THE STATE OF PERSONAL LIBERTY IN AUSTRALIA AFTER *M47*: A RISK THEORY ANALYSIS OF SECURITY RIGHTS

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In Plaintiff M47/2012 v Director General of Security*, the High Court of Australia unanimously applied a test of compatibility with human rights related statutory responsibilities to an impugned public interest criterion. A clear majority of the High Court appeared willing to consider whether the right to personal liberty in Australia has constitutional protections extending to refugees. This article applies Ulrich Beck's risk theory to recent preventive, administrative detention of refugees under adverse security assessments to examine the relationship between liberty rights and the decision-makers responsible for assessing, and for managing, national security risk. Risk theory casts light on how the collective right to national security relies on respecting every individual's right to liberty and security of person. The High Court's formal, values-based method of statutory interpretation is endorsed as an effective accountability mechanism capable of protecting fundamental values expressive of human rights.*

I INTRODUCTION

The number of refugees detained indefinitely because of adverse security assessments (ASAs) by the Australian Security Intelligence Organisation (ASIO) escalated from 19 in 2009 to 55 in June 2013.[1] That figure includes mothers, infants, and children. Many have been detained for three to four years. In *Plaintiff M47/2012 v Director General of Security*,[2] the High Court was asked to consider

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1 See ASIO, *Report to Parliament 2009–10* (2010) xvii <http://www.asio.gov.au/img/files/ASIOsReportToParliament09-10.pdf>; ASIO, *Report to Parliament 2012–2013* (2013) 39 <http://www.asio.gov.au/img/files/ASIO-Report-to-Parliament-2012-13.pdf>.

2 (2012) 292 ALR 243 ('*M47*').

the lawfulness of indefinitely detaining a Sri Lankan refugee[3] who arrived in Australia on a valid special purpose Humanitarian Visa and subsequently received an ASA.[4]

This article examines what power the Australian Minister for Immigration and Citizenship has to detain refugees and their children, potentially for the duration of their lives, when no evidence has been raised of past or planned criminal offences. Under the *Migration Act 1958* (Cth) ('*Migration Act*'), refugees without a current Australian visa require a positive visa decision from the Minister to reside in the Australian community.[5] In *M47*, the High Court held the Minister (or his delegate) must make a visa decision without devolving that responsibility to another agency.[6] As at February 2014, the Minister continues to automatically follow government policy that deems it inappropriate for refugees with ASAs to live in the community.[7] Plaintiff M47 awaits release.

In *M47*, significantly, Gummow and Bell JJ expressed a willingness to consider the lawfulness of detaining a refugee for a period that could extend for the term of his or her natural life in circumstances where a visa was not granted.[8] A refugee mother, Ranjini, similarly sought judicial review by the High Court of an ASA impeding the grant of her visa in *Plaintiff M76/2013 v Minister for Immigration Multicultural Affairs and Citizenship*.[9] In *M76* the High Court reiterated the importance of the Minister concluding the decision-making process in the particular circumstances of each case of a refugee with an ASA.[10] The Minister is yet to conclude those decisions. In *M76* French CJ, and Crennan, Bell and Gageler JJ in the majority, further expressed a willingness to consider the constitutional limits of detaining a refugee potentially for the balance of his or her life in a case with more suitable facts.[11] Hayne J indicated mandamus may be sought in a case where 'controversy were later to emerge about what the Minister had or had

3 A refugee is a person who is outside the country of their nationality because that country is unable or unwilling to protect them from persecution for reasons of unlawful discrimination based on race, religion, nationality, membership of a particular social group or holding a particular political opinion: *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 1 ('*Refugee Convention*') read together with the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 31 January 1967) ('*Refugee Protocol*'). See also James C Hathaway, *The Law of Refugee Status* (Butterworths, 1991) 125; *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1.

4 *Plaintiff M47/2012*, 'Amended Special Case', Submission in *Plaintiff M47/2012 v Director General of Security*, No M47 of 2012, 7 June 2012, [2]–[18].

5 *Migration Act* ss 36, 65, 65A.

6 *M47* (2012) 292 ALR 243, 262–3 [56] (French CJ), 297–8 [206] (Hayne J), 361–2 [458]–[459] (Kiefel J).

7 *Sri Lankan Refugees v Commonwealth* [2012] AusHRC 56 (July 2012) 31–3 [173]; *Immigration Detainees with Adverse Security Assessments v Commonwealth* [2013] AusHRC 64 (December 2013) 24 [142].

8 *M47* (2012) 292 ALR 243, 276 [114], 277 [120], 282–4 [145]–[150] (Gummow J), 379 [529], 380–1 [532]–[535] (Bell J).

9 (2013) 304 ALR 135 ('*M76*').

10 *M76* (2013) 304 ALR 135, 145–6 [29]–[32] (French CJ), 164 [132] (Hayne J), 168–9 [150] (Crennan, Bell, and Gageler JJ), 184–5 [246] (Kiefel and Keane JJ).

11 Ibid 138 [4] (French CJ), 165–7 [137]–[145] (Crennan, Bell and Gageler JJ).

not done in response to this Court's decision'.[12] That question involves several issues, including those circumstances detailed in the *Refugee Convention*[13] and the *Refugee Protocol*[14] that legitimate the removal or return of a refugee that have previously been interpreted by the High Court as within the scope of the *Migration Act*,[15] and legal principles protecting the right to personal liberty.[16]

The limits of the Minister's power to indefinitely detain refugees are discussed in this article by introducing Ulrich Beck's Risk Theory.[17] Beck's theory is applied to the circumstances in *M47* to analyse the national security consequences of a preventive detention regime directed at this politicised, and easily identifiable, group of people. 'Risk Society' is defined in Beck's own terms to discern both unintended and predictable consequences of Australia's national security administrative detention regime. Risk theory has not previously been applied to the context of indefinite immigration detention in Australia.

II AUSTRALIA'S NATIONAL SECURITY ADMINISTRATIVE DETENTION REGIME

A *Regulatory Framework*

The regulatory framework purporting to authorise indefinite detention of refugees issued with ASAs, such as Plaintiff M47, turned on Public Interest Criterion 4002 (PIC 4002), a regulation ostensibly authorised under the *Migration Act*.[18] PIC 4002 automatically precluded an applicant from being granted a protection visa if they were 'assessed by [ASIO] to be directly or indirectly a risk to security'.[19] Security is defined in s 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*') as meaning:

> (a) The protection of, and of the people of, the Commonwealth and the several States and Territories from:
>
> (i) espionage;

12 Ibid 160 [113]. See also at 160–1 [109]–[113].

13 *Refugee Convention* arts 1F, 32, 33(2).

14 See also *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 7, 9(1), 9(4) ('*ICCPR*').

15 *Migration Act* ss 36(2), 189, 196, 198. See *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161, 168 (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 339 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 174–5 (French CJ) ('*M70*').

16 *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

17 Ulrich Beck, *Risk Society: Towards a New Modernity* (Mark Ritter trans, Sage, 1992) [trans of: *Risikogesellschaft: Auf dem Weg in eine andere Moderne* (first published 1986)]; Ulrich Beck, *World Risk Society* (Polity, 1999); Ulrich Beck, *World at Risk* (Ciaran Cronin trans, Polity, 2009) [trans of: *Weltrisikogesellschaft* (first published 2007)].

18 *Migration Regulations 1994* (Cth) sch 2 cl 866.225, sch 4 pt 1 cl 4002 ('*Migration Regulations*'); *Migration Act* ss 31(3), 36(2)(a), 500(1)(c).

19 *Migration Regulations* sch 4 pt 1 cl 4002.

(ii) sabotage;

(iii) politically motivated violence;

(iv) promotion of communal violence;

(v) attacks on Australia's defence system; or

(vi) acts of foreign interference;

whether directed from, or committed within Australia, or not; and

(aa) the protection of Australia's territorial and border integrity from serious threats; and

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).[20]

The scope of that definition is broader than art 33(2) of the *Refugee Convention*, which precludes protection from expulsion or return from being 'claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is'.[21] Importantly, s 500(1)(c) of the *Migration Act* provides for the Administrative Appeals Tribunal (AAT) to conduct merits review of 'a decision to refuse to grant a protection visa'[22] relying on 'one or more of' arts 1F, 32, and relevantly for Plaintiff M47, art 33(2) of the *Refugee Convention*.[23]

Section 504 of the *Migration Act* grants the Governor-General power to make regulations that are 'not inconsistent' with that Act to give it effect. Section 31(3) of the *Migration Act* provides that '[t]he regulations may prescribe criteria for a visa or visas of a specified class'. Section 65(1) of the *Migration Act* stipulates that 'the *Minister* [of Immigration and Citizenship] … is to grant the visa; or … is to refuse to grant the visa' (emphasis added).

The practice of effectively relying on PIC 4002 to determine visa requests meant the ASA itself dictated the negative visa outcome. Kiefel J stated that 'it is nowhere contemplated by the *Migration Act* that officers of ASIO are to have a determinative role regarding applications for visas'.[24] In *M47*, the majority held PIC 4002 was invalid for jurisdictional error.[25] Their Honours found that the PIC was inconsistent with the scheme of the *Migration Act* because it: (a) impermissibly devolved the Minister's duty to make a decision to another agency; and (b) subsumed the criteria in art 33(2) of the *Refugee Convention*, giving

20 *ASIO Act* s 4 (definition of 'security').

21 *Refugee Convention* art 33(2).

22 *Migration Act* s 500(1)(c). See also *M47* (2012) 292 ALR 243, 297 [205] (Hayne J).

23 *M47* (2012) 292 ALR 243, 258 [36] (French CJ), 292–3 [183]–[184] (Hayne J), 345–6 [388]–[389] (Crennan J), 309 [258] (Heydon J), 354 [422]–[424] (Kiefel J), 365–6 [474] (Bell J).

24 Ibid 361–2 [458].

25 Ibid 265–7 [65]–[72], 268 [74] (French CJ), 296–301 [203]–[221], 301–2 [225]–[227] (Hayne J), 344–9 [381]–[401], 350–1 [404]–[406] (Crennan J), 355–62 [429]–[459], 362 [461] (Kiefel J).

s 500(1)(c) of the *Migration Act* no useful work to do.[26] In *M47*, the High Court unanimously considered international human rights obligations in its approach to statutory interpretation involving an analysis of the text, context and purpose of the impugned domestic legislation.[27] Billings, Cassimatis and Dooris identified that the High Court had similarly exercised 'their jurisdiction over administrative action' in *M70*, holding the 'executive and Parliament to account by ruling that the plain text, structure and purpose of the *Migration Act* pointed to an acceptance of a broad range of obligations owed to refugees' with regard to the 'gravity of the subject matter'.[28]

The established, formalist methodology of statutory interpretation to resolve inconsistency or ambiguity in an Australian statutory scheme,[29] and its relationship with international agreements,[30] leaves room for measures to protect national security when there is a reasonable suspicion based on objective evidence of a serious individuated security threat. The *Migration Act* prescribes mandatory detention for non-citizens without a valid visa until they are removed, deported, or granted a visa.[31] Plaintiff M47 remains detained for the purposes of his removal 'as soon as reasonably practicable'.[32]

B *Plaintiff M47's Case*

Plaintiff M47 is a Tamil national of Sri Lanka and a recognised refugee. He arrived in Australia on a valid humanitarian visa at about 11.10pm on 29 December 2009. His visa expired 50 minutes later. Plaintiff M47 refused to re-join the Liberation Tigers of Tamil Eelam and is now 'at risk of being targeted by the Sri Lankan Government and/or paramilitary groups in Sri Lanka'.[33] All parties to the litigation accepted that Plaintiff M47 is a refugee because 'there is a real risk that he will be persecuted by way of abduction, torture or death' if he is returned to Sri Lanka. [34] ASIO issued Plaintiff M47 with an ASA shortly after

26 Ibid 259 [41]–[43], 265–6 [65]–[75], [74] (French CJ), 296–303 [203]–[221], [225]–[227] (Hayne J), 344–51 [381]–[401], [404]–[406] (Crennan J), 355–62 [429]–[459], [461] (Kiefel J).

