 242 CLR 1, [423] (Crennan and Bell JJ), cited by Mr Kirk SC in Transcript of Proceedings, *M47* [2012] HCATrans 145 (19 June 2012) 2445–50; see also *Thomas v Mowbray* (2007) 233 CLR 307, 342 [61] (Gummow and Crennan JJ).

D Close the 'Back Door'

At the heart of the Commonwealth's submissions on the application of *Lim* to the instant case, as well as running as a thread throughout the decisions of the majority in *Al Kateb* and the immigration cases, is a strong – but misplaced – desire to prevent some kind of loophole entry to Australia. For example, the Defendants submitted that 'the Plaintiff's argument would have the consequence that a non-citizen who is a refugee must be admitted into the Australian community, even where that person has been assessed to pose a risk to Australia's security'.[98] In his opening paragraph, Heydon J said '[d]uring oral argument in *Al-Kateb*, McHugh J asked counsel for the appellant: "How can you claim a right of release into the country when you have no legal right to be here?"'.[99] James Allen has argued that the dissents in *Al Kateb* would, if accepted, 'open up a backdoor way into Australia',[100] and excoriates the dissenters for 'do-the-right-thing judging'.[101] Allen argues that 'Justice Hayne does what the dissenting Justices will not; he tells us [that] the consequences … of reading in a temporal limitation to the period of detention … will mean unlawful non-citizens 'will gain ... entry to the Australian community' through the backdoor, as it were'.[102]

It is odd that a Chapter III protection should be talked about as if some kind of tricky loophole. Nobody would say that *Kable* was a 'back door' way to release a murderer. It is about the principle of what the Parliament can or cannot do. It is not to protect the integrity of our borders, and to find that the current *Migration Act* does not permit the kind of indefinite detention M47 was subject to does not mean that no control can or ever will be imposed on the situation afterwards. It is very strange for a Court that has no problem saying '*fiat justitia ruat caelum*' ('let justice be done, though the sky may fall') in other Chapter III cases. The High Court is happy to the release a murderer like Kable who has demonstrated his animus, and it is ready to stand on Chapter III

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98 Director-General of Security and Others, 'Submissions of the Defendants', Submission in *M47* [2012] HCA 46, 13 June 2012, 28 [102].

99 *M47* [2012] HCA 46, [228] citing *Al Kateb* (2004) 219 CLR 562, 565.

100 James Allen, '"Do the Right Thing" Judging? The High Court in *Al Kateb*' (2005) 24 *University of Queensland Law Journal* 1, 12

101 Ibid 11, 32–4.

102 Ibid 16.

principle although it may benefit criminal syndicates like biker gangs,[103] but shows trepidation in requiring the Commonwealth to find a less absurd way to control refugees like pregnant mother of two and alleged LTTE-sympathiser Ranjini.[104] but Indeed, Gummow J says that 'the issues which arise are not answered simply by … a rhetorical question asking how the plaintiff may claim release from detention in the absence of a "legal right" to be present in this country'.[105]

The options are not simply that if the time comes that it is no longer reasonably practicable to remove an unlawful non-citizen from Australia and that therefore detention under the current scheme of the *Migration Act* is suspended, the person must be given a free ticket to ride.[106] A constitutional principle mandating the suspension of the requirement to detain an asylum seeker when there is no practical prospect of expulsion would not and need not unduly expose the nation to danger. This could be achieved either by the courts, at the application of the Commonwealth, putting conditions on the issue of the writ of habeas corpus.[107] There is also no reason why Parliament could not legislate to manage it. If the person is a genuine and present threat, then there could be an application to a court imposing immigration control orders structured similarly to those in *Thomas v Mowbray*.[108]

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103 Totani (2010) 242 CLR 1; *Wainohu* (2011) 243 CLR 181.

104 Steve Cannane, 'Family Shattered by Negative ASIO Assessment', *ABC News* (online), 12 May 2012 <http://www.abc.net.au/news/2012-05-12/refugee-story-lateline/4007202>.

105 *M47* [2012] HCA 46, [88].

106 Director-General of Security and Others, 'Submissions of the Defendants', Submission in *M47* [2012] HCA 46, 13 June 2012, 28 [102].

107 Such conditions were discussed in *M47* by Gummow J at [108]–[109], [149] and Bell J at [534], including by reference to Gleeson CJ in *Al Kateb* (2004) 219 CLR 562, 579–80 [27]–[29].

108 (2007) 233 CLR 307. There may be other problems, for example with admitting secret evidence for such orders, but that is beyond the scope of this piece. See, eg, *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, [24] (Gummow, Hayne, Heydon and Keifel JJ); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501. See also *Leghaei v Director-General of Security* [2005] FCA 1576; Saul, above n 96.

Detention or backdoor entry to Australia is a false dichotomy. The constitutional principle is liberty from non-judicial detention unsupported by a proper purpose. Lesser restrictions can be imposed that protect the public.

VI CONCLUSION

The basic principle that no person should be deprived of their liberty without judicial conviction has deteriorated.[109] The HCA may not be able or apt to prevent the further deterioration of the political discourse surrounding immigration (and particularly refugees) in Australia, but it is in a unique position 'at least [to] moderate the impact of the politicisation process on the refugees themselves'.[110] Doing so is by no means, as James Allen describes it, 'do-the-right-thing judging',[111] when it is achieved by the application of such a perfectly fundamental principle as the right not to be detained arbitrarily and indefinitely without due process. As much as judicial decisions premised on feel-good are unwanted, equally unwanted are unnecessarily inhumane judgments and unnecessarily narrow decisions that leave unanswered important questions about the structure that is supposed to give practical effect to the rule of law in our democracy.

M47 provided an opportunity for the HCA to redeem certain aspects of constitutional principle that were given dangerously short shrift in the immigration cases.[112] These cases have left open the question whether any practical constitutional limits remain to the power to detain aliens.[113] And while the reading given to the aliens power is for the moment only peculiarly wide to that head of power, the issue is not so confined. In *Al Kateb*, Gummow J noted that under the drift in the principle, the Parliament could potentially lock up bankrupts, for example, supposedly to protect society.[114]

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109 Gordon, above n 66.

110 Mary Crock, 'Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law' (2004) 26 *Sydney Law Review* 51, 73.

111 Allen, above n 100, 11, 32–4.

112 *Al Kateb* (2004) 219 CLR 562; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664; Woolley (2004) 225 CLR 1; Behrooz (2004) 219 CLR 486.

113 Alex Reilly, 'Immigration Detention: Pushing the Boundaries' (2004) 29 *Alternative Law Journal* 248, 249.

114 *Al Kateb* (2004) 219 CLR 562, 611 [133] (Gummow J).

While it is not HCA's job to decide the law in such a way as to avoid tragic outcomes, it is equally not the HCA's job to arrive at a narrow construction that ignores the absurd outcome of that interpretation. It is a crucial step in construing legislation that the consequences of a chosen construction are considered.

The outcome in *M47* will swiftly be returned to square one: while PIC 4002 is invalid, there are a number of ways for the Parliament to restore it. The whole scheme of ASIO adverse assessments and their interaction with *Migration Act* and protection visas means that every refugee issued with an adverse assessment with no citizenship other than that of the country they are fleeing will find themselves in a similar situation. It is not a marginal or chance event, it is structural. In the current political climate, in the area of refugee law – with all its attendant echoing implications for the protection of the rule of law for all of us – 'the Australian judiciary can, quite patently, be the last bastion against executive tyranny for the dispossessed and reviled'.[115]

115 Crock, above n 110, 73.