

INTERNMENT DURING THE GREAT WAR – A CHALLENGE TO THE RULE OF LAW

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The tragic, and often shameful, discrimination against Australians of German origin fostered during the World Wars had many consequences. No doubt, some of you carry the emotional scars of injustice during those times as part of your backgrounds or family histories. Let me as Governor-General, say to all who do how profoundly sorry I am that such things happened in our country.¹

The Constitution ... is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among those I think that it may fairly be said that the rule of law forms an assumption.²

I INTRODUCTION

During the Great War the internment in the British Empire of British subjects posed challenges to the rule of law. The internment of British subjects was then challenged in England³ as well as in Australia.⁴ Albert Venn Dicey in his

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1 Sir William Deane, Governor-General of the Commonwealth of Australia 'On the Occasion of the Opening of the Australian Conference on Lutheran Education' (Address delivered at the opening of the Inaugural Australian Conference on Lutheran Education, Gold Coast, 26 September 1999) <<http://www.gg.gov.au/speeches/html/speeches/1999/990926.html>> at 14 August 2005.

2 *Australian Communist Party v The Commonwealth of Australia* (1951) 83 CLR 1, 193 per Dixon J cited by William Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed, 1976), 59.

3 *R v Governor of Brixton Prison* (unreported, 21 December 1915); *R v Halliday; Ex parte Zadig* [1917] AC 260.

4 *R v Lloyd; Ex parte Wallach* [1915] VLR 476, 479. The concept of Australian citizenship was introduced by the *Australian Citizenship Act 1948* (Cth). In 1983 the *Australian Citizenship Act* was amended to remove the British subject status for Australians: see Brian Galligan and Winsome Roberts, *Australian Citizenship* (2004), 35–6.

Introduction to the Study of the Constitution then expounded the rule of law as a fundamental characteristic of the English *Constitution*.⁵ Dicey was at that time highly influential throughout the Empire. Lord Bingham has pointed out that after the *Introduction to the Study of the Constitution* first appeared in 1885 it ‘dominated discussion of its subject for most of the ensuing century’.⁶ One person who recognised the challenge to the rule of law that was posed by internment was Robert Menzies who as an undergraduate examined this issue in *The Rule of Law During the War*⁷ for which he was awarded the coveted Bowen English prize at the University of Melbourne.⁸ Menzies later became the longest-serving Prime Minister of Australia.⁹

Even though Dicey was a ‘living author’ his work could not then be cited by the courts as authoritative. However, as the holder of the Vinerian chair his work was not without influence and his work was cited by Sir Frederick Smith as the Solicitor-General in one internment case.¹⁰ At that time the practice appeared to be that counsel were free to cite the work of a living author provided that the citation was not regarded as authoritative.¹¹ This article argues that the judgments in some wartime internment cases were informed by the work of Dicey even though his work was not cited in those judgments. It is also submitted that the courts of the time did not pay sufficient regard to the then newly-passed *British Nationality and Status of Aliens Act 1914*¹² which gave rights to naturalised British citizens.

The process of internment involves the detention of a person into custody who is not formally charged with an offence. An interned person will generally not be entitled to a hearing in the ordinary courts of the land on the merits of the detention. However, there may sometimes be a review before some internal panel or advisory committee. A process of review may be undertaken on the papers and not even require that an oral hearing be held. The internee may not have the opportunity to insist on legal representation or to adduce evidence and examine witnesses. Perhaps more importantly an internee detained on ‘security grounds’ will not be entitled to know the grounds on which the internee is detained.¹³ Internment is also an arbitrary process, as different officials may take different views upon whether or not the internment of a person was justified in a particular instance. Internment was, as Menzies remarked, ‘the recognition of a kind of

5 A V Dicey, *Introduction to the Study of the Law of the Constitution*, (8th ed, 1915), 183 (For this article I have used the Liberty Classics 1982 reprint of this edition).

6 Lord Bingham of Cornhill, ‘Dicey Revisited’ [2002] *Public Law* 39, 40.

7 Robert G Menzies, *The Rule of Law During the War* (1917).

8 Robert G Menzies, *The Rule of Law During the War* (1917), cover page; Allan Martin, *Robert Menzies – A Life* (1993), 19.

9 Menzies served as Prime Minister between 1939–1941 and then again between 1949–1966.

10 In *R v Superintendent of Vine Street Police Station; Ex parte Liebmann* [1916] 1 KB 268, 270, Sir FE Smith KC, Solicitor-General, stated that Dicey defines prerogative as ‘the discretionary authority of the Executive’ and he explains that that means everything which the King or his servants can do without the authority of an Act of Parliament. It would seem that he was referring to A V Dicey, *Introduction to the Study of the Law of the Constitution*, (8th ed, 1915, Liberty Classics 1982 reprint), 281, 421.

11 *Greenlands Ltd v Wilmshurst* (1913) 29 TLR 685, 687 (Vaughan Williams LJ).

12 4 & 5 Geo 5, c 17.

13 Ernst Joseph Cohn, ‘Legal Aspects of Internment’ (1941) 4 *Modern Law Review* 200, 202.

administrative arrest; the harking back to systems which had strength in the sixteenth and seventeenth centuries'.¹⁴

Clause 39 of *Magna Charta* provided that 'no free man shall be ... imprisoned except by the lawful judgement of his equals or by the law of the land'. Menzies regarded internment as 'a virtual suspension of one of the fundamental provisions of *Magna Charta*'.¹⁵ Whilst internment certainly did not involve any judgment of the 'peers' of an interned person, in *Lloyd v Wallach*,¹⁶ ('*Wallach*') which Menzies examined, the internment was ultimately held to be authorised by the 'law of the land'. This is because in that case the internment was held to be authorised by statute.¹⁷ In using the words 'virtual suspension' Menzies would undoubtedly have had in mind the comments by Cussen J who remarked: 'I fail to see why an Act of Parliament, because it is given a certain construction, should not be treated as the law of the land'.¹⁸ There were certainly statutes in force in the British Empire that enabled orders or regulations to be made to authorise the internment of alien enemies.¹⁹ However, in some cases the internment of alien enemies was justified by the exercise of the prerogative powers of the Crown, which was just as much 'the law of the land' as any statute, although undoubtedly more nebulous.