27 Ibid 248–52 [11]–[21], 259–60 [43]–[46] (French CJ), 268–9 [75]–[79], 272–81 [94]–[136] (Gummow J), 287–8 [164]–[166], 289–90 [170]–[175], 301–2 [222]–[225] (Hayne J), 344–9 [381]–[401] (Crennan J), 353–60 [416]–[452] (Kiefel J), 363–5 [467]–[473], 373–81 [506]–[534] (Bell J). See also *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 339 [27]; *M70* (2011) 244 CLR 144, 174–5 [44] (French CJ), 189–90 [90]–[91] (Gummow, Hayne, Crennan and Bell JJ).

28 Peter Billings, Anthony Cassimatis and Marissa Dooris, 'Irregular Migration, Refugee Protection and the "Malaysian Solution"' in Angus Francis and Rowena Maguire (eds), *Protection of Refugees and Displaced Persons in the Asia Pacific Region* (Ashgate, 2013) 135, 168. See *M70* (2011) 244 CLR 144, 174–5 [44] (French CJ), 189–90 [90]–[91] (Gummow, Hayne, Crennan and Bell JJ). See also *M47* (2012) 292 ALR 243, 310 [262]–[263] (Heydon J).

29 The High Court adopted this approach in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 (McHugh, Gummow, Kirby and Hayne JJ).

30 Billings, Cassimatis and Dooris, above n 28, 168–9.

31 *Migration Act* ss 36(2), 189, 196, 198.

32 Ibid ss 196(1)(a), 196(1)(c), 198(1).

33 *M47* (2012) 292 ALR 243, 247 [5] (French CJ).

34 Ibid 351 [407] (Kiefel J).

his arrival in Australia, and he has remained in immigration detention without a visa ever since.

The High Court held that Plaintiff M47's negative visa decision was void ab initio because the PIC[35] that purported to enable ASIO to issue an ASA, triggering a negative visa decision and detention, went beyond the powers conferred by its own authorising legislation.[36] By a narrow 4:3 majority, the High Court granted Plaintiff M47 the equivalent of a writ of mandamus requiring the Minister, or his delegate, to make a visa decision regarding his application for a protection visa according to law.[37] Hayne J stated that due process, inclusive of merits review before the AAT, 'would require consideration of the facts and circumstances that underpinned any conclusion about risks to Australia's security'.[38] ASIO's opinions 'would not, of itself, be conclusive of the inquiry'.[39] Decisions must not only explain reasons, but they must be rational, logical, cogent, and rest on probative evidence. Both Gummow and Bell JJ, in the minority, were prepared to grant Plaintiff M47 release.[40]

The High Court's decision does not prevent the Minister, or his delegate, considering 'whether a person poses a risk to the security of Australia' in determining their visa outcome.[41] The decision in *M47* has three aspects: first, the responsibility for making a visa determination under the *Migration Act* cannot be effectively devolved from the Minister to another agency;[42] second, an ASA by ASIO cannot be used to deny consideration of granting a protection visa over national security concerns extraneous to those contemplated in the *Refugee Convention*;[43] and third, an ASA cannot be used to circumvent merits review and/or judicial review over a visa decision.[44]

Indeed, review by the AAT may, potentially, be of increased intensity where an adverse visa decision results in indefinite detention of a readily identifiable social group of non-citizens (refugees) under Australia's jurisdiction.[45] While non-citizens may be detained under the *Migration Act*, critically, the Minister must follow the *Migration Act*'s required procedures which provide for merits review of a visa decision.[46] The Minister's present policy automatism effectively

35 *Migration Regulations* sch 2 cl 866.225, sch 4 pt 1 cl 4002; *ASIO Act* s 4 (definition of 'security').

36 *Migration Regulations* sch 2 cl 866.255, sch 4 pt 1 cl 4002; *Migration Act* ss 31(3), 36(2)(a), 500(1)(c).

37 *M47* (2012) 292 ALR 243, 268 [74] (French CJ), 301 [221], 301–2 [225], 302–3 [227] (Hayne J), 350–1 [404]–[406] (Crennan J), 361–2 [458]–[461] (Kiefel J).

38 Ibid 297 [205].

39 Ibid.

40 Ibid 283 [149] (Gummow J), 380–1 [534]–[535] (Bell J).

41 Ibid 361 [456]–[457] (Kiefel J).

42 Ibid 262–3 [56] (French CJ): 'Section 498(1) of the *Migration Act* … does not authorise the making of regulations which abrogate, modify or qualify the scope of the powers conferred by the *Migration Act*' (citations omitted). See also at 361–2 [458]–[459] (Kiefel J).

43 Ibid 246 [2] (French CJ), 346–7 [390]–[393], 348–50 [396]–[401] (Crennan J), 356 [433]–[434], 360 [452], 361–2 [456]–[458] (Kiefel J), 363–4 [467]–[468] (Bell J).

44 Ibid 301–3 [225]–[227] (Hayne J).

45 Ibid 301–2 [225] (Hayne J).

46 Ibid 260 [45] (French CJ), 324 [303] (Heydon J), 345 [388] (Crennan J), 354–5 [426], 361 [457] (Kiefel J), 365–6 [474] (Bell J).

means refugees with ASAs remain indefinitely detained. A joint statement on behalf of 55 detainees in April 2013 expressed: 'We are on the edge of life. We can't keep living like this. We are in a cemetery'.[47] It is difficult to understand why the Minister needed several months after the High Court's decision to make a protection visa decision for Plaintiff M47, rather than adhering to the 90 days prescribed in the *Migration Act*.[48] The Minister and ASIO conducted the Special Case 'upon acceptance that the plaintiff is not a person about whom there are reasonable grounds for regarding as a danger to the security of Australia. Nor is he a person who having been convicted of a particularly serious crime constitutes a danger to the Australian community'.[49]

An administrative regime permitting indefinite detention without reasonable grounds of national security risk unintentionally endangers the right to personal liberty foundational to Australia's security.

III WORLD RISK SOCIETY IN THE AGE OF RIGHTS

A *Risk Theory*

Ulrich Beck is described as 'one of the foremost sociologists of the last few decades, single-handedly promoting the concept of risk and risk research in contemporary sociology and social theory'.[50] Cosmopolitan researchers within sociology, according to Beck and Grande, have become concerned, 'first, with squaring the circle of abstract universalism by emphasizing respect for the particularity of human diversity'.[51] Beck and Grande suggest that '[i]n the second place, they have sought to expand the circumference of the circle to include (if not to favour) those for whom cosmopolitanism is not a lifestyle choice, but the tragic involuntary condition of the refugee or otherwise dispossessed'.[52] Beck's thesis is of a world risk society where a social community of nation-states interact to address shared global challenges involved with 'dangers produced by civilization which cannot be socially delimited in either space or time'.[53] Beck observed, separately and contemporaneously with Anthony Giddens,[54] the paradox in late modernity of organised human action directed at real time risk

47 Statement from 27 'ASIO Refugees' on hunger strike at the Melbourne Immigration Transit Accommodation Centre, April 2013, quoted in the forum flyer for the Institute for International Law and the Humanities: Institute for International Law and the Humanities, *IILAH Forum: Refugees, ASIO and Indefinite Detention* (21 October 2013) Melbourne Law School <http://www.law.unimelb.edu.au/staff/events/files/IILAH.RefugeesAsioandIndefiniteDetention.pdf>.

48 *Migration Act* s 65A; *Migration Regulations* reg 2.06AA.

49 *M47* (2012) 292 ALR 243, 380–1 [534] (Bell J). See also at 363 [467] (Bell J).

50 Darryl S L Jarvis, 'Risk, Globalisation and the State: A Critical Appraisal of Ulrich Beck and the World Risk Society Thesis' (2007) 21 *Global Society* 23, 23.

51 Ulrich Beck and Edgar Grande, 'Varieties of Second Modernity: The Cosmopolitan Turn in Social and Political Theory and Research' (2010) 61 *British Journal of Sociology* 409, 417.

52 Ibid.

53 Beck, *World Risk Society*, above n 17, 19.

54 Anthony Giddens, *The Consequences of Modernity* (Polity, first published 1990, 1996 ed).

intervention increasing the probability of that very risk eventuating into its feared dangerous event. Risk is defined as 'the modern approach to foresee and control the future consequences of human action, the various unintended consequences of radicalized modernization. It is an (institutionalized) attempt, a cognitive map, to colonize the future'.[55]

Beck's risk regime is a 'function of a new [global] order' in a society of nation-states connected through commerce and research, and universal human rights commitments and shared global risks involved with 'administrative and technical decision-making'.[56]

Beck makes the point that both '[p]olitically and sociologically, modernity is a project of social and technological control by the nation-state'.[57] Risk calculus in the first modernity developed forms and methods of 'determinate judgement'[58] for 'making the *unpredictable predictable*'.[59] Risk presumes 'a *normative horizon* of lost security and broken trust'.[60] Beck and Giddens use the terminology 'risk society' to describe social organisation around decision-making about danger and risk.[61] But neither Beck nor Giddens assert that we are living in an era that is more hazardous or dangerous than our ancestors.[62] Beck has observed that the shift from industrial society to risk society features humankind's acquired 'capacity' for its own physical, 'nuclear and ecological self-destruction', while using political dynamics to transform perception into reality where possible.[63] Giddens contends that probabilistic reasoning applied to risk as identified by Beck has, in some ways, increased uncertainty and insecurity in the world,[64] as evidenced by the value placed on protections of personal liberty diminishing with perceived future security risks however (im)probable. In world risk society it is unclear whether risks have actually intensified, or only our perception of risks.[65] However, because risks involve uncertainties in the 'calculus of probability',[66] 'ultimately: *it is cultural perception and definition that constitute risk*'.[67] Beck's risk theory extends beyond how a society distributes knowledge, to identify social

55 Beck, *World Risk Society*, above n 17, 3.

56 Ibid 3–4.

57 Ibid 139.

58 Ibid. See also Scott Lash, 'Risk Culture' in Barbara Adam, Ulrich Beck and Joost Van Loon (eds), *The Risk Society and Beyond: Critical Issues for Social Theory* (Sage, first published 2000, 2005 ed) 47.

59 Beck, *World Risk Society*, above n 17, 140 (emphasis in original). See also François Ewald, *L'État Providence* (Bernard Grasset, 1986).

