The Thin End of the Wedge: Executive Detention of Non-Citizens & the Australian Constitution

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I. Introduction

Since Magna Carta's great pronouncement that 'no free man shall be imprisoned ... except by the lawful judgment of his peers or by the law of the land'[1] the incarceration of individuals only by court order has been generally assumed to be a cardinal principle of the common law. In reality, the executive government has always detained certain classes of persons, absent judicial involvement – whether in wartime camps, for quarantine purposes, or for immigration and refugee processing. It is on this final aspect of the executive's power of detention that this paper focuses.

This paper charts the Australian experience of executive detention of asylum seekers, examining how the High Court has authorised, through a narrow, textual interpretation of the Constitution, the mandatory, indefinite detention of such individuals. This exclusion of non-citizens[2] from Australian legal protections is tracked through a close analysis of two High Court cases, *Chu Kheng Lim v MILGEA*,[3] and *Al Kateb v Godwin*.[4] In both, the High Court endorsed the mandatory, executive detention of asylum seekers. I argue that *Al Kateb* systematically withdraws the limitations placed on executive detention in *Lim*, greatly broadening the Australian federal government's power over non-citizens. The purpose of this paper is to examine the shift from *Lim* to *Al Kateb*, illustrating the potential implications of such a legal change not only for asylum seekers who are subject to the current *Migration Act*, but for everyone who lives under a system of law where the Courts are prepared to allow government to diminish protection for certain groups through narrow constitutional interpretations.

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1 9 Henry III 1225, as confirmed in 25 Edward I 1297 CI 29.

2 This paper uses the terms non-citizen and alien interchangeably, as is congruent with current High Court jurisprudence. See *Singh v Commonwealth* (2004) 209 ALR 355, per Gleeson CJ, 357 [hereinafter *Singh*].

3 (1992) 176 CLR 1 [hereinafter *Lim*].

4 (2004) 208 ALR 124 [hereinafter *Al Kateb*].

By removing legal protections from vulnerable groups we undermine the fabric of legal protections to which we are all subject. It is not only those individuals who suffer, but all people subject to the law, which is weakened in its general attitude to the protection of cardinal common law liberties. It is this path upon which the High Court has embarked. An examination of the *Al Kateb* case shows that a majority of the High Court chose not to adopt accepted methods of constitutional interpretation that would have led the Court to decide the case with regard to the fundamental principles underlying and imbuing the Constitution, not least of which is liberty.

II. The Factual Background

Lim was the High Court's first endorsement of the Australian Government's scheme of mandatory administrative detention for asylum seekers who had entered the country without lawful permit. The Court was called upon to consider provisions of the *Migration Act* 1958 (Cth), which compelled the mandatory detention of a class of Cambodian boat people. In the early 1990's Australia had experienced a wave of asylum seekers, displaced by conflict in their home regions, who arrived without visas or other authorisation. In response to these uninvited arrivals, the Federal government introduced a scheme of mandatory detention. The legislation dealt specifically with the designated Cambodian 'boat people'. When the detainees brought actions seeking release in the Federal Court, the Parliament rushed through legislative amendments to strengthen the detention scheme. Among these amendments were provisions specifying that a 'designated person' was to remain in detention unless and until he or she was granted a visa, left the country, or until the maximum time limit of 273 days was reached. (This limit only included days when the person's file was under active consideration by the department).[5] Moreover, the legislation attempted to oust curial review, stating that 'the Court is not to order the release of a designated person.'[6] The strong legislative response to the arrival of such a small number of Asylum seekers is merely one – albeit an acute – example of the disproportionate political response engendered by refugee issues in Australia.[7]

The High Court upheld all aspects of this scheme, save only the fact that the legislation could not remove judicial oversight: that would result in a breach of the separation of powers in the Australian constitution and was therefore beyond the competence of the legislature to affect, or the executive to implement.

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5 See *Migration Act* 1958 (Cth) Pt 2 Div 4B [hereinafter *Migration Act*].

6 Ibid, s54R.

7 See Mary Crock, 'Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law' (2004) 26 SLR 51 [hereinafter Crock, 'Judging Refugees'].

Though the judgment reflects a high level of deference to both the legislature and executive, it was nonetheless a decision that placed strict limits on the government's power to hold non-citizens through administrative processes for the purposes of refugee processing or deportation. However, when the High Court was called upon to decide the case of *Al Kateb* last year, it substantially removed the strict restrictions mandated in the earlier judgment.

Mr. Al Kateb was a stateless man of Palestinian origin who fell into a gap in the *Migration Act*. While the legislation once again authorised detention for unlawful non-citizens until removal (either at the request of the detainee, or upon exhaustion of legal appeals) or the grant of a visa, it was silent on the position of people like Mr. Al Kateb, who, having failed in his asylum claims and subsequently requested removal, could not be deported as no country could be found that would take him. Mr. Al Kateb was also one of a 'wave' of boat people fleeing to Australia due to international strife: this time, conflicts in the Middle East. Once again, Australia's reaction to the small number of asylum seekers who arrived by boat without authorisation was disproportionately hostile, resulting in rushed legislative changes, the exclusion of boats of refugees from Australian waters by Executive order, and high public sentiment against 'illegal' immigrants.[8]

Relying both on the distinguishing features of the case from those in *Lim*, as well as a Full Federal Court judgment favouring release in cases such as his,[9] Mr. Al Kateb argued that the *Migration Act* did not authorise his continued detention. His argument relied in several respects on the restrictions discussed above in *Lim*. He argued that the purpose of the detention had come to an end, changing the character of the detention from an incident of the power to expel and deport to incarceration that was punitive in character; therefore engaging the judicial function of the Commonwealth and breaching the separation of powers.