II THE RULE OF LAW

Professor W Harrison Moore, a leading authority on constitutional law,²⁰ wrote the foreword to *The Rule of Law During the War*.²¹ In the foreword he identified three principles that 'summarize our political system': the rule of law, self-government and Parliamentary sovereignty. For Moore the rule of law meant 'that government must be carried on in accordance with the law as administered in the ordinary Courts' and 'the prevalence of an idea of right against arbitrary will'. Moore emphasised that 'executive authority is not above, but below the rule of law'. Moore also appreciated that with the advent of the modern principle of Parliamentary authority, the notion of law has become 'nothing other than an expression of will by a political superior'. He remarked: 'If, however, our

14 Robert G Menzies, *The Rule of Law During the War* (1917), 3.

15 Ibid 23.

16 *Lloyd v Wallach* (1915) 20 CLR 299.

17 *War Precautions Act 1914* (Cth).

18 *R v Lloyd; Ex parte Wallach* [1915] VLR 476, 509.

19 *Aliens Restriction Act 1914* (UK) ss 1(1)(d), (i); *War Measures Act 1914* (5 Geo 5, c 2) (Canada), ss 6, 11; *War Precautions Act (No. 10) 1914* (Cth), s 5.

20 Sir W Harrison Moore was a Professor of Law at the University of Melbourne (1892–1925). He was a constitutional adviser to the Government of Victoria (1907–10) and a member of the Committee on Constitutional Amendments (1919). He authored *The Constitution of the Commonwealth of Australia* (1910) and *Act of State in English Law* (1906).

21 Allan Martin has pointed out that the book had the 'honour of an introduction by William Harrison Moore the Professor of Law, and Menzies' hero': Allan Martin, *Robert Menzies – A Life* above n 7, 20.

conception of law is no more than an expression of will and power, it loses its moral value and ultimately its efficacy in the control of man's relations'.²²

Menzies was heavily influenced by the writings of Dicey as were other common lawyers of his era. In *The Rule of Law During the War*²³ there are references to two successive editions of *Introduction to the Study of the Law of the Constitution*.²⁴ W Ivor Jennings stated that 'Dicey has not dealt with the *Constitution* of England. He has been concerned with only a small part of it which deals with public order'.²⁵ However, Dicey did not intend to deal with the English *Constitution* in the same systematic manner as he examined private international law. In the preface to the first edition of his *Introduction to the Study of the Law of the Constitution*, Dicey modestly stated in 1885 that it 'does not pretend to be even a summary, much less a complete account of constitutional law. It deals only with two or three guiding principles which pervade the modern *Constitution* of England'.²⁶ One of those guiding principles was the rule of law. Dicey considered that 'the supremacy or rule of law is a characteristic of the English *Constitution*'.²⁷

A 'Three kindred conceptions'

Dicey regarded the rule of law as including 'three kindred conceptions'²⁸ or what Menzies referred to as 'three distinct phases of meaning'.²⁹ Dicey expressed these 'three kindred conceptions' of the rule of law as follows:

- (1) We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.³⁰
- (2) We mean, in the second place, when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.³¹

22 Above n 7, 25.

23 Above n 7.

24 A V Dicey, *Introduction to the Study of the Law of the Constitution*, (7th ed, 1908); A V Dicey, *Introduction to the Study of the Law of the Constitution*, (8th ed, 1915).

25 W Ivor Jennings, 'The Report on Minister's Powers' (1932) 10 *Public Administration* 333, 341.

26 A V Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, 1915, Liberty Classics 1982 reprint), xxv.

27 Ibid 183.

28 Ibid. Simpson has pointed out that most of these ideas are to be found in Blackstone, but in embryo: Alfred Brian Simpson, *Human Rights and the End of Empire* (2001), 34.

29 Robert G Menzies, *The Rule of Law During the War*, above n 7, 9.

30 A V Dicey, *Introduction to the Study of the Law of the Constitution*, (8th ed, 1915, Liberty Classics 1982 reprint), 183–4.

31 Ibid 189.

- (3) There remains yet a third and a different sense in which the ‘rule of law’ or the predomination of the legal spirit may be described as a special attribute of English institutions. We may say that the *Constitution* is pervaded by the rule of law on the ground that the general principles of the *Constitution* (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.³²

Menzies regarded it as significant that throughout these statements runs the idea of the ‘ordinary law’ and the ‘ordinary Courts of the land’. The rule of law was for Menzies ‘the complete negation of arbitrary power or any very extended use of prerogative right’.³³

B Rule of Law Secures Individual Freedom

Dicey was most certainly an individualist of the liberal era.³⁴ There is some validity to the view of Jennings that Dicey was a ‘conservative Liberal-Unionist of the Victorian era’.³⁵ Dicey regarded the common law as a guarantee of the freedom of the rights of the individual. He saw the rule of law as implying the security given under the English *Constitution* to the rights of individuals. One commentator has emphasised that ‘Dicey favoured the freedom of men from arbitrary government not their freedom to arbitrarily defy the law’.³⁶

Dicey also saw the development of administrative agencies as being the main threat to the rule of law.³⁷ He contrasted the rule of law ‘with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of government’.³⁸ The concern was that the rights of a person would be dealt with by agencies and tribunals that were other than ‘the ordinary Courts of the land’.