60 Beck, *Towards a New Modernity*, above n 17, 28 (emphasis in original).

61 Giddens, *The Consequences of Modernity*, above n 54.

62 Anthony Giddens, 'Risk and Responsibility' (1999) 62 *Modern Law Review* 1, 3; Beck, *World Risk Society*, above n 17, 3–5. Beck argues that '[e]very society has, of course, experienced dangers. But the risk regime is a function of a new order': at 3.

63 Beck, *World at Risk,* above n 17, 84.

64 Giddens, 'Risk and Responsibility', above n 62, 1, 4. Giddens notes '[t]he situation does not lead to increasing certainty about, or security in, the world — in some ways the opposite is true': at 4.

65 Ibid 3–4.

66 Beck, *World Risk Society*, above n 17, 124.

67 Ibid 135 (emphasis in original).

processes of 'unawareness of unintended consequences' associated with modern administrative decision-making.[68]

1 *Unintended Consequences*

Australian citizens become exposed to the *unintended consequence* of increased national insecurity when the steps taken by the executive to reduce risks to national security are logically irrational and/or unduly excessive. The current detention regime undermines precursors of national security — namely, the value of equality before the law — essential to upholding the principle of legality,[69] an aspect of the rule of law.[70] Beck's concept of risk illuminates reasons why a national security-related administrative detention regime, targeting a particular social group, can unintentionally become involved with generating national *insecurity*. Beck's risk concept places the future — a 'non-existent, constructed and fictitious' time — as the central determinant of present political and/or administrative decision-making.[71] Risk decision-making then relies on risk statements that are a hybrid of factual and value statements.[72] Risks are humanly constructed '*hybrids*' including and combining 'politics, ethics, mathematics, mass media, technologies, cultural definitions' and norms.[73] Beck states that risk 'characterizes a peculiar, intermediate state between security and destruction, where the *perception* of threatening risks determines thought and action'.[74] The language Beck adopts to describe that relationship has transformative effects on regulating nation-state security when 'sociological knowledge spirals in and out of the universe of social life, reconstructing both itself and that universe as an integral part of that process'.[75]

ASIO is responsible for gathering and providing information to the relevant government agencies responsible for managing national security risks.[76] Australia's national security detention regime exclusively detains refugees, and their children, who would otherwise be able to live in the community lawfully because Australia recognises the authenticity of their asylum claims. However, other countries are, predictably, unwilling to accept people with an ASA by ASIO, meaning removal is highly unlikely and impracticable.[77] The Minister considers it appropriate to exclude every *refugee* with an ASA from the community. That contradicts ASIO regarding any *citizen* with an ASA as being more effectively

68 Ibid 127.

69 *Potter v Minahan* (1908) 7 CLR 277, 304. See also Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449, 451.

70 See Peter M McDermott, 'Internment During the Great War — A Challenge to the Rule of Law' (2005) 28 *University of New South Wales Law Journal* 330, 332–4; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 263–4 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

71 Beck, *World Risk Society*, above n 17, 137.

72 Ibid 138, 146.

73 Ibid 146 (emphasis in original).

74 Ibid 135 (emphasis in original).

75 Giddens, *The Consequences of Modernity*, above n 54, 15–16 (emphasis altered).

76 *ASIO Act* s 17.

77 *M47* (2012) 292 ALR 243, 377 [524] (Bell J).

monitored within the community. Furthermore, ASIO regards a citizen with an ASA leaving Australia as a factor *increasing* the risk to national security posed by that person and recommends confiscating their passport.[78] There is no evident national security risk-related justification for detaining refugees for the purposes of their removal. Australia is 'increasingly at risk of home-grown terrorism'.[79] ASIO regards people who pose an authentic risk to national security leaving Australia as a factor increasing national security risk because they can train overseas in terrorist activities and employ technology to permeate borders and threaten security from locations where they cannot be readily monitored or apprehended.

The Minister refuses to consider any person in immigration detention with an ASA for release, advising the President of the Australian Human Rights Commission:

> As a matter of policy, the Australian Government has determined that, individuals who have been assessed by ASIO to be directly or indirectly a risk to security should remain in held detention, rather than live in the community, until such time as resettlement in a third country or removal is practicable.[80]

The Australian Human Rights Commission has found that two acts of the Commonwealth resulted in arbitrary detention in regards to ten adult Sri Lankan refugees with ASAs and three Sri Lankan refugee minors residing in detention with their parents.[81] The Department of Immigration and Citizenship failed to ask ASIO to 'assess the individual suitability of six of the complainants for community based detention'[82] while awaiting security clearance, and the Department failed to 'assess on an individual basis whether the circumstances of each individual complainant indicated that they could be placed in less restrictive forms of detention'.[83]

The Australian Human Rights Commission made similar findings in *Immigration Detainees with Adverse Security Assessments v Commonwealth*.[84] The complaint was made by nine immigration detainees, including a four-year-old child.[85] The Minister responded to the President of Australian Human Rights Commission by confirming the Department of Immigration agrees with statements made by ASIO 'that it does not consider that the assessment provided by ASIO for

78 ASIO, *ASIO's Security Assessment Function* (29 January 2013) 2 <http://www.asio.gov.au/img/files/Security-Assessment-Function.pdf>.

79 Simon Cullen, 'ASIO Warns of Rise in Home-Grown Terrorism', *ABC News* (online), 4 September 2012 <http://www.abc.net.au/news/2012-09-04/spy-chief-warns-of-growing-threat-of-home-grown-terrorism/4242596>.

80 *Sri Lankan Refugees v Commonwealth* [2012] AusHRC 56 (July 2012) 31.

81 Ibid 1. In addition to contravening art 9(1) of the *ICCPR*, there was also a failure to fully consider alternatives to closed detention for the refugee children that was found to be contrary to arts 3 and 37(b) of the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

82 *Sri Lankan Refugees v Commonwealth* [2012] AusHRC 56 (July 2012) 1.

83 Ibid.

84 [2013] AusHRC 64 (December 2013).

85 Ibid 1.

the purpose of determining whether a visa should be granted is the same as the assessment provided by ASIO for the purpose of determining whether a person should be placed in community detention'.[86]

However, current government policy operates to preclude 'a person refused a visa on security grounds … from consideration for community detention or other forms of community placement'.[87] That preclusion occurs even where ASIO 'would not assess that person a risk to security if placed in community detention', or where 'any risk could be mitigated through imposing other conditions'.[88] The Minister rejected the President of the Australian Human Rights Commission's recommendation that he 'not refuse to consider a person in immigration detention for release from detention or placement in a less restrictive form of detention merely because the department has received advice from ASIO that the person not be granted a visa on security grounds'.[89] The Minister further expressed the view that the decision in *M47* is confined to precluding PIC 4002 as a requirement for granting a protection visa, and is distinguishable from the position of the complainants who are statute barred from making a valid visa application.[90]

The Minister is treating citizens and refugees differently in circumstances where they are alike because both groups of persons have ASAs and can otherwise lawfully reside in the community. Under those similar circumstances, citizens reside in the community while refugees face mandatory preventive indefinite detention. Kirby J in *Neat Domestic Trading Pty Ltd v Australian Wheat Board Ltd* commented adversely on decision-makers automatically following policy rather than making an individuated assessment:

> adopting any method for making a discretionary decision, including the use of a legally permissible policy, does not relieve the decision-maker of the need to consider the individual circumstances of each application that comes before it … Unthinking, inflexible administration can be an instrument of oppression and abuse of power, taking the decision-maker outside the purpose for which the power was granted. The essence of lawful public administration in the exercise of a discretion (as of good decision-making generally) is to keep an open mind concerning the justice, reasonableness and lawfulness in the particular case, even if this sometimes involves a departure from a general policy.[91]

Gleeson CJ agreed with the general tenor of a requirement for individuated assessment in administrative decision-making of each application.[92]

86 Ibid 9 [42].
87 Ibid 22 [131].
88 Ibid.
89 Ibid 24 [142].
90 Ibid 25 [142].
91 (2003) 216 CLR 277, 320 [138] (citations omitted).
92 Ibid 284.

2 *Values*

Beck asserts that decision-making to control an uncertain future is now axial on social organisation around probability calculations of risk involving implied values.[93] Risk is defined as 'the modern approach to foresee and control the future consequences of human action', including a variety of 'unintended consequences'.[94] Beck's use of 'axial' means decision-making is now formed on the axis of institutionalised probability calculations of future risk containing value-laden implications and assumptions of the undesirable consequences of human actions that society organises around.

Values are expressed in how we wish to live, including both what society chooses to organise around, and the subsidiary question of what institutionalised steps are appropriate to intervene and mitigate the undesirable future consequences of human activity. Stated another way, this age of universal human rights coincides with an age of risk and responsibility. Beck does not mean we live in a society that is any more dangerous or risky than our ancestors, rather he describes the uniqueness of living in this world risk society as our capacity to rapidly annihilate humanity via malign nuclear or eugenic activities.[95] Mobile communication technologies have also radicalised global interconnectivity enabling issues or values that 'begin locally', even if on occasion in 'unlocalized proximity' to become cosmopolitan through a 'border-transcending network of strategically decisive subnational actors'.[96]

Judicial scrutiny of administrative decisions, and public discussion of the values predicating risk calculations within risk society guards against administrators acquiring unchecked power when they decide on all three elements of risk — its definition, determination, and management. Without review and effective accountability mechanisms, administrative decision-makers accrue unbounded power over the people affected by their decisions. Within the world risk society context, Beck argues for the 'opening up to democratic scrutiny of the previously depoliticized realms of decision-making and for the need to recognize the ways in which contemporary debates of this sort are constrained by the epistemological and legal systems within which they are conducted'.[97] To counter value implications and assumptions infected with excessive fear, Beck argues for values that help more than harm humanity,[98] and such values could include equality, personal liberty, and procedural fairness. Beck calls for the retention of

> good relations with the treasures of tradition, without a misconceived and sorrowful turn to the new, which always remains old anyway. Tracking down new categories, which are already beginning to appear with the decay

93 Beck, *World Risk Society*, above n 17, 19, 70, 110, 137–9; Beck, *Towards a New Modernity*, above n 17, 589.

94 Beck, *World Risk Society*, above n 17, 3.

95 Ibid 53.

96 Beck and Grande, above n 51, 430.

97 Beck, *World Risk Society*, above n 17, 152.

98 Ibid 151–2.

> of the old ones, is a difficult undertaking. To some it smacks of 'changing the system' and putting into jeopardy constitutionally guaranteed 'natural rights' [such as procedural fairness and natural justice].[99]

Yet the contours of the right to liberty and security of person under the *International Covenant on Civil and Political Rights* are safely, and compatibly, traversed within the *Constitution*'s guarantee of the High Court's original jurisdiction to issue prerogative writs.[100]

B *Release from Unlawful Detention*

Poole, similarly to Beck, holds that legal tradition provides some guide to decision-making in world risk society.[101] Poole describes the 'invocation of the apparent decency and solidity of the past' within legal institutions as providing 'like Dante's Virgil, some guide to the uncertain paths of the future'.[102] Gummow, Crennan and Bell JJ in *M47* relied on the established principle of legality in statutory interpretation,[103] and a longstanding fundamental right to personal liberty recognised in the general law,[104] to grant the procedural remedy of habeas corpus (release from unlawful detention) that has provenance predating the *Magna Carta* of 1215. Habeas corpus is a court order (prerogative writ) commanding either a government official or individual who has forcibly detained a person to produce that detainee for the court to determine the lawfulness of the detention and order the detainee's release if detention in unlawful.[105] Dicey wrote of the *British Habeas Corpus Acts* that they 'declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty'.[106] In Australia, the High Court has original jurisdiction in all matters where a detainee seeks habeas corpus against an officer of the Commonwealth to secure his or her release from arbitrary, hence unlawful, detention.[107] Dicey explained that 'under existing federal governments

99 Beck, *Towards a New Modernity*, above n 17, 12.

100 *Constitution* s 75(v).