In the result, the High Court dismissed Mr. Al Kateb's arguments. A majority of four judges – Justices McHugh, Hayne (with whom Heydon J agreed, affording his honour the distinction of writing the leading judgment) and Callinan – upheld the mandatory, and in this case indefinite, executive detention of a non-citizen. They did so based on a combination of grounds involving principles of statutory and constitutional interpretation. Of the

8 The infamous Tampa incident provides an example in microcosm of the public and governmental panic. See, for example, H Pringle & E Thompson, 'The Tampa Affair and the Role of the Australian Parliament' (2002) 13 PubLR 128, and Mary Crock 'In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows' (2003) 12 PacificL&PolicyJ 49.

9 *MIMIA v Al Masri* (2003) 197 ALR 241.

dissentients, Chief Justice Gleeson confined his decision to an examination of the *Migration Act*, Justices Gummow and Kirby wrote dissenting judgments covering both issues.

III. The Australian Constitutional Framework

Before turning to the cases, I will outline the constitutional framework in which the decisions were made. This background is necessary to understand the basis on which the High Court arrived at its decision. As my analysis focuses on the constitutional aspects of the judgments, rather than on the aspects dealing with statutory interpretation, it is necessary to set out the relevant aspects of the Australian Federal Constitution.

The Constitution contains no express power over citizenship. Rather, the Commonwealth government is empowered in two relevant areas: These are the powers to make laws with respect to Immigration and Emigration; under s 51(xxvii) and Naturalisation and Aliens; under s 51(xix). Because of this structural emphasis, the discussion on issues of membership of the Australian community has been framed in the negative: not who is an Australian, but who is not, so as to fall within the ambit of either of the powers. The power over emigration and immigration has been interpreted as relatively restricted,[10] and is not relevant for our purposes. The power over naturalisation and aliens has been interpreted to have no such inconvenient limitations, and, as this paper demonstrates, has recently undergone a widening in its scope.

The other cardinal feature of the Constitution that must be mentioned is the separation of judicial power. This is a central issue in any discussion of executive detention. Chapter III of the Constitution invests the judicial power of the Commonwealth in the High Court of Australia. This structural decision reflected the desire of the Framers to follow the United States model of a High Court as final arbiter of the legality of government action.[11] The central motivation for a separate judiciary is to diffuse power and limit its arbitrary use or abuse. A separation of judicial power embodies Montesquieu's famous concept 'there is no liberty, if the judiciary power be not separated from the legislative and executive.'[12] While the High Court in Australia has insisted on a strict separation of its powers from the two other branches of government,

10 For a summary of the early cases, which continue as good law, see Tony Blackshield & George Williams, *Australian Constitutional Law and Theory* 3rd Ed (2002) 854-874 [hereinafter Blackshield & Williams].

11 Ibid, 606; and Leslie Zines, *The High Court and the Constitution* 4th Ed (2004) 154.

12 Baron de Montesquieu, *The Spirit of Laws*, T Nugent (trans) (1949) 152.

the record of the separation as a check on executive action is less clear, as the case of *Al Kateb* illustrates. Nevertheless, the separation of judicial power remains vital to the operation of the Australian federation.[13]

Inherent in this separation of powers is the idea that the judicial branch alone holds the judicial power of the Commonwealth. This power includes 'a power to make an adjudication of guilt, fine, imprison or perform similar function' and must 'affect traditional (ie criminal or civil) rights.'[14] Chief Justice Griffith's 1909 statement remains the classic definition:

> I am of the opinion that the words 'judicial power' as used in ... the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property.[15]

However, it has been noted that 'the definitions of what does and does not constitute "judicial power" are sufficiently imprecise to allow a significant measure of pragmatic flexibility.'[16] It is this imprecision that was addressed in the *Lim* case and it is the increased scope of the aliens power, coupled with the deferential interpretation to encroachments of executive action on the judicial power, that have allowed the *Al Kateb* judgment to expand beyond those circumscribed conditions for executive detention found in *Lim*, the case to which I will now turn.

IV. The High Court And The Rights Of Non-citizens Under The Law

A. The Case of Chu Kheng Lim

The central principle in *Lim* revolved around the issue of judicial power: could the government introduce legislation that explicitly sought to prevent the Court from ordering the release of the specified class of persons held in immigration detention? The majority of the High Court held that the Parliament clearly could not do so. This was an inherent part of the judicial function of the Court, exercisable only by the Court. It was not the province of the executive or legislature to prevent courts from performing their constitutionally entrenched role.

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13 See A.M. Gleeson, *The Rule of Law and the Constitution* (2000) 76-91 [hereinafter A. M. Gleeson].

14 RD Lumb, *Australian Constitutionalism* (1983) 105.

15 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357.

16 Blackshield and Williams, supra n 10 at 619.

Despite the ruling on the judicial power, the High Court nevertheless upheld the bulk of the legislative scheme: mandatory detention of non-citizens pending the outcome of their status determinations was constitutionally permissible. There were, however, several substantial qualifications on the Government's use of this power. These included that executive detention could only operate with respect to non-citizens; that the purpose of the detention must be tied to or incidental to the Government's power over aliens; and finally, that such executive detention could only apply in a limited set of circumstances. The subtleties inherent in these arguments are examined below.