British constitutional law was changing with successive editions of the *Introduction to the Study of the Law of the Constitution*. In the 1915 edition Dicey lamented the changes to the constitutional structure caused by industrial lawlessness as well as the growth of tribunals.³⁹ He was thankfully spared the development whereby Community law may invalidate an Act of the Westminster Parliament.⁴⁰

32 Ibid 191.

33 Robert G Menzies, *The Rule of Law During the War*, above n 7, 9.

34 Gottfried Dietze, *Two Concepts of the Rule of Law* (1973), 4.

35 W Ivor Jennings, ‘The Report on Minister’s Powers’ (1932) 10 *Public Administration* 333, 342. See also G de Q Walker, *The Rule of Law* (1988), 133.

36 David Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order* (1999), 11.

37 Ibid.

38 A V Dicey, *Introduction to the Study of the Law of the Constitution*, (8th ed, 1915, Liberty Classics 1982 reprint), 110.

39 Ibid, lvi.

40 *R v Secretary of State for Transport Ex parte Factortame* [1991] 1 AC 603.

III PERSONAL FREEDOM AND THE RULE OF LAW

Menzies rightly appreciated that the process of internment most certainly offends the conceptions of the rule of law as enunciated by Dicey. The curtailment of the freedom of a person is a process whereby a person ‘can be lawfully made to suffer in body’. The process of internment also does not occur because of ‘a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land’. The internment of an individual occurs because of the decision by some administrative official that it is the interests of the State that the freedom of a person is taken away during a conflict. In this process not only is the freedom of a person taken away by a decision other than a judgment of ‘the ordinary Courts of the land’, an interned person becomes unable to challenge the merits of the detention in ‘the ordinary Courts of the land’.

Dicey regarded any restraint on freedom as being *prima facie* illegal. He remarked:

That anybody should suffer physical restraint is in England *prima facie* illegal, and can be justified (speaking in very general terms) on two grounds only, that is to say, either because the prisoner or person suffering restraint is accused of some offence and must be brought before the Courts to stand his trial, or because he has been duly convicted of some offence and must suffer punishment for it.⁴¹

The notion of internment does not readily fit into this formulation although Dicey later commented ‘again in very general terms indeed’ that that there would be the need to have ‘some legal warrant or authority’ for any arrest or imprisonment.⁴²

The influence of Dicey is still seen where there is an attack on personal freedom. In 1994 the New South Wales Parliament, under considerable community pressure, passed the *Community Protection Act 1994* (NSW) that was intended to provide for the preventive detention of one man whose release from prison was imminent. The *Community Protection Act* was later held by the High Court of Australia as being incompatible with Chapter III of the *Commonwealth Constitution* and thus unconstitutional.⁴³ A member of the Parliament (Hon J W Shaw MLC) said:

there is no clear precedent in other democratic regimes for a measure of this kind – that is, detention for two years without any criminal charge being laid, without any criminal trial being conducted, and without a jury having found the person guilty beyond a reasonable doubt.

41 A V Dicey, *Introduction to the Study of the Law of the Constitution*, (8th ed, 1915, Liberty Classics 1982 reprint), 124.

42 Ibid.

43 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

He went on to mention:

One of the great constitutional theorists of the nineteenth century, who wrote about the rule of law, was Albert Venn Dicey. Some people, even those of my side of politics, might regard his comments as a Tory slogan, but the rule of law is a positive force for freedom and justice in our society. It is as relevant to 1994 as it was to the nineteenth century. Dicey wrote a definition of the rule of law, and part of that definition is very apposite to this measure.

The Honourable Member then quoted from the *Introduction to the Study of the Law of the Constitution* to illustrate Dicey's conception of the rule of law:

Englishmen are ruled by the law and by the law alone. A man may be punished for breaches of law, but he can be punished for nothing else. ... We mean in the first place that no man is punishable, or can be made to suffer in body or good, except for a clear breach of law established in the ordinary legal manner, established before the ordinary courts of the land. In this sense, the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint.⁴⁴

IV PRE-WORLD WAR I CONCERN ABOUT GERMAN ESPIONAGE

Prior to the Great War there was grave concern about German espionage activity.⁴⁵ A number of sub-committees of the Committee of Imperial Defence examined German espionage activity, including the sub-committee of Lord Haldane, which proposed a revision of the *Official Secrets Act 1889*.⁴⁶ This Act was repealed by the *Official Secrets Act 1911*⁴⁷ which increased the penalties for wrongful possession of official information, conferred a power to arrest a person committing a offence so that 'the person is apprehended and detained in the same manner as a person who is found committing a felony' (that is, arrest without a warrant); and imposed a penalty for harbouring spies. The *Official Secrets Act 1911* also made it clear that a person who incited the commission of an offence under the Act was guilty of a felony or misdemeanour. The *Official Secrets Act 1911*, like the 1889 Act, also extended to all British possessions, including the Dominions.

From the outset, the Government appreciated that it would have to examine the position of aliens. From the Napoleonic Wars until the commencement of the *Aliens Act 1905*⁴⁸ in 1906 no alien was prevented from entering or leaving the

44 Second Reading Debate, Community Protection Bill 1994 (NSW), Legislative Council, 15 November 1994 (Jeffrey W Shaw, Shadow Attorney-General of NSW) <<http://www.parliament.nsw.gov.au/prod/parliament/hansart.nsf/V3Key/LC19941115009>> at 14 August 2005.

45 Foxton refers to the German spy-mania of the early 1900s: see David Foxton, 'R v Halliday ex parte Zadig in Retrospect' (2003) 119 *Law Quarterly Review* 455, 461 fn 50.