101 Thomas Poole, 'Courts and Conditions of Uncertainty in "Times of Crisis"' (Working Paper No 7, Law Society Economy, September 2007) 32 <http://eprints.lse.ac.uk/24626/1/WPS07-2007Poole.pdf> ('*Poole Working Paper*'). A later, amended version of this paper was published as Thomas Poole, 'Courts and Conditions of Uncertainty in "Times of Crisis"' [2008] *Public Law* 234.

102 *Poole Working Paper*, above n 101, 32.

103 (2012) 292 ALR 243, 277 [119] (Gummow J), 378–9 [528]–[529] (Bell J). See also *Lacey v A-G (Qld)* (2011) 242 CLR 573, 582–3 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 553.

104 (2012) 292 ALR 243, 277 [120] (Gummow J), 348–9 [400] (Crennan J), 378 [528] (Bell J).

105 David Clark and Gerard McCoy, *Habeas Corpus: Australia, New Zealand, the South Pacific* (Federation Press, 2000) 20.

106 A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan, 8th ed, 1915) 195, quoted in McDermott, above n 70, 340.

107 *Constitution* ss 71, 75(iii), 75(v).

the constitution will be found to provide the means for its own improvement',[108] such as by referendum and not by sovereign prerogative.[109]

Gummow J reasoned the common law tort of false imprisonment protects Plaintiff M47 'against detention by or under the authority of officers of the Commonwealth' without valid statutory warrant.[110] His Honour identified that '[n]o party submitted that detention in such circumstances may be warranted other than as an incident to judicial adjudication and punishment of criminal guilt'.[111] In any event, the *Migration Act* itself provides no statutory warrant for indefinite detention because of ministerial inaction to make a visa decision in circumstances where removal is impracticable because there is no realistic prospect of removal when an ASA has been issued. Gummow J would have granted the remedy habeas corpus, an order 'upon terms and conditions effecting the release of the plaintiff'.[112] His Honour reasoned the High Court is justified in not following the earlier majority decision validating indefinite immigration detention in *Al-Kateb* because it 'appears to have erred in a significant respect in the applicable principles of statutory construction'.[113] In that case, Palestinian Ahmed Ali Al-Kateb was refused a protection visa in Australia and was unable to obtain permission to enter another country. By a narrow majority the High Court held that the *Migration Act* validly authorised his 'tragic' indefinite immigration detention.[114]

1 *The Principle of Legality*

Specifically, Gummow J in *M47* stated that McHugh and Callinan JJ in *Al-Kateb* did not address the doctrine in *Coco v The Queen* which his Honour considered as providing the 'strongest guidance in resolving the issue of construction'[115] regarding the interaction of sections of the *Migration Act* relevant to indefinite detention:

> The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should

108 Dicey, above n 106, 142–3.

109 *Constitution* s 128.

110 *M47* (2012) 292 ALR 243, 270 [88]. See also Dicey, above n 106, 203–4; *Ruddock v Taylor* (2005) 222 CLR 612, 645–62 (Kirby J); *Myer Stores Ltd v Soo* [1991] 2 VR 597; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514.

111 *M47* (2012) 292 ALR 243, 274 [105].

112 Ibid 283 [149].

113 Ibid 277 [120].

114 *Al-Kateb v Godwin* (2004) 219 CLR 562, 580–1 [31] (McHugh J) ('*Al-Kateb*'). See also at 595 [74] (McHugh J), 643 [241], 651 [268] (Hayne J), 659–61 [292]–[295] (Callinan J), 662–3 [303]–[304] (Heydon J).

115 *M47* (2012) 292 ALR 243, 277 [119].

> not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language.[116]

As Gummow J noted in *M47*, Gleeson CJ's minority decision in *Al-Kateb* preferred an interpretation that 'if removal ceases to be a practical possibility, the detention must cease, at least for as long as that situation continues'.[117] Gummow J adopted Gleeson CJ's construction because it 'better accommodates the basic right of personal liberty'.[118] Gummow J stated further that '[t]he contrary construction adopted by the majority in [*Al-Kateb*] should not be regarded as a precedent which in the present case forecloses further consideration of the matter'.[119]

Bell J concurred with Gummow J in granting habeas corpus, with either a Justice of the High Court, or another court upon remitter, to consider the terms and conditions of Plaintiff M47's release. Bell J held that detention for the purposes of removal from Australia is only lawful under decisions relying on art 33(2) of the *Refugee Convention* according to the terms of the *Migration Act*.[120] Her Honour acknowledged the Special Case was 'conducted upon acceptance [Plaintiff M47] is not a person about whom there are reasonable grounds for regarding as a danger to the security of Australia. Nor is he a person who having been convicted of a particularly serious crime constitutes a danger to the Australian community'.[121] Endeavours to find a third country to receive Plaintiff M47 have been unsuccessful for over three years. Bell J relied on the *High Court Rules 2004* (Cth) to draw the inference from those facts that 'removal of the plaintiff from Australia is not likely to be practicable in the foreseeable future'.[122]

Bell J further stated: 'the principle of legality requires that the legislature make plain that it has addressed' the consequence of 'mandatory administrative detention for an indefinite period that may extend to the balance of the detainee's life' and that 'it is the intended consequence'.[123] Her Honour quoted with approval Gleeson CJ in *Al-Kateb*:

> 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.[124]

116 Ibid, quoting *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

117 *M47* (2012) 292 ALR 243, 276 [117] (Gummow J), citing *Al-Kateb* (2004) 219 CLR 562, 575 [14].

118 *M47* (2012) 292 ALR 243, 277 [120].

119 Ibid.

120 Ibid 373 [506].

121 Ibid 380 [534].

122 Ibid 377 [524]; *High Court Rules 2004* (Cth) r 27.08.5.

123 *M47* (2012) 292 ALR 243, 378–9 [529].

124 *Al-Kateb* (2004) 219 CLR 562, 577 [19] (emphasis added), quoted in *M47* (2012) 292 ALR 243, 378 [528].

In 1908, O'Connor J enunciated what has developed into a principle of legality in statutory interpretation in *Potter v Minahan*.[125] Common law courts have entrenched that principle over the last century such that since 1987 it has been strictly applied in Australia.[126] Taggart, Dyzenhaus and Hunt define the principle of legality as 'broadly expressed discretions [that] are subject to the fundamental values, including values expressive of human rights, of the common law'.[127] Aside from the question of constitutional validity of mandatory indefinite detention, Bell J considered that the principle of legality is applicable to statutory construction involving the fundamental rights of citizens and non-citizens alike.[128] Her Honour followed Dixon J in *Koon Wing Lau v Calwell*, a case involving the *War-Time Refugees Removal Act 1949* (Cth), where his Honour interpreted a temporal limitation when reading provisions authorising custody for the purposes of deportation.[129] Dixon J stated that if this did not occur 'within a reasonable time', the detainee 'would be entitled to his discharge on habeas'.[130]

The clarity and integrity of Gummow and Bell JJ's reasoning provides hope in the shadows of Plaintiff M47's continued bureaucratic detention. Prominent social theorist Anthony Giddens notes that not even Max Weber, the 'most pessimistic' of the 'founding fathers' of sociology, 'fully anticipate[d] how extensive the darker side of modernity would turn out to be'.[131] Weber saw the paradoxical modern world as achieving 'material progress … at the cost of an expansion of bureaucracy that crushed individual creativity and autonomy'.[132] Beck discusses this aspect of Weber's vision of modernity under the heading 'Organized Irresponsibility and the Power Game of Risk Definitions'.[133] The majority judgment in *M47* reads as a judicial conversation with Parliament and the executive to placate and conciliate power games over risk definitions. The executive is required to ensure that administrative decisions, actions, or inaction enabling preventive detention are within the limits of the law. In Plaintiff M47's circumstances, that requires temporal limits on detention, with review at the level of intensive scrutiny of reasons that must be evidence-based and rationally connected to the purposes of detention. Without those basic human rights protections, the High Court effectively invited further applications in order to enable reconsideration of *Al-Kateb*.[134]

French CJ has stated extra-judicially that 'the interpretive rule [of legality] can be regarded as "constitutional" in character even if the rights and freedoms which it

125 (1908) 7 CLR 277, 304, quoting Sir Peter Benson Maxwell, *On the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905) 121–2. See also Meagher, above n 69, 451.

126 *M47* (2012) 292 ALR 243, 378–9 [528]–[529] (Bell J); *Re Bolton; Ex parte Beane* (1987) 162 CLR 514.

127 David Dyzenhaus, Murray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 *Oxford University Commonwealth Law Journal* 5, 6.

128 *M47* (2012) 292 ALR 243, 380 [532].

129 (1949) 80 CLR 533, 581 (Dixon J).

130 Ibid, quoted in *M47* (2012) 292 ALR 243, 379–80 [531].

131 Giddens, *The Consequences of Modernity*, above n 54, 7.

132 Ibid.

133 Beck, *World Risk Society*, above n 17, 148–51.

134 *M47* (2012) 292 ALR 243, 267 [72] (French CJ), 282–3 [145]–[149] (Gummow J), 346 [391], 351 [406] (Crennan J), 362 [460] (Kiefel J), 380 [534] (Bell J).

protects are not'.[135] The constitutional character of the rule of legality is entrenched by the strict separation of judicial power from parliamentary and executive power.[136] That means, for example, 'only a court may exercise the judicial power of the Commonwealth' to determine the lawfulness of detention and order release if that detention is unlawful.[137]

2 *Risk and Responsibility*

Beck refers to 'organized irresponsibility' as the 'paradox' of threats and hazards becoming 'increasingly inaccessible to attempts to establish proof, attributions and compensation by scientific, legal and political means', at the very time those threats and hazards are 'seen to become more dangerous and more obvious'.[138] When the routines of law, administration, and politics involved with decision-making and control are prioritised over human safety, this normalises the destruction of humanity.[139] Beck's reasoning applied here means Australia's legal rules and regulations are normalising the incidence of suicidal deaths in immigration detention in Australia, not the incidence of people who are breaking the rules of visa regulation. Certain latent risks flowing from human action, and ministerial inaction, have become visible. A psychiatric disorder involving intermittent suicidal ideation related to indefinite immigration detention has been identified, and the incidence of attempted suicide rates amongst detainees with ASAs is higher than in the general community.[140] According to Beck, government 'administration, politics, industrial management and research negotiate the criteria of what is "rational and safe"'.[141] Those criteria in relation to the national security administrative detention regime involve decision-makers' knowledge of the predictable consequence of increased rates of suicidal ideation amongst persons indefinitely detained compared to that within the general community.[142]

135 Chief Justice Robert French, 'The Common Law and the Protection of Human Rights' (Speech delivered at the Anglo Australasian Lawyers Society, Sydney, 4 September 2009) 8 <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj4sep09.pdf>.