Citizens' Rights v Non-Citizens' Vulnerabilities

It is clear in every respect of the judgment in *Lim* that administrative detention by the executive government is only authorised in relation to non-citizens. As their Honours Brennan, Deane and Dawson stated in the leading judgment, '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 an Australian citizen in a variety of respects.'[17] Similarly, McHugh J wrote: 'Parliament can make laws imposing burdens, obligations and disqualifications on aliens which could not be imposed on members of the community who are not aliens.'[18] On the other hand, the Constitution cannot vest legislative power to 'arbitrarily' detain *citizens* in the executive because 'the involuntary detention of a citizen in custody by the State is penal or punitive in character and ... exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.'[19]

The most important of an alien's legal disabilities involves his or her 'vulnerability to exclusion or deportation.'[20] According to *Lim*, this susceptibility flows both from the provisions of the Constitution and from the common law.[21] In respect of the common law, the judges appealed to cases regarding a State's clear power to make laws for the detention or deportation of 'even a friendly alien.'[22] Secondly, the Court accepted that the Commonwealth power over naturalisation and aliens in s 51(xix) of the Constitution authorises the government not only to make laws relating to determining the status of aliens, but also determining the way in which they may be treated. The Court was in agreement on the plenary nature of this Constitutional head of power,

17 *Lim*, supra n 3, per Brennan, Deane & Dawson JJ, at 29.
18 Ibid, per McHugh J, 64.
19 Ibid, per Brennan, Deane & Dawson JJ, 27.
20 Ibid, 29.
21 Ibid, 29-31.
22 Ibid, per McHugh J, 64; per Brennan, Deane & Dawson JJ, 29-30.

and the uses to which the Government could turn it,[23] although Justice Gaudron appeared to give the power a more limited reading.[24] Thus, Chief Justice Mason stated, for example, that 'the legislative power conferred by s 51 (xix) of the Constitution extends to conferring upon the executive authority to detain an alien in custody for the purposes of expulsion or deportation.'[25]

Detention as 'Incidental' to the Aliens Power?

Despite the legal vulnerabilities of aliens, the majority of the Court did not interpret the executive power to detain such persons as otherwise at large. Rather, the Court interpreted the detention to be attendant on, or tied to, the power to deport or expel the alien.

Justice Gaudron was careful to point out that the power conferred by s 51(xix) does not permit laws for the detention of aliens 'merely because they are aliens.'[26] Rather, the Constitution authorises the detention of non-citizens as an incident of the legislative power to deport or expel an alien from Australia. In the words of the joint judgment 'authority to detain an alien in custody, when conferred upon the Executive in the context and for the purposes of an executive power of deportation and expulsion, constitutes an incident of that executive power.' They continued, stating that such detention 'takes its character from the executive powers to exclude, admit and deport of which it is an incident.'[27] What this means is that if the law is only incidental to the deportation or expulsion of the non-citizen, then the power of the legislature to sanction the executive's detention of non-citizens is limited by the purpose of the detention. Here, the Court clearly held that the purpose of the detention was to make non-citizens available for deportation and to facilitate their processing. As such, the aliens and naturalisation power authorised the legislation. Thus, executive detention is necessarily limited by a continuing purpose – a substantial qualification that assumed much significance in the case of *Al Kateb*.

The fact that a law must be incidental to the purpose of the power had a further consequence, and this was that the law must be reasonably necessary to affect the purpose. The joint judgment stated that laws that authorised administrative detention not only needed to be for a specific purpose, they needed to be sufficiently tailored to that purpose: in other words, the detention

23 Ibid, per Mason CJ, 10; see also Brennan, Deane & Dawson JJ at 25, Toohey J at 44 and McHugh J at 64.

24 Ibid, per Gaudron J, 55.

25 Ibid, per Mason CJ, 10.

26 Ibid, per Gaudron J, 55.

27 Ibid, per Brennan, Deane & Dawson JJ, 32.

must be 'reasonably capable of being seen as necessary for [those] purposes.'[28] McHugh also appeared to suggest that some sort of proportionality or necessary connection between the law and the purpose must be undertaken by the court. He wrote that 'if a law authorising detention went beyond what was reasonably necessary to effect the deportation of that person, the law might be invalid because it infringed the provisions of Ch III of the Constitution.'[29] Or in Justice Gaudron's words, legislation only authorises detention that the Court deems 'reasonably necessary for the purposes of deportation or for the making and consideration of an entry application.'[30] These statements provide a potential oversight function for the Court, which gives it a role beyond a mere examination of whether the law is 'about' aliens. As Adrienne Stone recently identified, the test of proportionality or necessity employed in *Lim* meant that 'even when considering the apparently technical question of whether a law was "with respect to" a nominated head of power, the court had latitude to incorporate rights concerns through closer scrutiny of the means chosen by Parliament to pursue a nominated end.'[31] This approach allows the Court to undertake a 'tailoring' role to ensure the necessity, or the sufficient connection, between the aliens power and the legislation in question.

Limited Circumstances

Having determined that the law must authorise detention for a legitimate purpose, and must be reasonably necessary, proportionate or adapted, the Court went on to state clearly that such conditions would only be met in certain limited circumstances. Justice Gaudron stressed that '[d]etention in custody in circumstances not involving some breach of the criminal law ... is offensive to ordinary notions of what is involved in a just society.'[32] This sentiment was echoed, albeit less forcefully, in a majority of the judgments. The joint judgment quoted Blackstone's Commentaries to the effect that 'the confinement of the person, in any wise, is an imprisonment.'[33]

In recognition that liberty is a central principle of the Australian legal system, their Honours therefore stressed that executive detention could only occur in certain delimited circumstances: where the detention was incidental to the executive power to exclude or deport, where the detention was non-punitive so as not to encroach upon the Judicial power of the Court, and where it

28 Ibid, 33.
29 Ibid, per McHugh J, 65.
30 Ibid, per Gaudron J, 58.
31 Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Agreement' (2005) 27 SLR 29, 39 [hereinafter Stone].
32 Lim, supra n 3, per Gaurdon J, at 55.
33 Ibid, per Brennan, Deane & Dawson JJ, 28. See also McHugh J at 63.