46 52 & 53 Vict, c 52. See Panikos Panayi, *German Immigrants in Britain During the 19th Century, 1815–1914* (1995), 249.

47 1 & 2 Geo 5, c 28.

48 5 Edw 7, c 13.

United Kingdom.⁴⁹ This meant that in the event of war with Germany there would be a considerable number of enemy aliens whose number and location would not be known to the Home Office. That is why the Haldane sub-committee recommended the establishment of another sub-committee to specifically examine the treatment of aliens in time of war. This sub-committee, under the chairmanship of the Home Secretary, Winston Churchill, established an unofficial register of aliens kept by the police. In July 1913 this unofficial register contained some 28 830 names (including 11 100 Germans and Austrians). The Churchill sub-committee also recommended the establishment of a ‘Standing Sub-Committee of the Committee of Imperial Defence on the Treatment of Aliens in Time of War’ which drew up the draft *Aliens Restriction Act*.⁵⁰ There then began a process whereby the freedom of enemy aliens was taken away at a time of national emergency.

V ALIENS RESTRICTION ACT 1914

On 5 August 1914 His Majesty King George V assented to the *Aliens Restriction Act 1914*,⁵¹ which had been passed without discussion by both the House of Lords and the House of Commons that day. His Majesty had declared war on the German Empire on the previous day, 4 August 1914. Section 1 of the *Aliens Restriction Act* empowered His Majesty ‘at any time when a state of war exists between His Majesty and any foreign power, or when it appears that an occasion of imminent national danger or great emergency has arisen’ to make Orders in Council to ‘impose restrictions on aliens’. The declaration of war having been made on the day previous to when the King gave his assent to the *Aliens Restriction Act*, Orders in Council could be made under the authority of the Act.

A Aliens Could be Regulated by Orders in Council

The *Aliens Restriction Act* gave wide powers to the executive branch of government to regulate the activities of aliens in Britain.⁵² The *Aliens Restriction Act* enabled Orders in Council to be made in respect of such matters as prohibiting aliens from landing or embarking in the United Kingdom;⁵³ for the deportation of aliens;⁵⁴ for requiring aliens to reside and remain within certain places or districts;⁵⁵ for prohibiting aliens from residing or remaining in any

49 David Saunders, ‘Aliens in Britain and the Empire During the First World War’ (1985) 4 *Immigrants & Minorities* 5, 6.

50 Discussed below.

51 4 & 5 Geo 5, c12.

52 Prakash Shah, *Refugees, Race and the Legal Concept of Asylum in Britain* (2000), 43; Stephen Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* (1987), 95, 244.

53 *Aliens Restriction Act 1914*, ss 1(1)(a), (b).

54 *Aliens Restriction Act 1914*, s 1(1)(c).

55 *Aliens Restriction Act 1914*, s 1(1)(d).

areas specified in the Order;⁵⁶ and for requiring aliens residing in the United Kingdom to comply with certain provisions as to registration, change of abode, travelling or otherwise as specified in the Order.⁵⁷ More significantly, the Act enabled an Order in Council to be made for ‘conferring upon such persons as may be specified in the Order such powers with respect to arrest, detention, search of premises or persons, and otherwise, as may be specified in the Order and for any other ancillary matters for which it appears expedient with a view to giving full effect to the Order’.⁵⁸

Vaughan Bevan said that the Act ‘essentially gave the Secretary of State a free hand to regulate aliens as he saw fit’.⁵⁹ Various Orders in Council were made to restrict the activities of alien enemies. These Orders in Council were promulgated upon the very day that assent was given to the Act. Crucial to the success of any internment programme, was an Order in Council of 5 August 1914 which required all enemy aliens to register themselves at the local registration office, usually the local police station.⁶⁰

B Prerogative Powers of the Crown Unaffected by Act

The Government in sponsoring the passage of the *Aliens Restriction Act* did not want to affect any prerogative powers of the Crown. A savings clause in the *Aliens Restriction Act* expressly provided that any powers under s 1 of the Act or under any Order in Council made under the section ‘shall be in addition to, and not in derogation of, any other powers with respect to the expulsion of aliens, or the prohibition of aliens from entering the United Kingdom’.⁶¹ Somewhat surprisingly, the savings clause in the *Aliens Restriction Act* did not refer to the detention of enemy aliens even though the Act enabled an Order in Council to be made for the ‘detention’ of aliens.⁶² However, the savings clause also made it clear that the *Aliens Restriction Act* did not derogate from ‘any other powers of His Majesty’.⁶³ The savings clause was obviously inserted in the *Aliens Restriction Act* to preclude any argument such as later arose in cases like *Attorney-General v De Keyser’s Royal Hotel*,⁶⁴ and later in the Australian case of *Ruddock v Vadarlis* (‘*MV Tampa Case*’),⁶⁵ that the prerogative of the Crown was displaced by the conferral of extensive defined statutory powers upon officers of the Crown. It might be mentioned that the prerogative power to prohibit aliens from entering the realm was recently reaffirmed in the *MV Tampa Case*.

No Order in Council appears to have been made under the *Aliens Restriction Act* to authorise the internment of enemy aliens. It is interesting to speculate why

56 *Aliens Restriction Act 1914*, s 1(1)(e).

57 *Aliens Restriction Act 1914*, s 1(1)(f).

58 *Aliens Restriction Act 1914*, s 1(1)(i).

59 Panikos Panayi, ‘The Destruction of the German Communities in Britain During the First World War’ in Panikos Panayi (ed), *Germans in Britain since 1500* (1996), 116.

60 *Ibid* 116–8.

61 *Aliens Restriction Act 1914*, s 1(6).