136 Attorney-General's Department and the Australian Government Solicitor, *The Constitution with Overview, Notes and Index* (1999) 3.

137 Ibid 10; *Constitution* ss 71, 75(i), (iii), (v).

138 Beck, *World Risk Society*, above n 17, 150.

139 Ibid 31–4.

140 Maris Beck, 'New Syndrome Hits Detainees', *The Sydney Morning Herald* (online), 22 May 2012 <http://www.smh.com.au/opinion/political-news/new-syndrome-hits-detainees-20120521-1z1d0.html>; Daniel Flitton and Maris Beck, 'Refugees' ASIO Despair', *The Sydney Morning Herald* (online), 16 May 2012 <http://www.smh.com.au/opinion/political-news/refugees-asio-despair-20120515-1yp6d.html>; Daniel Flitton and Bianca Hall, 'Second Tamil Refugee Attempts Suicide', *The Sydney Morning Herald* (online), 15 November 2012 <http://www.smh.com.au/federal-politics/political-news/second-tamil-refugee-attempts-suicide-20121115-29e0l.html>; Daniel Flitton and Bianca Hall, 'Security Risk Refugee Tries to End Life', *The Age* (online), 16 November 2012 <http://www.theage.com.au/national/security-risk-refugee-tries-to-end-life-20121115-29eub.html>; Kirsty Needham, 'ASIO Cites Security to Block Teen', *The Age* (Melbourne), 4 January 2012, 5.

141 Beck, *World Risk Society*, above n 17, 32.

142 Colin Neave, Commonwealth and Immigration Ombudsman, 'Suicide and Self-Harm in the Immigration Detention Network' (Report No 2, May 2013).

To match the relations of definition within world risk society with the character of hazards or manufactured uncertainties, Beck focuses on four question clusters:

(1) Who defines and determines what is the danger and the risk, and 'where does responsibility lie'?

(2) Who is given evidence and 'proof' of the 'kind of knowledge or non-knowledge about the causes, dimensions, [and] actors … involved?'

(3) What counts as sufficient proof where 'knowledge … is necessarily contested and probabilistic?'

(4) Who decides 'on compensation for the afflicted, and what constitutes appropriate forms of future damage limitation control and regulation?'[143]

In that way, Beck's world risk society thesis transposes risk culture to 'the institutional dimension of risk and power … with its cultural focus on the institutional base of contemporary globalized industrial society'.[144]

Risk theory 'develops an image that makes the circumstances of modernity contingent, ambivalent and (involuntarily) susceptible to political rearrangement'.[145] Due to the 'often unseen and undesired self-discreditation ('reflexive modernization') which is provoked … by [risk discourse], something ultimately happens which sociologists loyal to Max Weber would consider impossible: *institutions begin to change*'.[146] Beck says that 'Max Weber's diagnosis is that modernity transforms into an iron cage in which people must sacrifice to the altars of rationality like the fellahim of ancient Egypt'.[147] The antithesis is Beck's prognosis that 'world risk society elaborates … [how] *the cage of modernity opens up*'.[148] He argues that 'there is a utopia built into risk society and risk society theory — the utopia of a *responsible* modernity, the utopia of *another* modernity, *many* modernities to be invented and experienced in different cultures and parts of the globe'.[149]

In the second cosmopolitan phase of modernity, Beck's concept of unintended consequences recognises the 'uncomfortable challenges' of 'moral and economic costs of liability or changes in politics and lifestyle' that accompany 'the recognition of the consequences and thus the responsibility for them'.[150] Media comment expresses the discomfort of indefinitely detaining a refugee mother with her children and baby for the purpose of national security. Perhaps Ranjini is the most high-profile of the 47 detained refugees.[151]

143 Beck, *World Risk Society*, above n 17, 149–50.

144 Ibid 149. Cf Lash, above n 58.

145 Beck, *World Risk Society*, above n 17, 147.

146 Ibid (emphasis in original).

147 Ibid.

148 Ibid.

149 Ibid (emphasis in original).

150 Ibid 121.

151 See *Letters for Ranjini* (4 June 2013) Facebook <https://www.facebook.com/#!/LettersForRanjini>; *Ranjini's Story*, Letters for Ranjini <http://lettersforranjini.com/ranjinis-story/>.

In May 2012, Ranjini was pregnant and living with her Australian husband, Ganesh, in Melbourne when an ASA led the Department of Immigration and Citizenship to detain her with her two sons in Sydney's Villawood Immigration Detention Centre. On 15 January 2013, Ranjini gave birth to a baby boy in a Sydney hospital. Five days after the birth of her son, Paari, they were both returned to indefinite detention. Ganesh is prevented from seeing his wife and son outside of designated visitor hours and areas. An Ombudsman's report warned that the self-harming of traumatised children in immigration detention 'is an ongoing issue'[152] and *The Sydney Morning Herald* reported that Ranjini's 'oldest son had shoved sticks into his ears'.[153] The 'Release Ranjini' campaign has communicated globally and locally via Facebook,[154] vigils throughout Australian cities,[155] Law School forums[156] and CNN.[157]

Reflexive modernity does not mean Ranjini poses a risk crisis, but rather the circumstances of Ranjini's detention indicate an institutional crisis where agencies responsible for assessing and managing risk are involved with increasing national insecurity. Further consequences for national security are fear-based responses driving out existing minimum consensus on shared cultural values that bind citizens and/or nationals to identify in a constructive way with their nation-states by respecting the equality and common humanity of all people. Reflexive modernity encapsulates how the crisis of institutions is publicly scrutinised at the grass roots level by non-government organisations and concerned individuals, with knowledge of their self-endangerment by actions of administrators carried out on their behalf, and for their protection. That public scrutiny engenders institutional transformation, even in the realm of the usual monopoly retained by Parliament with the executive, to decide on matters of internal national security. Public concern about the unfairness and irrationality of reasons for detaining refugees with ASAs indefinitely, contrary to the usual remedies available to protect the right to personal liberty, led to the appointment of an Independent Reviewer of ASAs for detainees.

3 *Hybrid Review*

The executive facilitated merits review of ASAs by ASIO against non-citizens in October 2012 for the first time since the enactment of the *ASIO Act* in 1979, as planned before the handing down of the decision in *M47.* Retired Federal Court Justice Margaret Stone was appointed as the Independent Reviewer for ASAs. The Reviewer's terms of reference require ASIO to provide an applicant

152 Neave, above n 142, 41–2 [6.22]–[6.26].

153 Daniel Flitton, 'Refugee Mum, Branded "Security Threat", Has Chance at Defending Herself', *The Sydney Morning Herald* (online), 8 May 2013 <http://www.smh.com.au/opinion/political-news/refugee-mum-branded-security-threat-has-chance-at-defending-herself-20130508-2j7ot.html>.

154 *Letters for Ranjini*, above n 151.

155 Anthony Bieniak, 'Born into Detention: the Plight of Ranjini and Paari', *The Drum* (online), 22 January 2013 <http://www.abc.net.au/unleashed/4478524.html>.

156 Institute for International Law and the Humanities, above n 47.

157 Hilary Whiteman, 'Mom Locked up in Australia as Security Risk Has Baby Boy', *CNN* (online), 16 January 2013 <http://edition.cnn.com/2013/01/15/world/asia/australia-ranjini-indefinite-detention>.

for review with 'an unclassified written summary of reasons for the decision to issue an adverse security assessment' and to establish regular yearly review for determining current security risk.[158]

The function of the Reviewer is to issue opinions on ASAs, providing advice and recommendations to the Director General of Security on whether an adverse security assessment is an appropriate outcome based on the material ASIO relied upon.[159] This new 'tier of review' may create the possibility of litigation availing the 'legal architecture … [to] create a new level or merits review'.[160] The terms of reference indicated that once the current caseload has been cleared, applications for review would be cleared within three months.[161] The nature of this review function is a hybridisation of independent scrutiny within ASIO's own internal appeals and review processes. The Reviewer's staff include secondees from ASIO.[162] Significantly, the Reviewer's opinions are non-binding. The Hon Margaret Stone received unclassified summaries of ASIO's findings in relation to 55 detainees in April 2013 and visited some of the detainees that same month.[163] The Hon Margaret Stone was unable to advise the detainees of the timing of the outcome from her recommendations which has given rise to tension among detainees.[164] The Attorney-General had previously indicated outcomes could be known by June 2013.[165]

ASIO reversed an ASA after an internal review unrelated to the Hon Margaret Stone's independent review on 13 May 2013.[166] Manokalo, a refugee widow, and her six-year-old son had been recognised by Australia as persons owed protection under the *Migration Act* and lived in Dandenong for around a year before Manokalo received an ASA and was taken into detention at Villawood in Sydney for 18 months. Manokalo fled Sri Lanka after her husband, Antony Jenaddharsan, was killed in a bombing raid. Antony had previously been a member of the Tamil Tigers, a separatist group involved in Sri Lanka's civil war, a group that has never been listed as a terrorist organisation in Australia. Manokalo insisted her husband was not on active service when he was killed and that she had never joined a political party or made any donations. Manokalo states she worked in a textiles shop and as a bookkeeper. Pursuant to ASIO reversing its ASA, the

158 Attorney-General (Cth), *Independent Review Function: Terms of Reference* (16 October 2012) 4 <http://www.ag.gov.au/NationalSecurity/Counterterrorismlaw/Documents/Final - Independent Review Function - Terms of Reference.pdf>; Beck, *World at Risk*, above n 17, 105–6 (emphasis in original): 'the profile of the perpetrators does *not* coincide with alien stereotypes … [t]he most conspicuous thing about the members of this perpetrator group is their inconspicuousness'.

159 Attorney-General (Cth), above n 158, 1.

160 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia (Estimates), *Official Committee Hansard*, 12 February 2013, 151.

161 Attorney-General (Cth), above n 158, 3.

162 Senate Legal and Constitutional Affairs Legislation Committee, above n 160, 149–50.

163 Jane Lee, 'Refugees to Learn of ASIO's Findings', *The Age* (Melbourne), 5 April 2013, 4; ASIO, *Report to Parliament 2012–2013*, above n 1, 39.

164 Lee, above n 163, 4.

165 Daniel Flitton, 'Review of ASIO Analysis of Refugees', *The Age* (Melbourne), 2 May 2013, 17.

166 Daniel Flitton and Michael Gordon, 'ASIO Backs Down on Threat Ruling', *The Sydney Morning Herald* (online), 22 May 2013 <http://www.smh.com.au/federal-politics/political-news/asio-backs-down-on-threat-ruling-20130522-2k0uz.html>.