was reasonably necessary for the purpose of the detention. Each of Justices Brennan, Deane and Dawson and Chief Justice Mason pointed out that the detention of aliens was only available when these criteria were met.[34]

What 'limited' circumstances included, was not spelled out. It is possible that the High Court did not consider that any existed. However, it is more likely that the Court did not deem it wise to speculate beyond the narrow factual situation in issue. However another inherent limitation arising from the factual situation did exist. This was the question of 'voluntary' detention raised by Justice McHugh. His Honour noted that 'a designated person may release himself or herself from the custody imposed or enforced.'[35] In this case, liberation could be achieved by the detainee requesting return to his or her home country. While McHugh J noted that a person applying for refugee status might not consider this a 'real choice,' he maintained that as a matter of law, it was. The qualification that detention by the executive is therefore voluntary has become a cornerstone of both judicial and governmental rationales for the legitimacy of that detention.[36]

The judgment in *Lim* proceeded on a wide reading of the legislative power over aliens, and a narrow reading of incursions into the judicial power that will allow the High Court to scrutinise the detention of non-citizens. It was itself narrow and textual in focus; and was criticised on this basis by the United Nations' Human Rights Committee in *A v Australia,*[37] a compliant later brought before the UN by the *Lim* plaintiffs. However, the judgment did include significant qualifications on the executive's power to authorise administrative detention. These limitations and qualifications were put under severe pressure in the case of *Al Kateb*.

B. The Case of Al Kateb

The case of *Al Kateb* gave the High Court the opportunity to re-examine *Lim* in light of different facts, and to determine what the earlier decision meant for future challenges to involuntary executive detention. The major legal effect of the decision (other, that is, than the personal consequences for Mr. Al Kateb) was to roll back the main qualifications imposed on executive detention by the Court in *Lim*. I will address the attack on the limitations in turn: detention as 'incidental' to the aliens power; the limited circumstances

34 Ibid, per Brennan, Deane & Dawson JJ, 32; per Mason CJ, 10.

35 Ibid, per McHugh J, 72.

36 See, for example, Tania Penovic, 'The Separation of Powers: *Lim* and the 'Voluntary' Immigration Detention of Children' (2004) 29 AltLJ 222.

37 Communication No 560/1993, UN Doc CCPR/C/59/560/1993 (30 April 1997).

in which detention may occur; the 'reasonable necessity' of the detention; and finally the essential qualification in *Lim* that executive detention can only operate in the case of non-citizens.

Detention as an 'Incident' of the Aliens Power?

The majority in *Al Kateb* backed away from the idea of detention as 'incidental' to the power to deport or process an asylum seeker. This was done in various ways, to which not all majority judges subscribed. Among the arguments put forward by their Honours, were: reformulating the ratio in *Lim;* following a previous dissenting opinion; expanding the characterisation of 'legitimate purposes'; and moving the consideration from one of judicial power to one of 'connection' with the relevant head of power.

Re-opening the Ratio in Lim

McHugh J opened his discussion of the constitutional issue by quoting the ratio in *Lim* to the effect that the power to detain takes its character from the executive powers to exclude, admit and deport of which it is an incident. However, he wrote, 'this ... does not mean that the power to detain pending deportation is an incidental constitutional power, that is, a power that is merely incidental to the aliens power.'[38] Such a characterisation would limit the power in several ways, including the necessity of scrutinising the proportionality between the head of power and the law. Justice McHugh rather interpreted the statement from *Lim* to mean that the joint judgment had been discussing 'an event that occurs in the course of the executive government's authority to deport or expel. They were not speaking of a measure of constitutional power.'[39] In McHugh's judgment, laws relating to the detention of aliens:

> are not incidental to the aliens power. They deal with the very subject of aliens. They are at the very centre of the power, not at its circumference or outside the power but directly operating on the subject matter of the power.[40]

In this way, McHugh J's reasoning potentially expands the circumstances in which the executive can detain. This is achieved by removing one important test available to the Court in scrutinising the rational connection or necessity between the law and the head of power.

38 *Al Kateb*, supra n 4, per McHugh J, at 134.
39 Ibid, 134 -35.
40 Ibid, 135.

Justice Hayne ambiguously stated in his judgment that 'I would not identify the relevant power in quite so confined a manner as is implicit in the joint reasons in *Lim*.'[41] While he was careful to stress that a connection with the relevant head of power was necessary to validate a law authorising detention of non-citizens, his judgment suggests that almost any law with such a connection will be valid, and that certainly, 'these laws in their exclusionary operation have that connection.'[42] Thus, it is not just laws that are incidental to the power to exclude, admit and deport that are authorised as held in *Lim*, but also laws aimed at segregating aliens from the community and excluding them from the benefits of an Australian way of life.

Preferring a Previous Minority Opinion

Justice McHugh's reinterpretation of the ratio, set out above, is perhaps not surprising given that he had advanced that interpretation of the aliens power in *Lim*. As the only member of the Court common to both judgments, it could be argued that his Honour had a particular insight into what the majority meant in the earlier case. However, it is more persuasive to note that his Honour did not agree on this issue with the majority in *Lim*, and that here he has held with his earlier interpretation. It is not clear that his current position can be reconciled with the majority decision in the 1992 case; rather, his Honour's judgment exhibits a coherent line of reasoning developed from his earlier result.