62 *Aliens Restriction Act 1914*, s 1(1)(i).

63 *Aliens Restriction Act 1914*, s 1(6).

64 [1920] AC 508.

65 *Ruddock v Vadarlis* (2001) 110 FCR 410.

the Government chose to rely on the prerogative of the Crown to authorise the internment of enemy aliens. There may have been an argument that the *Aliens Restriction Act* had not been specific enough to authorise long-term internment for the duration of the war. An argument may also have been open that the *Aliens Restriction Act*, in enabling the Executive to prohibit an alien enemy from travelling more than five miles from his registered address, may not been specific enough to authorise the more drastic remedy of internment.⁶⁶ The word ‘detention’ in s 1 of the *Aliens Restriction Act*,⁶⁷ may have been thought to only confer an *ejusdem generis* construction as it appeared in the words ‘arrest, detention, search of premises or persons’ and so was limited to the investigation of offences and not to the more long-term nature of internment. However, in one case the Solicitor-General took the view that the internment of aliens could, if necessary, be justified under the *Aliens Restriction Act*.⁶⁸ However, to draft Orders in Council under the *Aliens Restriction Act* may have reduced flexibility of administration and any delay in drafting such measures to apply to individuals may well have been prejudicial to the defence of the realm. Such reasons may have been why the Executive chose to place reliance upon the prerogative powers of the Crown to detain enemy aliens.

VI INTERNMENT OF ENEMY ALIENS

Within two days after the passage of the *Aliens Restriction Act* the General Staff called for the comprehensive internment of all Germans and Austrians. However, the War Office, the Foreign Office and most particularly the Home Office recognised that this measure was impractical. However, despite such opposition some 4300 males, including suspected spies, were interned within a month.⁶⁹ The registration process required each alien to disclose particulars of their service with a foreign government.⁷⁰ In this manner, moves were made to identify enemy military and naval reservists.⁷¹ Initially men of military age were interned. Later, some 3000 men were released between November 1914 and early February 1915. One reason why there was no wholesale internment at this time was because there was a lack of space to house prisoners.⁷² The general internment of enemy aliens occurred after the sinking of the *Lusitania*. On 15 May 1915 Prime Minister Asquith announced: ‘At this moment some 40,000 unnaturalised aliens, of whom 24,000 are men, are at large in this country. The government proposes that all adult males of this class should, for their own safety

66 Cf *R v Superintendent of Vine Street Police Station; Ex parte Liebmann* [1916] 1 KB 268, 272.

67 *Aliens Restriction Act 1914*, s 1(1)(i).

68 *R v Superintendent of Vine Street Police Station; Ex parte Liebmann* [1916] 1 KB 268, 270.

69 Panikos Panayi, ‘The Destruction of the German Communities in Britain During the First World War’ above n 59, 71–5. By late September 1914 some 13 600 persons were interned, many of whom were enemy military reservists. By February 1915, 3000 had been released with some 7000 people voluntarily repatriating.

70 Ibid 118.

71 Ibid 70–6.

72 Ibid 120.

and that of the country, be segregated and interned'.⁷³ This policy was later implemented on 1 June 1915 by regulation 14B of the *Defence of the Realm Regulations* which enabled the Home Secretary on the recommendation of 'competent naval or military authority' to intern a person who had 'hostile origin or associations'.⁷⁴

VII HABEAS CORPUS AND ENEMY ALIENS

In the Great War one issue that arose was whether *habeas corpus* was suspended in circumstances like the grave peril of the nation. The availability of the writ of *habeas corpus* is a question that arises whenever anybody wishes to make a challenge to the internment of an individual. The writ of *habeas corpus* is traditionally regarded as the safeguard of liberty under English law. Dicey said: 'The *Habeas Corpus Acts* declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty'.⁷⁵ That is because under *habeas corpus* proceedings the legality of the detention of a person can be examined. Menzies remarked that 'one of the results of the growth of the Rule of Law was that 'commitment per *specific mandatum regis* ... was not a sufficient return to a writ of *Habeas Corpus*'.⁷⁶

During the Great War the availability of the 'great writ' was not uniform throughout the Dominions. In Britain and Australia *habeas corpus* proceedings were not suspended by statute during the war. Dicey⁷⁷ recognised that, in times of national emergency, there have been instances in British history when the availability of the writ of *habeas corpus* has been expressly suspended by Parliament.⁷⁸ In England, in *R v Superintendent of Vine Street Police Station; Ex parte Liebmann*⁷⁹ Sir Frederick Smith, as the Solicitor-General, informed the court: 'It is not contended that the *Habeas Corpus Act* is suspended by the war'.⁸⁰ Later, in *R v Halliday*⁸¹ Sir Frederick Smith, as the Attorney-General, informed their Lordships: 'There is no ground for the contention that the legislation in

73 James Garner, 'The Treatment of Enemy Aliens' (1918) 12 *American Journal of International Law* 27, 41; Panikos Panayi, 'The Destruction of the German Communities in Britain during the First World War' above n 59, 122.

74 David Foxton, '*R v Halliday ex parte Zadig in Retrospect*' (2003) 119 *Law Quarterly Review* 455, 465–6.

75 A V Dicey, *Introduction to the Study of the Law of the Constitution*, (8th ed, 1915, Liberty Classics 1982 reprint), 142–3.

76 Robert G Menzies, *The Rule of Law During the War*, above n 7, 24.

77 A V Dicey, *Introduction to the Study of the Law of the Constitution*, (8th ed, 1915, Liberty Classics 1982 reprint), 224–8.