Minister advised Manokalo in a letter dated 22 May 2013 that he 'had exercise[d] his power to allow her to lodge a claim for a protection visa'.[167]

Only two prior instances of reversals of an ASA issued to non-citizens by ASIO were known as at February 2014. In 2007 ASIO overturned Mr Muhammad Faisal's ASA when his mental health deteriorated while he was being detained on Nauru.[168] Then in late 2011, Mr Sayed Kasim, a Burmese Rohingya refugee, spent 14 months in detention before writing to ASIO. Mr Kasim's initiative in writing the letter inviting ASIO to visit him led to ASIO conducting an interview and lifting the ASA.[169] On 5 June 2013, the Rahavan family of five were released from detention in Villawood after their ASA was lifted on the recommendation of the independent reviewer, the Hon Margaret Stone.[170] Mr Yogachchandran Rahavan, Mrs Sumathi Rahavan, and their children Atputha, Abhinayan, and Vahesan were released days before Mr Rahavan's case was to be heard by the High Court. [171]

On 20 August 2013, ASIO lifted an ASA against a Tamil man of 52 who had lost his leg below the knee in a bomb blast during the Sri Lankan civil war.[172] Both the United Nations High Commissioner for Refugees and Australia, in May 2010, had previously recognised his refugee status.[173] He was living in the community when the ASA was issued, resulting in his removal to Christmas Island where he was detained before being moved to Sydney's Villawood Immigration Detention Centre.[174]

Various avenues of review for the remaining 47 detainees are available including internal review of an ASA by ASIO, independent/hybrid review of an ASA by the Hon Margaret Stone, and merits review of any negative protection visa decision relying on 'one or more of' arts 1F, 32, or 33(2) of the *Refugee Convention* by the AAT.[175] Decisions of the AAT are appealable to the Federal Court on a question of law, and to the Full Federal Court. An issue of serious concern is the length of review and appeal processes for refugees with ASAs, and the timing of periodic review. Recognised refugees seeking protection visas remain in mandatory detention for the duration of review and the undefined length of any appeals process. Citizens with ASAs remain in the community and have their passport

167 Ibid.

168 'Minister Defends Handling of Iraqi Refugee', *The Sydney Morning Herald* (online), 1 February 2007 <http://www.smh.com.au/news/national/minister-defends-handling-of-iraqi-refugee/2007/02/01/1169919442158.html>.

169 Kirsty Needman, 'Without Hope, Without Reason', *The Sydney Morning Herald* (online), 14 January 2012 <http://www.smh.com.au/national/without-hope-without-reason-20120113-1pzei.html>.

170 Daniel Flitton, 'Refugee Family Free as ASIO Assessment Overturned', *The Sydney Morning Herald* (online), 12 June 2013 <http://www.smh.com.au/federal-politics/political-news/refugee-family-free-as-asio-assessment-overturned-20130612-2o4vq.html>.

171 Ibid. The S138/2012 hearing set down for 18 June 2013 was vacated: Transcript of Proceedings, *Plaintiff S138 v Director General of Security* [2013] HCATrans 148 (13 June 2013).

172 Daniel Flitton, 'ASIO Reverses Adverse Finding against Tamil Refugee Detained for Four Years', *The Age* (Melbourne), 20 August 2013, 4.

173 Ibid.

174 Ibid.

175 *M47* (2012) 292 ALR 243, 258 [36] (French CJ), 292–3 [183]–[184] (Hayne J), 345–6 [388]–[389] (Crennan J), 309 [258] (Heydon J), 354 [422]–[424] (Kiefel J), 365–6 [474] (Bell J).

confiscated to prevent them leaving the country because ASIO regards that as increasing the risk to national security.

On 20 August 2013, the United Nations Human Rights Committee '[pressured] Australia to release' 'arbitrarily detained' refugees with ASAs and compensate them for unlawful detention and any associated psychological harm.[176] Professor Ben Saul raised twin complaints to the Committee on behalf of 46 detainees.[177] The authors of the complaints were people recognised as refugees and held in Australian immigration facilities including three Myanmarese Rohingya, 42 Sri Lankan Tamils, and a Kuwaiti Bedouin.[178] The Committee's views in these two complaints produced a finding of 143 violations of international law by Australia.[179]

The Committee concluded that Australia 'is under an obligation' to provide the authors 'with an effective remedy, including release under individually appropriate conditions, rehabilitation and appropriate compensation'.[180] The opinions of the 18 international experts who considered the complaints are not binding. However, according to its treaty obligations, Australia must respond within 180 days assuring the Committee it has acted on the recommendations and taken steps to prevent similar violations in the future.[181]

The Committee held the view that Australia could not demonstrate the availability of an effective remedy because '[t]he possibility that the State party's highest court may someday overrule its precedent upholding indefinite detention [*Al-Kateb*] does not suffice to indicate the present availability of an effective remedy'.[182] The Minister's automatic policy reliance, and delay in determining visa applications as instructed by the High Court in Plaintiff M47's case, denied the authors of the complaints access to a domestic court that could determine *without delay* the lawfulness of their detention, and that could order release if the detention was found to be unlawful.

The Committee regarded the following factors as indicia of arbitrariness:

> the authors are kept in detention in circumstances where they are not informed of the specific risk attributed to each of them, and of the efforts undertaken by the Australian authorities to find solutions which would allow them to obtain their liberty.[183]

176 Matt Siegel, 'UN Pressures Australia to Release 46 Refugees', *The New York Times* (online), 22 August 2013 <http://www.nytimes.com/2013/08/23/world/asia/un-criticizes-australia-over-asylum-policy.html?_r=0>. See generally Human Rights Committee, *Views: Communication No 2094/2011*, 108th sess, UN Doc CCPR/C/108/D/2094/2011 (20 August 2013) ('*FKAG et al v Australia*'); Human Rights Committee, *Views: Communication No 2136/2012*, 108th sess, UN Doc CCPR/C/108/D/2136/2012 (25 July 2013) ('*MMM et al v Australia*').

177 ABC, 'Committee Finds Australia Violates International Law by Detaining Refugees', *Lateline*, 22 August 2013 (Tony Jones) <http://www.abc.net.au/lateline/content/2013/s3831908.htm>.

178 Ibid.

179 Ibid.

180 *FKAG et al v Australia*, UN Doc CCPR/C/108/D/2094/2011, 20 [11].

181 Ibid 20 [12].

182 Ibid 16 [8.4].

183 Ibid 18 [9.4].

Furthermore, the authors are 'deprived of legal safeguards allowing them to challenge their indefinite detention'.[184] For those reasons, the Committee concluded that the detention of the authors was arbitrary and contrary to arts 9(1), (4) of the *ICCPR*.[185] The Committee considered that

> the combination of the arbitrary character of the authors' detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the authors and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them, and constitute treatment contrary to article 7 of the Covenant.[186]

Five more refugees have authored a complaint based on similar arguments to the Committee that is yet to be decided.[187]

IV RISK, RIGHTS AND LEGITIMACY

A *Legitimacy*

The history of understanding the *Universal Declaration of Human Rights* as expressing states' collective responsibilities to cooperate on managing risk and protecting human rights as *enforceable by individuals* emerged during the 1970s.[188] This equitable approach to implementing treaty responsibilities is now beginning to be referred to in the context of domestic jurisprudence.[189] A related phenomenon is the 'impulse' to regard human rights as radiating beyond an introspective nation-state perspective attaching rights to citizenship.[190] Bell J in *M47*, for example, stated that 'fundamental rights are not confined to Australian citizens'.[191] French CJ, in the majority judgment, also stated:

> Australia's obligations under the [Refugee] convention are owed to the other state parties to the convention. They are obligations which require Australia to afford a degree of protection to the persons to whom the convention applies. The word 'protection' appears in the preamble to the

184 Ibid.

185 Ibid 18 [9.4], 19 [9.6]–[9.7].

186 Ibid 19 [9.8]. Art 7 of the *ICCPR* prohibits torture and cruel, inhuman or degrading treatment or punishment. See also *FKAG et al v Australia*, UN Doc CCPR/C/108/D/2094/2011, 20 [10].

187 Michael Gordon and Daniel Flitton, 'Australia Violated Refugees' Human Rights, UN Says', *The Sydney Morning Herald* (online), 22 August 2013 <http://www.smh.com.au/federal-politics/federal-election-2013/australia-violated-refugees-human-rights-un-says-20130822-2sdxq.html>.

188 Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap Press, 2010) 7–8, 38–9, 174–5, 227. See generally *Universal Declaration of Human Rights*, GA Res 217A (III), UN GOAR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

189 Moyn, *The Last Utopia*, above n 188; *M47* (2012) 292 ALR 243, 249 [13] (French CJ).

190 Moyn, *The Last Utopia*, above n 188, 38.

191 (2012) 292 ALR 243, 380 [532], citing *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 19 (Brennan, Deane and Dawson JJ); *Abebe v Commonwealth* (1999) 197 CLR 510, 560 [137] (Gummow and Hayne JJ). See also *M70* (2011) 244 CLR 144, 196 (Gummow, Hayne, Crennan and Bell JJ).

> convention which begins with a recitation of the principle affirmed by the *Charter of the United Nations* and the *Universal Declaration of Human Rights* that 'human beings shall enjoy fundamental rights and freedoms without discrimination'. Obligations accepted by the signatories to the convention appear in a number of Arts which require contracting states to treat refugees within their territories no less favourably than their nationals in relation to the enjoyment of various rights and freedoms and social benefits.[192]

The cosmopolitanism of the second modernity elevates human rights as the universalist vision that has prevailed from amongst many cosmopolitan visions throughout history.[193] Beck asserts the class societies of the first modernity were able to organise as nation-states, but world 'risk societies bring about "communities of danger" that ultimately can only be comprised in the United Nations'.[194] The risk society contains within itself 'a grass-roots *developmental dynamics that destroys boundaries*' because people are 'forced together in the uniform position of civilization's self-endangering'.[195] According to Beck: '[t]he potential for self-endangering developed by civilization in the modernization process thus also makes the utopia of a world society a little more real or at least more urgent'.[196] Risk society replaces discourse on the elimination of scarcity with that of elimination of risk as the new source of international conflict and consensus.[197] Self-determination and individual and state autonomy become foundational to the emergence of world society where any solidarity is contingent on anxiety as well as need.

The challenge of anxiety solidarity[198] is expressed in Moyn's observation about human rights that perhaps 'cruelty [is] the worst thing we can do, not solidarity the best thing we can achieve'.[199] In what way is solidarity on risk not fully equipped for the imperatives of the human rights age? Primarily because the legal institutions in a world risk society move away from the backward looking assessment of breach and illegality, towards administrative mechanisms to deter some future feared catastrophic event. Refugee law involves making determinations about future risk to the individual, as well as contemplating the risks that person might pose to the host society. When necessary, that involves balancing the risk to Australia's national security posed by a deconstruction of the right to personal liberty, that is, the most basic rule of law general principle, against measures limiting the right to personal liberty that are reasonably appropriate and adapted to achieve the legitimate end of reduced risk to national security. Here the comparator is the

192 *M47* (2012) 292 ALR 243, 249 [13] (citations omitted).

193 See Moyn, *The Last Utopia*, above n 188.

194 Beck, *Towards a New Modernity*, above n 17, 47.

195 Ibid (emphasis in original).

196 Ibid.

197 Ibid 35–8.

198 Ibid 49. Beck argues that the '*quality of community*' in risk society 'is expressed' as '*Solidarity Motivated by Anxiety*' (emphasis in original).

199 Samuel Moyn, 'Substance, Scale and Salience: The Recent Historiography of Human Rights' (2012) 8 *Annual Review of Law and Social Science* 123, 135.

value of personal liberty foundational to true national security. A key issue in *M47* is the prior question of whether the Minister automatically following a policy to detain refugees who have been issued with ASAs under ss 189, 196 and 198 of the *Migration Act* is within legislatively defined power.