Expanding the Characterisation of the 'Legitimate Purpose' of the Law

In *Lim*, the legitimate purpose of the law was expressed as being incidental and necessary to affect processing or deportation of the asylum seeker. No purposes beyond this were expressly contemplated in the judgment. However, in *Al Kateb*, the majority did not confine itself to these qualified purposes. Justice Hayne, for one, stated that:

> the conclusion that a law requiring detention for the purposes of processing a visa application and ... for the purpose of removing the non-citizen from Australia *is* a law with respect to aliens and with respect to immigration, does not necessarily entail that a law requiring detention of non-citizens in other circumstances, or for other purposes, is beyond power.[43]

In fact, all the majority judges were prepared to look beyond the purposes that were set out in *Lim*.

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41 Ibid, per Hayne J, 188.
42 Ibid, 189.
43 Ibid, 185-86.

In Justice McHugh's view, the detention did not need to be tied to the purpose of the legislation in the same way the majority in *Lim* had advanced. Instead, it could extend beyond these purposes to the purpose of segregating an alien from the Australian community,[44] and to protecting the Australian community from the alien.[45] Neither of these purposes would render the law punitive so as to attract court scrutiny. This necessarily expands those situations in which the aliens power could authorise executive detention beyond those delimited by the majority in *Lim*. Justice Hayne also set out further legitimate purposes, stating that 'it is plain that unlawful non-citizens have no general immunity from detention otherwise than by judicial process'[46] and that they can therefore be detained for a variety of legitimate purposes, including excluding a non-citizen from the Australian community, preventing entry to Australia, or, after entry, by segregating that person from the community.[47] Callinan J voiced similar sentiments. Without finding it necessary to decide the issue, he hypothesised that detention could extend to segregating aliens from the community, excluding them from the right to work or 'otherwise enjoying the benefits that Australian citizens enjoy... If it were otherwise ... non-citizens would be able to become de facto citizens.'[48] He also provided an obiter statement to the effect that detention for the purposes of deterrence[49] might be constitutionally acceptable.

The change in the reasoning between *Lim* and *Al Kateb* on this issue is one of purpose versus effect. In *Lim*, the question was whether the law was one that could be seen as being for the purpose of bringing about a legitimate end – refugee detention *for the purpose of* status determination and/or removal. In *Al Kateb*, the legitimate end was not the focus. Rather, the purpose of the law became a question tied up with the applicability of Ch III and the separation of powers, in that laws with a punitive purpose will attract Ch III scrutiny, while laws with a punitive effect will not, at least not solely on that basis.[50]

Framing the Question as Connection with the Head of Power

The central concern of the Court in *Lim* was the question of how to reconcile executive detention with the key principles of separation of judicial power; principles which recognise that:

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44 Ibid, per McHugh J, 136.

45 Ibid.

46 Ibid, per Hayne J, 189.

47 Ibid, 190.

48 Ibid, per Callinan J, 196.

49 Ibid, 197.

50 For an analysis of this issue, see Arthur Glass, 'Al Kateb and Behrooz' paper presented at 2005 Constitutional Law Conference (18 February 2005) available at: http://www.gtcentre.unsw.edu.au/publications/papers/docs/2005/5_ArthurGlass.pdf

> In a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature of the executive. To vest in the same body executive as well as judicial power is to remove a vital constitutional safeguard.[51]

Unlike *Lim*, however, the majority judgments in *Al Kateb* demonstrate insignificant attention to this question and certainly no soul searching over any implications arising from it. Rather, the Court's attention has shifted in focus to the connection between the legislation and the head of power. This has the effect of skipping over questions of fundamental principles of constitutionalism and proceeding directly to questions of interpretation and characterisation. It represents a method of constitutional interpretation lacking sufficient attention to the context in which such interpretation takes place.

As an example, take the following statement by Justice Hayne. After deciding that the executive was not confined by the purposes set out in *Lim*, but could generally make any law 'with respect to the head of power' he stated that the legislation suggested 'a test more apposite to the identification of whether the law is a law with respect to aliens' than a question of whether or not the law breached the separation of powers.[52] This statement illustrates that his Honour's approach proceeds from the specific head of power as the first point of consideration, rather than from any overriding sense of the Constitution's function or context. Secondly, it allows his Honour to sidestep the issue of the separation of judicial power completely. This re-characterisation of the issue enables the Court, as Steven Churches has written, to 'move the debate away from the possible restrictions inherent in Chapter III.'[53] In other words, by focussing on the plenary nature of the power and the non-discretionary nature of the legislation, his Honour neatly minimised the argument on the Ch III issue that was so much the focus of the judgments in *Lim*.

However, Ch III issues are fundamental to the Australian system of government, and the protection of the people subject to it. Cheryl Saunders illustrates the far-reaching importance of the separation of powers:

> A principle purpose of a division of power ... is to protect liberty by checking a concentration of authority that is likely to be harmful to it. ... A separation of judicial power, in a common law context, has the additional effect of protecting judicial independence, shielding courts from undue interference by the legislature or executive. It protects the perception of judicial independence as well, thus encouraging public confidence in the integrity and impartiality

51 Attorney-*General (Commonwealth) v R; Ex parte Australian Boilermakers' Society* (1957 95 CLR 529, 540-41.

52 *Al Kateb*, supra n 4, per Hayne J, at 187.

53 See Steven Churches, (Oct 2004) Law Soc Bulletin 30, 31 [hereinafter Churches].

> of judicial decisions. Institutionally, these purposes are ends in themselves. But they also serve a wider good, structuring a system of government to meet the needs of the people, for whom, in a democracy, government is deemed to exist.[54]

Accordingly, the significance of a judicial shift in focus from underlying issues dependent on Ch III goes beyond the confines of immigration and refugee issues. If, as Justice Deane stated, 'the most important [express or implied right, guarantee or immunity] is the guarantee that the citizen can be subjected to the exercise of Commonwealth judicial power only by the "courts" designated by Ch III,'[55] then any minimisation of the issues arising from this cardinal doctrine has the real potential to weaken the constitutional protections available to Australians.