78 There have been many occasions when *habeas corpus* has been suspended in Britain: see Robert Sharpe, *The Law of Habeas Corpus* (2nd ed, 1989), 94–5. See also Alfred Brian Simpson, *Human Rights and the End of Empire* above n 28, 57–8, where it is mentioned that the last occasion when *habeas corpus* was suspended in the United Kingdom was in Ireland between 1866 and 1869.

79 [1916] 1 KB 268.

80 Ibid 270.

81 [1917] AC 260, 263.

question has taken away the appellant's right to apply for a writ of *habeas corpus* if there is any foundation for it'.⁸²

A different approach was evident in Canada. Whilst the *Habeas Corpus Act* was not expressly suspended in Canada the wartime legislation provided that an enemy alien could not be discharged without the consent of the Minister for Justice.⁸³ This Canadian legislation had the consequence that the court could not under *habeas corpus* proceedings order the release of an interned alien enemy without the prior consent of the Minister for Justice.⁸⁴

Quite apart from any considerations of whether or not the right to *habeas corpus* was suspended by statute, there is long-standing authority that prisoners of war could not seek *habeas corpus*.⁸⁵ However, the mere assertion by the Executive that a prisoner is a prisoner of war does not prevent the court from examining the truth of that assertion. In *habeas corpus*⁸⁶ and other⁸⁷ proceedings the courts have always asserted the jurisdiction to determine whether or not a prisoner was an enemy alien. Recently, the Supreme Court of the United States in *Rasul v Bush*⁸⁸ reaffirmed this jurisdiction by ruling that the federal courts have jurisdiction to determine the legality of the detention of foreign nationals detained at the Guantanamo Bay Naval Base, Cuba. In that case the fact that the plaintiffs were not nationals of countries at war with the United States was an important consideration.

VIII PREROGATIVE AUTHORITY TO INTERN ENEMY ALIENS

The reliance by the Executive on the prerogative powers of the Crown to detain enemy aliens was certainly something that Dicey would have understood. Indeed, Dicey in his discussion of constitutional law appreciated that certain acts of the government that were done without statutory authority may be done in reliance on these prerogative powers. As Dicey remarked: 'Every act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative'.⁸⁹ However, whilst recognising that the prerogative could affect the rights of a person, Dicey did not closely focus upon how the prerogative could affect the right to personal freedom of a person. Menzies was also aware of the significance of the prerogative of the

82 Ibid.

83 *War Measures Act 1914*, 5 Geo 5, c 2, s 5.

84 See, eg, *Gusetu v Lang* (1915) 24 CCC 427.

85 *Three Spanish Sailors' Case* (1779) 2 WBl 1324, 96 ER 775; *R v Schiever* (1759) 2 Burr 765, 97 ER 551; *Furly v Newnham* (1780) 2 Doug 419, 99 ER 269.

86 *R v Schiever* (1759) 2 Burr 765, 766, 97 ER 551, 552 ('but the Court thought this man, upon his own shewing, clearly a prisoner of war, and lawfully detained as such').

87 *Sparenburgh v Bannatyne* (1797) 1 Bos & Pol 162, 126 ER 837.

88 542 US 466 (SC, 2004).

89 A V Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, 1915 Liberty Classics 1982 reprint), 282-3.

Crown; in *The Rule of Law During the War* he referred to ‘any very extended use of prerogative right’.⁹⁰

The Crown has a recognised prerogative power to intern enemy aliens. In an eighteenth century case it was said: ‘if an alien enemy come into England without the Queen’s protection, he shall be seized and imprisoned under the law of England’.⁹¹ That ‘law of England’ would undoubtedly be the prerogative powers of the Crown as there was then apparently no statute that conferred such authority. This prerogative power to detain enemy aliens had not fallen into disuse by the time of the Great War. The existence of the prerogative power to intern enemy aliens was affirmed by decisions during the Great War⁹² and later after the Second World War.⁹³ It should be appreciated that in the United Kingdom, which does not have a written constitution, the issue of whether a prerogative power exists to enable a public official to do a particular act is certainly examinable by the courts.⁹⁴

A The *Liebmann* case

In September 1915 a challenge to the detention of an enemy alien was made in *R v Superintendent of Vine Street Police Station; Ex parte Liebmann*.⁹⁵ In this case the enemy alien was not an actual combatant or enemy reservist. Alfred Liebmann, who had obtained a discharge from German nationality, but had not become a naturalised British subject, had sought *habeas corpus*. Under the German *Delbrück* Law (‘German Imperial and State Nationality Law’) of 1913 Liebmann was not entirely divested of German citizenship and could reapply under that law for German citizenship. Liebmann would in these circumstances be regarded as an alien enemy. The *Liebmann* case was certainly an important test case for the Crown. In the event of an adverse ruling the Crown would be faced with false imprisonment actions from the many enemy aliens who were detained as well as the embarrassing need to pass remedial legislation.

The importance of this issue from the viewpoint of the Executive was apparent because the Attorney-General sought a ruling from a Divisional Court. In addition, the Solicitor-General (Sir Frederick Smith) personally appeared before the Divisional Court to show cause why a writ of *habeas corpus* should not be issued. The Solicitor-General conceded: ‘It is true that there is no authority in the books for the proposition that the Crown by virtue of the prerogative has the right to control the liberty of aliens’.

90 Robert G Menzies, *The Rule of Law During the War* above n 7, 9.

91 See, eg, *Sylvester’s Case* (1702) 7 Mod 150, 87 ER 1157.

92 See, eg, *R v Superintendent of Vine Street Police Station; Ex parte Liebmann* [1916] 1 KB 268 (DC); *Ex parte Weber* [1916] 1 KB 280.

93 *R v Bottrill; Ex parte Kuechenmeister* [1947] 1 KB 41.

94 See *Re Diftord; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 368–9 (Gummow J).

95 [1916] 1 KB 268.