In *M47*, French CJ stated that where an Act, such as the *Migration Act*, 'uses terminology derived from or importing concepts which are derived from the international instrument, it is necessary to understand those concepts and their relationships to each other in order to determine the meaning and operation of the Act'.[200] In *M47*, the High Court considered international human rights obligations in its approach to statutory interpretation.[201] Hayne J referred to the 'text and structure'[202] of the *Migration Act*, while French CJ stated that Act 'creates a statutory scheme, the purpose of which is to give effect to Australia's obligations under the [Refugee] convention'.[203] French CJ found that 'the level of threat sufficient to lift the prohibition against refoulement'[204] under art 33(2) of the *Migration Act* is such that

> [t]he threat must be 'serious', in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible.[205]

Hathaway, Weis and the United Nations High Commissioner for Refugees advise that the test under art 33(2) was intended to be interpreted restrictively, as a 'particularized and highly exceptional form of protection for states'.[206] Article 33(2) places the onus on the state asserting a refugee poses a future risk to national security to establish an answerable case.[207] Hathaway regards a national security argument as 'appropriate where a refugee's presence or actions give rise to an objectively reasonable, real possibility of directly or indirectly inflicted substantial harm to the host state's most basic interests, including the risk of an

200 *M47* (2012) 292 ALR 243, 248 [11].

201 See also *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319; *M70* (2011) 244 CLR 144.

202 *M47* (2012) 292 ALR 243, 301 [222] (Hayne J).

203 Ibid 265 [65] (French CJ).

204 Ibid 266 [68].

205 Ibid, quoting *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, 51 [90]. See *Zaoui v A-G (NZ) [No 2]* [2006] NZLR 289, 310. See also Paul Weis, *The Refugee Convention, 1951: The Travaux Preparatoires Analysed, with a Commentary by Dr Paul Weis* (Cambridge University Press, 1995) 342.

206 James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 348; Weis, above n 205, 342; United Nations High Commissioner for Refugees, *Advisory Opinion from the Office of the United Nations High Commissioner for Refugees (UNHCR) on the Scope of the National Security Exception under Article 33(2) of the 1951 Convention Relating to the Status of Refugees* (6 January 2006) <http://www.refworld.org/docid/43de2da94.html>. Cf Conclusion No 44 (xxxvii) in United Nations High Commissioner for Refugees, *Conclusions Adopted by the Executive Committee on the International Protection of Refugees* (December 2009) 57 <http://www.refworld.org/docid/4b28bf1f2.html>.

207 Hathaway, *The Rights of Refugees*, above n 206, 348.

armed attack on its territory or its citizens, or the destruction of its democratic institutions'.[208]

Reasonable grounds for regarding a person as a danger to national security under art 33(2) require 'that the state concerned cannot act either arbitrarily or capriciously and that it must specifically address the question of whether there is a future risk and the conclusion on the matter must be supported by evidence'.[209] Article 33(2) also requires some individuated element of causation. The Supreme Court of Canada ruled the risk to national security must be proved on the basis of fair procedures and cannot be assumed from the fact of group membership or affiliation alone.[210] In *M47* none of the defendants argued the plaintiff was a future risk to Australia's most basic national security interests as identified by Hathaway. Rather, the risk was submitted as arising from alleged past membership of the Liberation Tigers of Tamil Eelam. The Supreme Court of Canada has held an authority deciding a refugee is an adverse security risk for the purposes of removal or deportation must specifically prove what the future risk to national security is.[211] Further, the authority's conclusion on that matter must be supported by evidence connecting the refugee to that risk by providing 'as much information as is possible, without risking the disclosure of … classified security information'.[212]

Koskenniemi notes that administrators have become responsible for taking precautionary steps to protect national security.[213] But simultaneously attempts must be made to dilute legal responsibility because it would 'undermine solidarity and commitment to regime objectives'.[214] International treaties and domestic legislation 'set up mechanisms for reporting, discussion and assistance: informal pressure and subtle persuasion as socially embedded guarantees for conforming behaviour'.[215] In that way the rule of law tradition insisting that no person or authority is so powerful to act without any legal scrutiny becomes imbued with concepts of legitimacy and procedural fairness. Those concepts conciliate and placate distrust and hostility. Whether legitimacy and procedural fairness persuasively immunise against 'indefinite detention … by administrative degree'[216] in response to excessive public fear involves humane values prevailing within contested moral principles.

208 Ibid 346 (citations omitted). See also *M47* (2012) 292 ALR 243, 266 [67]–[68] (French CJ), 328 [319] (Heydon J); *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3; *Zaoui v A-G (NZ) [No 2]* [2006] 1 NZLR 289.

209 *Zaoui v A-G (NZ) [No 2]* [2005] 1 NZLR 690, 725 [133] (Glazebrook J).

210 Hathaway, *The Rights of Refugees*, above n 206, 348; *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, 29 [41], 62–4 [115]–[120] (McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

211 *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, 49 [85], 62 [115], 65–6 [123] (McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

212 *Zaoui v A-G (NZ) [No 2]* [2004] 1 NZLR 690, 710 [72].

213 Martti Koskenniemi, *The Politics of International Law* (Hart Publishing, 2011) 321.

214 Ibid.

215 Ibid 321–2 (citations omitted).

216 Ibid 321.

Once there is minimum consensus that our shared common humanity means that all people must be treated equally before the law, detention regimes that target people from within recognisable social groups for differentiated treatment under the law warrant the most intensive judicial scrutiny. At one level, adopting the means of indefinitely detaining refugee men, women and children to attain the legitimate end of reducing risks to national security is unwarranted. First, that is because the means of indefinite detention are incompatible with the legislatively prescribed purpose of removal when removal to another country becomes impracticable once an ASA has been issued. Second, the means have no rational connection to the otherwise legitimate purpose of reducing risks to national security when removal is more likely to increase the risk to national security in cases involving evidence of actual individuated threat to Australia's national security. At a deeper and more alarming level, a detention regime that continues because the executive diverges from prescribed legislative processes to apply government policy in a discriminatory way against refugees defies the law as made by Parliament, as explained clearly by the High Court in *M47*.

The principle of legality is a rule of statutory and constitutional interpretation[217] to prevent inflexible and unaccountable governance by policy limiting fundamental rights without any clear statutory or constitutional authority. The *ASIO Act* defines national security in terms broader than necessary to warrant indefinite detention under the *Migration Act* without evidence of any past criminality, or planned future criminality to legitimate the Minister refusing to veer from the policy of detention for any refugee with an ASA irrespective of individuated circumstances. Koskenniemi notes 'legitimacy is indifferent to the conditions of its existence: fear, desire, manipulation, whatever'.[218] The 'perspective [of legitimacy] is control'.[219] How legal institutions use of the concept of legitimacy to control excessive use of government power contrary to both individual rights and public safety, in the pursuit of public safety, is the key issue steering litigation over Australia's national security administrative detention regime.

B *Democratisation of Safety*

The normative project of Beck's cosmopolitanisation is safety.[220] The Utopia of Risk is concerned with '*preventing* the worst'[221] — when perhaps 'cruelty [is] the worst thing we can do'.[222] Risk society's goal is '*self-limitation*' rather than 'attaining something "good"'.[223] Beck describes the 'utopia of the risk society' as 'everyone should be *spared* from poisoning' rather than the 'dream of class

217 French, above n 135, 8–9.

218 Koskenniemi, above n 213, 322.

219 Ibid 322–3.

220 Beck, *Towards a New Modernity*, above n 17, 49.

221 Ibid (emphasis in original).

222 Moyn, 'Substance, Scale and Salience', above n 199, 135.

223 Beck, *Towards a New Modernity*, above n 17, 49 (emphasis in original).

society' that 'everyone wants and ought to have a *share* of the pie'.[224] He points to the reality of a '*new political culture* … in which heterogeneous centers of sub-politics have an effect on the process of politically forming and enforcing decisions, on the basis of utilized constitutional rights'.[225] Beck defines political modernisation as the 'process of the realization of civil and constitutional rights in all its stages'.[226] The high profile of Ranjini's case and social media advocacy on her behalf is an example where '*political modernization disempowers and unbinds politics*' — the nation-state's monopoly on regulating national security — '*and politicizes society*'.[227]

The modernisation process facilitates 'gradually emerging centers and fields of action'.[228] Knowledge, mobile communication technologies, and social media platforms create possibilities for sub-politics through 'extra-parliamentary monitoring with and against the system'.[229] Beck states that this means 'partially autonomous cooperative and alternative politics are separated out which are based on rights that have been fought for and are now protected'.[230] 'Power relationships within society' change in that manner 'through the observance, expansive interpretation and elaboration of these rights'.[231] Political leaders and administrators 'are confronted by cooperatively organized antagonists, with a "definition-making power" of media directed publicity … which can essentially codetermine and change the agenda of politics',[232] even regarding the usual state monopoly over internal security:

> courts become omnipresent monitoring agencies of political decisions … in exactly the degree to which, on the one hand, the judges exercise their 'judicial independence' even against the grain of politics, and on the other, citizens transform themselves from the loyal addressees of political decrees into political participants and attempt to sue for their rights in court *against* the state, if need be.[233]

Asylum seekers, refugees, the stateless, and dispossessed can also be subjects of the national legal jurisdictions of their (perhaps unwilling) host state, despite being excluded from additional human rights protections attached to citizenship. Refugees and their advocates litigating on human rights issues not only seek equality before the law by virtue of their humanity; they democratise the structuring of legal institutions entrusted with determining their claims.

224 Ibid (emphasis in original).
225 Ibid 194 (emphasis in original).
226 Ibid.
227 Ibid (emphasis in original).
228 Ibid.
229 Ibid.
230 Ibid.
231 Ibid.
232 Ibid.
233 Ibid (emphasis in original).

Beck observes that reflexive modernisation involves a '*structural democratization* [that] occurs alongside the parliament and the political system'.[234] Political culture opens up into 'heterogeneous centers of sub-politics' that affect the political process of forming and enforcing decisions, on the basis of 'utilized constitutional rights'.[235] According to Beck, nation-state politics 'retains its monopoly [most strongly in] the central areas of foreign and military policy and in the application of state power for the maintenance of "internal security"'.[236]

1 *Utilised Constitutional Rights*

The 'concretisation of democracy' within this political culture sees constitutional rights as 'hinges for a decentralization of politics with long-term amplification effects'.[237] Constitutional rights 'offer multiple possibilities for interpretation and, in different historical situations, new starting points to break up formerly prevalent, restrictive and selective interpretations'.[238] Some basic rights have a universalist validity claim to facilitate political development evidenced by emergent initiative groups, social movements, and alternative forms of critical professional practices.[239] Liberty rights have been fought for in parliaments, forged in treaties and bilateral and multilateral agreements, and centres of sub-politics have developed and 'differentiate[d] themselves parallel to the parliaments', so that 'a new page in the history of democracy can be opened'.[240] Beck argues that the arenas for cultural and social sub-politics including the media, judiciary, spaces of privacy, initiative groups and social movements, create new forms of culture, some that are protected institutionally and some existing outside of institutions.[241] He states 'the *generalization* of political action announces itself, whose themes and conflicts are no longer determined only by the fight for rights, but also by their elaboration and utilization for the entire society'.[242]

Theories that emphasise 'consultation, interaction, negotiation, [and] network' are displacing the influence of bureaucracy research and decision-making theories.[243] The focus is now on the '*interdependency and process character* [of] responsible, affected and interested agencies and actors from the formulation of programs' following 'through [to] the choice of measures [and] forms of their enforcement'.[244] The politics of the current approach is 'viewed as the collaboration of different agents even *contrary* to formal hierarchies and *across* fixed responsibilities'.[245]

234 Ibid (emphasis in original).
235 Ibid.
236 Ibid.
237 Ibid 195.
238 Ibid.
239 Ibid.
240 Ibid 195–6.
241 Ibid 198.
242 Ibid 195 (emphasis in original).
243 Ibid 199.
244 Ibid (emphasis in original).
245 Ibid (emphasis in original).