Limited Circumstances of Detention?

As noted above, *Lim* consciously curtailed the circumstances in which the executive could detain. While these were not defined, it is not clear that the judges contemplated that there were *any* circumstances, other than those addressed, in which the executive could detain a non-citizen without encroaching on the judicial power. The judges were careful to point out the negative impact such detention had on liberty. The *Al Kateb* judgment explicitly rejected these inherent limitations.

Rather than beginning from the *Lim* premise that an alien at common law was not an outlaw, Justice Hayne states that 'it is plain that unlawful non-citizens have no general immunity from detention otherwise than by judicial process.'[56] Even more explicitly, he states that the assumption that there is a limited class of circumstances in which executive detention is authorised 'is open to doubt.'[57] Likewise, Justice McHugh expresses the view that the power is 'unlimited unless the Constitution otherwise prohibits the making of the law.'[58] In other words, there is no limitation within the aliens power. This differs from the position espoused in *Lim*. There, while all the judges recognised that constitutional heads of power are plenary, they did not draw as a mechanical conclusion the fact that there were no limitations on such powers. And in fact, the High Court has interpreted many such 'plenary' heads of power as having limitations inherent upon their use, above and beyond merely that the law is

54 Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin & Fiona Wheeler (eds.), The *Australian Federal Judicial System* (2000) 33.

55 *Street v Queensland Bar Association* (1989) 168 CLR 461, 521.

56 *Al Kateb*, supra n 4, per Hayne J, at 189.

57 Ibid.

58 Ibid, per McHugh J, 135.

'with respect to' the subject matter of the power. This is evident based on an examination of the jurisprudence interpreting the Commonwealth's power over defence, for example.[59]

The majority judgments in the current case also differ from *Lim* in their approach to the context in which the constitutionality of legislation is determined. Churches notes the 'curious passivity' of Justice Hayne's leading judgment. He notes its acceptance of the legislation 'at face value' with 'only a fleeting glance at the ... protection of core common law sacred cows, but ... no reflection on the leader of that herd: liberty.'[60] Similarly, Juliet Curtin has identified this as a 'blinkered approach to the text of the legislation.'[61] This is a significant change from the judgment in *Lim*, which, however limited in its recognition of constitutional protections, nonetheless focussed the core of its judgment around exceptions to the rule that no person may be detained without due process of law provided by courts exercising separate judicial power.

The 'voluntary' nature of the detention had been a key qualification on the government's power in *Lim*. But in *Al Kateb*, Justice McHugh's statement that the possibility of ending one's detention by requesting return to one's home country might not seem like a 'real choice' had proved all too true. The issue was precisely that the detention was, if not in its term, in its effects, indefinite. The detainee could not, through his own actions, bring his incarceration to an end. However, the characterisation of the detention as self-imposed survived, most notably when Justice Callinan stated:

> by their manner of entry, repetitive unsuccessful applications and litigation founded on unsubstantiated claims, or, if and when it occurs, escape from immigration detention, some aliens may attract so much notoriety that other countries will hesitate or refuse to receive them. In those ways they may personally create the conditions compelling their detention for prolonged periods.[62]

This carry-through of a judicial sense that the detention was of the asylum seeker's own making suggests a blurred line between the idea that executive detention is of a non-discretionary, administrative character and the impermissible imposition of punishment by the executive.

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59 Section 51(xi). See, e.g., Australian *Communist Party v Commonwealth* (1951) 83 CLR 1.

60 Churches, supra n 53 at 31.

61 Juliet Curtin 'Never Say Never: *Al Kateb v Godwin*' (2004) 27 SLR 355, 364.

62 *Al Kateb*, supra n 4, per Callinan J, at 196.

Must the Detention be Reasonably Necessary?

In line with the interpretation of detention as incidental to the aliens power, the Court in *Lim* held that there must be some test of reasonableness, proportionality or necessity between the law and the detention. Such a test was unequivocally rejected in *Al Kateb*.

According to McHugh J:

> a law requiring detention of aliens for the purpose of deportation or processing of applications would not cease to be one with respect to aliens even if the detention went beyond what was reasonably necessary to effect those objects. That is because any law that has aliens as its subject is a law with respect to them.[63]

Hayne J also explicitly rejected any suggestion that the law must be subject to a test of reasonable necessity, that it must be appropriate and adapted, or that it must be reasonably capable of being seen as necessary.[64]

The assertions of the majority in this respect directly contradict Justice Gaudron's statement in *Lim* that the power conferred by s 51(xix) does not permit laws for the detention of aliens solely because of their status as aliens. However, it should be noted that in *Re Woolley*, handed down shortly after *Al Kateb*, McHugh J noted that the majority ruling in *Al Kateb* had overruled *Lim* on this point.[65] Therefore, it appears clear from the reasoning in *Al Kateb* that provided the law is a law with aliens as its subject matter, it will be within the power of parliament to enact.

The approach adopted in the recent case may illustrate part of a wider trend. As Stone notes:

> For most of its history, the High Court has employed rather deferential tests of application in the interpretation of grants of legislative power. For example, when interpreting incidental powers, the court showed a high level of deference to the means employed by the Parliament to pursue ends within its power. But for a brief period in the 1990s, the court sometimes used a test of 'proportionality' to apply closer scrutiny to Commonwealth legislation.[66]

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63 Ibid, per McHugh J, 135.

64 Ibid, per Hayne J, 188.

65 *Re Woolley; Ex parte Applicants M276/2003* (2004) 210 ALR 369, [55] [hereinafter *Re Woolley*]. Again, the case concerned the legality of executive detention, but focused on the detention of Children.