However, the Solicitor-General submitted that the absence of authority was ‘that the necessity of so controlling them has never before arisen’.⁹⁶ He submitted:

the internment of alien enemies is part of the discretionary power of the Executive, and therefore the terms of the *Aliens Restriction Act*, 1914 (4 & 5 Geo. 5, c.12), and the Orders made thereunder are immaterial. The Act of 1914 was not passed in consequence of the absence of power in the Crown to intern aliens, but in order to give notice of the powers of the prerogative, and by s.1, sub-s.6, the powers of the Crown are expressly preserved.⁹⁷

In the *Liebmann* case the Divisional Court (Bailhache and Low JJ) accepted the submission of the Crown that the prerogative enabled the internment of an alien enemy who was not a combatant or spy. The court was not prepared to make a distinction between a prisoner of war or other enemy alien. Justice Bailhache remarked:

Spying has become the hall-mark of German ‘kultur’. In these circumstances a German civilian in this country may be a danger in promoting unrest, suspicion, doubts of victory, in communicating intelligence, in assisting in the movements of submarines and Zeppelins – a far greater danger, indeed, than a German soldier or sailor.⁹⁸

Later, the House of Lords later confirmed that this prerogative power to detain enemy aliens extended to an alien who had not completely lost his German nationality.⁹⁹

IX NO PREROGATIVE AUTHORITY TO DETAIN BRITISH SUBJECTS

It is clear that, at least since Tudor times, there is no recognised prerogative power to intern a subject of the Crown. In a recent study of the rule of law in Tudor times it was observed that the monarchy was then regarded as a limited monarchy, as the King or Queen was subject to the law.¹⁰⁰ Even at that time the liberty of a subject of the Crown was something that would be protected by the courts from the reach of the Crown itself. In 1532 in *Sergeant Browne’s Case*¹⁰¹ the judges advised Henry VIII that he could not imprison his subjects without trial.¹⁰² This tradition continued up to the Great War where the judges appreciated that the liberty of British subjects could not be lightly taken away by the Crown. For instance, in *Liebmann*¹⁰³ Low J stated: ‘nothing in this judgment

96 Ibid 270.

97 Ibid.

98 Ibid 275.

99 *Ex parte Weber* [1916] AC 421.

100 John Baker, *The Oxford History of the Laws of England* (2003), 63.

101 (1532) Spelman 183, 184. Baker has pointed out that the case is misdated as 1540: Ibid 63 fn 58.

102 Ibid 63.

103 [1916] 1 KB 268.

is intended to apply to the case, should it arise of a British subject or of a friendly alien, but only to the case of an alien enemy'.¹⁰⁴

A The 'broad and fundamental principle of English law'

Dicey, himself, in discussing martial law in England during a time of war or insurrection, remarked:

we must constantly bear in mind the broad and fundamental principle of English law that a British subject must be presumed to possess at all times in England his ordinary common-law rights, and especially his right to personal freedom, unless it can be conclusively shown, as it often may, that he is under given circumstances deprived of them, either by Act of Parliament or some well-established principle of law.¹⁰⁵

This 'broad and fundamental principle of English law' of Dicey was an important statement of principle which recognised that right to personal freedom of a British subject could not be lightly abrogated.

B The German *Delbrück* Law

One important issue was the status of Imperial Germans who later became naturalised as British subjects. One matter of concern was that Imperial Germans could retain their German citizenship under some circumstances despite being subject to naturalisation in a foreign country. Section 25 of the German *Delbrück* Law of 1913 provided that a German national who applied for a foreign nationality without first obtaining the permission of the German authorities would lose his or her nationality.¹⁰⁶ However, a German national who obtained the requisite permission from the German authorities to relinquish his or her citizenship could re-acquire German citizenship following the revocation of his or her acquired British citizenship.. This residual right to re-acquire German citizenship, which was retrospectively conferred by the German *Delbrück* Law, meant that a former German citizen was not irrevocably divested of his or her German nationality and this created dual allegiances between countries at war. In Britain, the courts did not attach special significance to whether German nationality had been lost by long residence abroad or formal discharge from a German official. This is because the *Delbrück* Law still gave residual rights to a German who had divested himself or herself of German nationality.¹⁰⁷

104 [1916] 1 KB 268, 279.

105 A V Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, 1915, Liberty Classics 1982 reprint), 397.

106 *Oppenheimer v Cattermole* [1976] AC 249, 254 (Lord Cross of Chelsea, Lord Salmon agreeing).

107 Arnold McNair, 'British Nationality and Alien Status in Time of War' (1919) 35 *Law Quarterly Review* 213, 225.

C Arthur Zadig

Wartime cases that tested the legality of the internment of naturalised citizens established that British subjects of enemy origin could be interned. Before the war had ended national security had emerged triumphant over the individual rights of persons, especially those of enemy alien origins. The leading English test case concerned *habeas corpus* proceedings to challenge the internment of Arthur Zadig who was naturalised in 1905.¹⁰⁸ The order,¹⁰⁹ which appears in the report of proceedings before the House of Lords,¹¹⁰ was made under regulation 14B of the *Defence of the Realm (Consolidation) Regulations 1914*. The regulation enabled the Secretary of State to order the internment of any person ‘of hostile origin or associations’. Initially Lord Reading CJ stated that ‘the Court would require a very clear argument before it would hold that a British subject could be imprisoned without trial’.¹¹¹ However, the Home Secretary, Sir John Simon, did not consider that it was appropriate ‘to draw a strict line’ between naturalised and natural born subjects.¹¹²

1 Divisional Court Declined Zadig a Rule for Habeas Corpus

On 20 January 1916 the Divisional Court declined Zadig a rule for *habeas corpus* against Sir Frederick Halliday who was the commandant of the place of internment.¹¹³ As this was an important test case the Divisional Court was presided over by Lord Reading CJ and four other judges.¹¹⁴ The Divisional Court ruled that the detention of Zadig was authorised by regulation 14B of the *Defence of the Realm (Consolidation) Regulations 1914*.