When administrators formulate programs affecting people, and choose measures and forms of enforcement of those programs without regard to formalised restraints on power, the content of human rights is exposed to erosion. The executive's policy to exclude refugees with ASAs from the community in Australia is applied in a manner curtailing constitutional protections that are not confined to citizenship, mandamus or habeas. Beck states: 'research has shown that the system of executive administrative agencies is often characterized by the lack of strict authority relationships and the dominance of horizontal connecting channels'.[246] The negative side of this new politics that avoids rule from above is an explosion of administration, and a push toward conferring unaccountable powers on administrators that can significantly limit the liberty rights of others through their decisions. A radical inequality arises between decision-makers and the 'powerless [who] are affected to the core of their being by the "side effects" of decisions taken by others'.[247]

Koskenniemi consolidates Beck's version of a cosmopolitan world risk society when he writes of the absolutism of managerialism. Koskenniemi contends:

> the state of nature is articulated today in the anarchy of autonomous function systems: trade, human rights, environment, security, diplomacy, and so on. As there is no truth superior to that provided by each such system or vocabulary, each will re-create within itself the sovereignty lost from the nation-state. … The lawyer becomes a counsel for the functional power-holder speaking the new natural law: from formal institutions to regimes, learning the idiolect of 'regulation', talking of 'governance' instead of 'government' and 'compliance' instead of 'responsibility'. The normative optic is received from a 'legitimacy', measured by international relations — the Supreme Tribunal of a managerial world.[248]

Here nature is conflated with culture turning global hazards into Beck's 'socially constructed and produced … uncontrollable "actor" that delegitimates and destabilizes state institutions with responsibilities for … public safety, in general' through the anarchy of autonomy.[249]

Preventive detention is a legitimate step available to the Australian executive and Parliament to protect national security in exceptional circumstances. In exceptional cases, human rights matter most. Suicidal deaths have occurred amongst detainees with ASAs.[250] The associated detention of children in refugee families whose parents have ASAs is, plainly, not conducive to the development of these children. Detention conditions linked to suicidal ideation run counter

246 Ibid.

247 Beck and Grande, above n 51, 423.

248 Koskenniemi, above n 213, 324.

249 Beck, *World Risk Society*, above n 17, 150.

250 Kirsty Needham, 'Dead Detainee's Case File Reached Ombudsman Too Late', *The Sydney Morning Herald* (online), 27 October 2011 <http://www.smh.com.au/national/dead-detainees-case-file-reached-ombudsman-too-late-20111026-1mk8r.html>.

to the primary value the common law places on the sanctity of human life.[251] For children in indefinite detention to develop self-respect, they must overcome the disparity between a national security detention regime linked to increased suicidal ideation, and the common law's respect for the sanctity of all human life.

The right to personal liberty for people in identifiable social groups in Australia relies upon the exercise of judicial reasoning grounded in common law values expressive of human rights. Protection of the right to personal liberty for *M47*, and for all of these 47 detainees, could proceed from the express procedural remedies against arbitrary detention in the *Constitution*. Refugees are a small minority in Australia, making them a politicised source of potential national security risk that is easy to regulate. Coupled with their minority status is the more problematic legal vulnerability of persons who by reason of their status as a refugee have no nation state that is willing or able to protect them from persecution for reasons of unlawful discrimination. The perception of refugees as a particularly high source of national security risk, and their high degree of regulation, diverts resources and attention from the breadth of sources of real national security risk both within and external to the Australian community. Beck and Grande have observed that '[t]he new conflicts of world risk society are concerned with anticipated future catastrophes in the present, which … have been set in motion precisely by *legal* forms of action'.[252] Beck's current work is concerned with transforming the vertical dimension of the concept of cosmopolitanism to refer to individual or collective responsibilities towards humankind.[253] Security takes on the meaning of the protection of public safety and individual liberty as dual dimensions of national freedom, which can further promote international cooperation.

V CONCLUSION

The technical approach to judicial review of the majority of the High Court in *M47* allowed for the Minister to make a visa decision according to the required processes in the *Migration Act*, while clearly indicating willingness to revisit the question of indefinite detention. Gummow and Bell JJ in the minority applied the principle of legality in statutory interpretation in a manner expressive of the right to personal liberty, and the value of equality before the law foundational to Australia's national security. That value is found in legislation, in the common law, the *Constitution*, enacted international agreements, and international law

251 See Neave, above n 142, 59–66 [7.80]–[7.107]; Nicholas G Procter, Diego De Leo and Louise Newman, 'Suicide and Self-Harm Prevention for People in Immigration Detention' (2013) 199 *Medical Journal Australia* 730, 730–2. *Harriton v Stephens* (2006) 226 CLR 52, 119 [227], 130 [263] (Crennan J). Crennan J states that '[a]ll human lives are valued equally by the law': at 130 [263].

252 Beck and Grande, above n 51, 424 (emphasis in original).

253 Ibid 417.

norms.[254] The principle of legality has subsequently gained authoritative support from five out of seven of the serving Justices of the High Court in relation to fundamental rights.[255] Equality as a value fits within Beck's definition of 'utilized constitutional rights',[256] including freedom from arbitrary detention, and the right to personal liberty. This right and respective remedy is protected by a strict separation of powers between on the one hand, the judiciary, and on the other, Parliament and the executive.[257] Australian society exists in the age of human rights. Remembering the terror and loss of life from the destruction of the World Trade Centre, London Underground Bombings, and Bali Bombings may well provide the electoral mandate from a fearful public for preventive detention. However, the legality of indefinitely detaining refugees with ASAs for fear of some future risk as a matter of policy without individuated assessment, and effective judicial oversight, may be deemed arbitrary and contrary to the right to liberty and security of person.

In situations of exceptional and actual or imminent danger that threatens the life of the nation, preventive detention is a restriction on individual liberty sacrificed to protect national freedom and security more effectively.[258] However, there are national values of respect for the dignity of the individual, commitment to the rule of law, and non-discrimination in the spirit of egalitarianism that prevent total sacrifice undermining Australia's true national security and freedom.[259] These values require an equal and impartial administration that is accountable to the judiciary for the clarity and integrity of the reasons behind decisions, actions, or inaction that enable indefinite preventive detention without criminal charge. No reasons have been given for why it took the Minister several months to make a visa decision after *M47*.

Judicial review involving intense scrutiny is required when a national security administrative detention regime targeting a particular identifiable social group has no rational connection to pursing the purpose of national security. Intensive judicial scrutiny in Plaintiff M47's circumstances means, first, applying the

254 Minister for Immigration and Citizenship, *Australian Values Statement for Public Interest Criterion 4019*, IMMI 12/081, 9 November 2012; *Waters v Public Transport Corporation* (1991) 173 CLR 349, 402 (McHugh J); *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth); *Australian Human Rights Commission Act 1986* (Cth); *ICCPR* arts 2(1), 26; David Dyzenhaus, 'The Rule of (Administrative) Law in International Law' (2005) 68(3–4) *Law and Contemporary Problems* 127, 161–2; Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 *European Journal of International Law* 187, 187–214; Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68(3–4) *Law and Contemporary Problems* 15, 61.

255 *Monis v The Queen* (2013) 295 ALR 259, 267 [20], 269–70 [28], 278 [59] (French CJ), 288–9 [103] (Hayne J), 342 [331] (Crennan, Kiefel and Bell JJ). See also *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 263–4 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

256 Beck, *Towards a New Modernity*, above n 17, 194.

257 *Constitution* s 75(v).

258 United Nations Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN ESCOR, 41st sess, UN Doc E/CN.4/1985/4 (28 September 1984) annex.

259 Minister for Immigration and Citizenship, above n 254.

principle of legality to sections of the *Migration Act* to determine the limits of legislative power to detain people indefinitely without criminal charge. Second, intensive judicial scrutiny involves checking whether ministerial decision-making is compliant with legislatively prescribed processes. Third, intensive scrutiny considers the constitutionally entrenched remedy of habeas corpus, an order of release, if the detention is found to be unlawful.

The present detention regime applied to refugees with ASAs fails to provide access to a court without delay that can order release if ongoing detention is held to be arbitrary and, hence, unlawful.[260] After over three years, with no prospect of removal to an alternate safe country, the practicable limits of removing Plaintiff M47 within a reasonable time have been broken. Recently in Ranjini's case, the High Court affirmed its decision in *M47* with four justices indicating they may consider the constitutional limits of the indefinite immigration detention of a refugee in a case with more suitable facts on another day.[261] The continuing detention of Plaintiff M47 once the Minister concluded his decision-making process by refusing to issue a visa might potentially involve suitable facts to seek judicial review and mandamus for justice to be done.[262] The High Court could closely scrutinise Ministerial decision-making to conclude that, contrary to their previous guidance, the Department of Immigration followed incorrect processes. Those processes depend entirely on a policy that arguably has no demonstrably rational connection to national security and border protection, or the requirements of the *Migration Act*, potentially grounding an action by Plaintiff M47 for false imprisonment.

In *M47* the Australian government argued that it was necessary to curtail the liberty of persons within the refugee population to the point of indefinite detention to protect national liberty, security and freedom. The unpredictable and incalculable character of threats to national security can utilise fear for its parasitic effect on national values such as respect for the rule of law, individual liberty, equality before the law, and procedural fairness, draining them of any substantial meaning. The profile of high-risk sources of threat to national security is not refugees and that makes it difficult to understand why there is a policy targeted at detaining recognised refugees for removal.[263] The High Court in *M47* expressed with clarity a willingness to consider the constitutional dimensions of the right to personal liberty for refugees.[264]

260 Ben Saul, '"Fair Shake of the Sauce Bottle": Fairer ASIO Security Assessments of Refugees' (2012) 37 *Alternative Law Journal* 221, 226–7; Ben Saul, 'Dark Justice: Australia's Indefinite Detention of Refugees on Security Grounds under International Human Rights Law' (2012) 13 *Melbourne Journal of International Law* 685.

261 *Plaintiff M76/2013 v Minister for Immigration Multicultural Affairs and Citizenship* (2013) 304 ALR 135, 138 [4] (French CJ), 165–8 [137]–[148] (Crennan, Bell and Gageler JJ).

262 See ibid 160 [113] (Hayne J).

263 Beck, *World at Risk,* above n 17, 105–6. The actual profile of the source of risk is 'much more likely to be "nice boys from the neighbourhood" who were born in our country and grew up in good middle-class … families': at 105.

264 *M47* (2012) 292 ALR 243, 227 [120] (Gummow J), 348–9 [400] (Crennan J), 362 [460] (Kiefel J), 378 [528] (Bell J).