66 Stone, supra n 31 at 38-39 (footnotes omitted).

Stone, then, regards the proportionality test as a short lived experiment in constitutional interpretation. I would argue that attention to the defence power and the external affairs power, as well as other clauses of the Constitution, such as the limitation on Commonwealth power to interfere with religious choice, illustrates a long and thriving history for such tests of rational connection, rather than a brief flowering in the final decade of the twentieth century. For example, in the 1943 case of *Adelaide Company of Jehovah's Witnesses v Commonwealth*, the Court used what amounted to an archetypal test of proportionality, balancing the freedom of religion against reasonable legislative limits.[67] As such, the test should not be so easily laid to rest by the Court. Such an enquiry into the reasonableness or rationality of legislation by the Court provides a necessary safeguard for the rule of law, and illustrates that the Court's role as the guardian of the Constitution is alive and well.

May the Executive Detain Citizens?

While the clearest holding in *Lim* might have been the Court's explicit statement that executive detention of individuals is only authorised with regard to aliens: those people who do not enjoy the rights of liberty that inhere to citizens, making their detention other than by court order inherently punitive and thus illegal, even this limitation was under attack in *Al Kateb*.

Interestingly it was Justice Gummow, a dissenter in the case, who flagged the potential for the current interpretation of Commonwealth heads of power to authorise the executive detention of citizens. In the context of arguing that 'the administrative detention of aliens is not at large' his Honour illustrated the way in which an interpretation of heads of power as not only plenary, but as therefore having no inherent limitations, opened up the scope of executive power to detain. Thus, adopting McHugh J's analysis in the case, Gummow J wrote:

> it could not seriously be doubted that a law providing for the administrative detention of bankrupts in order to protect the community would be a law with respect to bankruptcy and insolvency (s 51(xxvii) or that a law providing for the involuntary detention of all persons within their homes on census night would be a law with respect to census and statistics (s 51(xi)).[68]

This reasoning is consciously employed to illustrate the enormous breadth of the Commonwealth heads of power if the Court interprets those powers as being, indeed, 'at large.' The consequences of this reasoning are equally applicable to heads of power that have no particular operation over aliens or immigrants, but everyone within the power of the Australian law.

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67 (1943) 67 CLR 116 per Latham CJ, 131; Starke J, 155.

68 *Al Kateb*, supra n 4, per Gummow J, at 158.

I am conscious of the High Court's oft quoted aphorism, stated most straightforwardly in a recent judgment by Kirby J, that 'Australian constitutional interpretation cannot take place in an environment in which horrible and extreme instances are imagined to frighten the decision maker.'[69] But I would suggest that this is not such a situation. In fact, McHugh J went on in the case of *Re Woolley*,[70] handed down shortly after *Al Kateb*, to state that detention of citizens by the executive was not always penal or punitive. Any statement to this effect in *Lim* had gone 'too far.'[71] It appears, therefore, that McHugh J at least is now prepared to accept that the executive could detain citizens without the involvement of a court.

V. Weakening the Australian Constitutional Fabric

Justice McHugh's acceptance that there exist instances when the executive government can detain *citizens* without the involvement of a court illustrates clearly that there are implications for all Australians in the High Court's current approach to the interpretation of heads of power under the Constitution. The Court has turned down an opportunity of adopting legitimate and accepted techniques of Constitutional interpretation that would better protect the liberty of individuals. Instead, the Court has preferred to read the text in isolation from its context.

The shift occurring between the arrival of the Cambodian asylum seekers in *Lim*, and the attempted removal of the stateless Mr. Al Kateb has been far-reaching. There are many reasons to which the shift can be attributed. Alex Reilly identifies the changed composition of the High Court and a possible change in judicial attitude to the presence of aliens in the community in the context of the 'war on terror'.[72] Justice Ronald Sackville has pointed to the acute political sensitivity to judicial review of refugee decisions in recent years.[73] However, at heart the issue is one of a shift in how the Court reads the Constitution.

The approach taken in *Al Kateb* has several elements, which have been touched on in the discussion of the case. First is the issue of the meaning of plenary power. Second is the issue of reading the text of the Constitution divorced from the context of the document, which includes the choice to ignore fundamental principles of constitutionalism that should inform debate.

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69 *Singh*, supra n 2 at 431.

70 *Re Woolley*, supra n 65.

71 Ibid, per McHugh J, 384.

72 Alex Reilly, 'Pushing the Boundaries' (2004) 29 AltLJ 248, 249.

73 Ronald Sackville, 'Refugee Law: The Shifting Balance' (2004) 26 SLR 37.

Plenary Power as Inherently Unlimited

Justice Gummow's analogy of the breadth of the aliens power to the power over bankruptcy and insolvency and the power over census and statistics neatly illustrates the implications of approaching plenary heads of power as actually unqualified.

When called upon to interpret the Constitution, many High Court judges begin by noting that the powers under s 51 are 'plenary.' The word is defined as 'complete, entire, perfect, not deficient in any element or respect; absolute, unqualified.'[74] However, the judges are careful to note that those plenary powers are nevertheless 'subject to this Constitution.' In past jurisprudence, the plenary nature of the heads of power has not 'trumped' the requirement that the power be subject to the Constitution. This can be illustrated by the settled use of tests of proportionality. It can also be illustrated by the recognition that when a law rests upon an incidental footing, it too must be appropriate and adapted in order to be within power.[75] More fundamentally, this statement accords with the concept that the Constitution must be read in light of the common law principles which underlie and inform it. In the context set out, these are not radical or contested forms of interpretation. They operate to provide a further mechanism for judicial scrutiny of a law's validity.

What has occurred in *Al Kateb* is that the question of the plenary nature of the power has become the primary, perhaps only question. If a judge's analysis begins from the assumption that a head of power has no limitation other than the necessity that the law can be characterised as with respect to that power; and only then proceeds to examine the question of what 'subject to this Constitution' means, it is likely the judge will end up at a different place than had she begun from the position of examining the fundamental principles underlying the constitution, counting any principle of liberty contemplated by its structure – including the separation of powers: it is not inventive to suggest that the choice of where one starts one's inquiry may determine where one ends it. Recall the parable of the blind man who was asked to describe an elephant after grasping only its tail. Like that man, the High Court judges may have seized the Constitution only by the tail, and identified it as a very thin object indeed.

74 *The New Shorter Oxford English Dictionary* (1993).

75 See Blackshield & Williams, supra n 10 at 691.

The Constitution in Context

The Constitution is Australia's founding deed. A document of structural and legal complexity, it conveys little of the fervour and patriotism of many other written constitutions that appeal to the rights of man, the inherent liberties of the citizen and the sanctity of freedom. Rather, it concerns itself with establishing a governmental framework and creating a practical skeleton on which to build a nation. This does not mean, however, that the Australian Constitution was created in a vacuum of principle. As Joseph & Castan note, 'Australian Constitutional law is ... imbued with many fundamental doctrines and assumptions about government which find their origin in the British legal tradition.'[76] Important among these doctrines and assumptions are the rule of law, and the separation of powers. Both these doctrines have been important in the development of the common law, and both are designed to safeguard the rights of the subject as against the power of the state. As has been set out earlier in this essay, the separation of powers does this by dispersing power among various entities, who can only act in their own legitimate spheres and who oversee the actions of each other. The rule of law, though a disputed concept, is commonly appealed to as a mechanism that 'restrains and civilises power.'[77] These two underlying principles are crucial to a full interpretation of the Constitution.

Mary Crock has noted that the High Court has always tended to a narrow textual focus in refugee cases. Indeed, she cites the *Lim* case as an example in itself.[78] It is my argument that the High Court need not depart from its chosen legalistic, textualist role in order to give regard to the rule of law and the separation of powers which are inherent in the Constitution. Even the *Engineers Case*[79] – the seminal statement of legalism – recognised the importance of these principles. There, the Court stated that legitimate constitutional interpretation is 'founded on the words of the Constitution or on [a] recognised principle of the common law underlying the expressed terms of the Constitution.'[80] Thus, while the dominant method of constitutional interpretation in Australia has so often been accepted as 'a strict and complete legalism'[81] this has not resulted in a constitutional jurisprudence devoid of attention to the principles upon which the Constitution rests. Writing extrajudicially, Chief Justice Gleeson has analogised the Australian Constitution to the Canadian, where 'certain

76 Joseph & Castan, *Federal Constitutional Law* (2001) 4.
77 Gleeson, supra n 13 at 1.
78 Crock, 'Judging Refugees' supra n 7at 61-65.
79 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
80 Ibid, per Knox CJ, Isaacs, Rich and Starke JJ, 142.
81 Swearing in of Sir Owen Dixon as Chief Justice (1952) 85 CLR xi, xiv.

fundamental principles, which, although unstated in the text ... breathe life into it, govern its interpretation, define the role of the nation's political institutions and guide the evolution of the [nation's] system of government.'[82]

Reading principles into the Constitution has, however, become unfashionable under the Gleeson Court, and since there is very little agreement on the exact content of those concepts that are said to underlie the document, they have not been much appealed to in recent jurisprudence. Stone identifies *Al Kateb* as a clear example of cases 'which might have lent themselves to arguments based on fundamental common law rights [but] were decided without any reference to the idea.'[83] But it cannot be accepted that the Court is ready to consider that fundamental principles of the common law, such as liberty, are anything but fundamental. The principle of interpretation that holds that the Constitution should be interpreted – so far as its text and structure permit – in a way that favours rights and freedoms has not gone out of favour. The Chief Justice, writing in dissent in *Al Kateb*, appealed in strong language to the fact that:

> 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 and freedoms in question, and has consciously decided upon abrogation or curtailment.[84]

Though written in the context of statutory interpretation, this passage clearly recognises the basic importance of liberty in Australian law, and indicates the serious consideration it should be afforded in judicial decision making. This again raises the worrying shift illustrated by *Al Kateb's* lack of attention to the context of the case, and the questions underlying the purpose of the doctrine of the separation of judicial power; not to mention any of the other principles of constitutionalism discussed here.

VI. Conclusion

Constitutional provisions are constantly subject to contested interpretations, their words picked apart and put back together again in different contexts for different purposes. The Australian Constitution is no stranger to this process, nor are these methods unfamiliar to the judges whose calling it is to uphold it and pronounce upon it.

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82 A M Gleeson, supra n 13 at 4.

83 Stone, supra n 31 at 35.

84 *Al Kateb*, supra n 4, per Gleeson CJ, at 130.

But it is precisely because of these attempts to pull the Constitution in one way or another, to suit the current needs of a government, business, individual or group that judges must keep one eye firmly on the principles which provide the foundation of the document. Without these principles, the Constitution is rootless.

The High Court of Australia's judgment in *Al Kateb* illustrates the inadequate regard which the current Court bestows upon these foundational principles. The judgment is a prime example of constitutional interpretation devoid of considerations of the key triumphs of constitutional democracies: liberty of the individual and protection against the abuse of executive power not least among them. The *Lim* case illustrates, on the other hand, the way in which judges can uphold these principles in conformity with a strict and conservative constitutional interpretation. In the short term, the *Al Kateb* judgment may only impact upon a small group of stateless detainees. In the long run, such an approach to constitutional interpretation will weaken the very foundations upon which the Australian Constitution is laid.