¹⁰⁸ The internment of Zadig is comprehensively discussed in David Foxton, ‘*R v Halliday ex parte Zadig in Retrospect*’ (2003) 119 *Law Quarterly Review* 455

¹⁰⁹ ‘Whereas, on the recommendation of a competent military authority appointed under the Defence of the Realm Regulations, it appears to me that, for securing the public safety and the defence of the realm, it is expedient that Arthur Zadig, of 56 Portsdown Road, Maida Vale, W., should, in view of his hostile origin and associations, be subjected to such obligations and restrictions as are hereinafter mentioned. I hereby order that the said Arthur Zadig shall be interned in the institution in Cornwallis Road, Islington, which is now used as a place of internment, and shall be subject to all the rules and conditions applicable to aliens there interned.

If, within seven days from the date on which this order is served on the said Arthur Zadig, he shall submit to me any representations against the provisions of this order, such representations will be referred to the advisory committee appointed for the purpose of advising me with respect to the internment and deportation of aliens and presided over by a judge of the High court, and will be duly considered by the committee. If I am satisfied by the report of the said committee that this order may be revoked or varied without injury to the public safety or the defence of the realm, I will revoke or vary the order by a further order in writing under my hand. Failing such revocation or variation, this order shall remain in force.

(Signed) John Simon, one of His Majesty’s Principal Secretaries of State. Whitehall, 15th October, 1915.’

¹¹⁰ *R v Halliday* [1917] AC 260.

¹¹¹ *The Times*, 12 January 1916 cited in David Foxton, ‘*R v Halliday ex parte Zadig in Retrospect*’ (2003) 119 *Law Quarterly Review* 455, 472 fn 132.

¹¹² David Foxton, ‘*R v Halliday ex parte Zadig in Retrospect*’ (2003) 119 *Law Quarterly Review* 455, 465.

¹¹³ *R v Halliday* [1916] 1 KB 738.

¹¹⁴ Lawrence, Rowlatt, Atkin and Low JJ.

Sir Frederick Smith, the Attorney-General, remarked:

Hitherto, except in one case,¹¹⁵ the subjects of internment Orders have been alien enemies, and they, as prisoners of war, have been interned under the authority of the Royal prerogative, so that it was unnecessary to consider the effect of the regulations. Here the person interned is a naturalized British subject, and the Order was made under reg. 14B.¹¹⁶

Sir Frederick Smith, in a rather dramatic fashion, illustrated how the regulation could be used:

The Executive may be notified by their secret service agents that a particular person is about to carry out some plot against the public safety, but not able to furnish such evidence as would be required in a Court of law. If the Executive are satisfied that the man is dangerous it is essential that in the emergency they should be allowed to intern him before he has acted.¹¹⁷

The main argument of the applicant was that the terms of the emergency legislation did not affect the rights of a British subject. Patrick Hastings, who argued in support of the rule, submitted: 'It must be presumed that Parliament did not intend to authorize the imprisonment of a British subject without trial and without redress'.¹¹⁸ The Divisional Court followed the precedent established by another Divisional Court which had earlier ruled that a British subject could be interned under regulation 14B of the *Defence of the Realm (Consolidation) Regulations 1914*.¹¹⁹ Justice Atkin said:

it seems to me well within the scope of such contemplated regulations that for the safety of the realm any person, whether a British subject or not, should be ordered to be kept in confinement, or what is known as internment.¹²⁰

It is interesting to observe that later, as Lord Atkin, he adopted a more strict construction of similar internment legislation that was in force during World War II.¹²¹

2 *Zadig's Appeal to the Court of Appeal was Dismissed*

On 9 February 1916 Arthur Zadig's appeal to the Court of Appeal was heard. After Leslie Scott KC (with him Patrick Hastings) gave his argument, Sir Frederick Smith was not called upon. Without reserving its decision, the Court of Appeal dismissed the appeal. Lord Justice Swinfen Eady remarked: 'In my judgment the regulation is clearly and in terms authorized by the express language of the statute; Parliament has indeed expressed its intention with irresistible clearness'.¹²² This case, of course, dealt with somebody who was of undoubtedly enemy origin, although he had acquired British citizenship. Lord

115 This was presumably *R v Governor of Brixton Prison* (Unreported, 21 December 1915), mentioned below, which concerned a natural-born British subject.

116 [1916] 1 KB 738, 739.

117 Ibid 739–40.

118 Ibid 740.

119 *R v Governor of Brixton Prison* (Unreported, 21 December 1915, Ridley and Darling JJ).

120 [1916] 1 KB 738, 742.

121 *Liversidge v Anderson* [1942] AC 206, 247. See also Robert Heuston, 'Liversidge v Anderson in Retrospect' (1970) 86 *Law Quarterly Review* 33.

122 [1916] 1 KB 738, 745.

Justice Swinfen Eady remarked: ‘It must be borne in mind that the regulation as far as it relates to the present applicant, is a regulation dealing, not with British-born subjects, but with persons of hostile origin’. However, this was really a distinction without a difference because the Divisional Court had earlier ruled that a natural born British subject could be interned.¹²³ It was also a difference that could hardly be maintained until s 3 of the *British Nationality and Status of Aliens Act 1914*,¹²⁴ which gave a naturalised British citizen ‘to all intents and purposes the status of a natural-born British subject’, was expressly abrogated by a later Imperial statute.

3 *Zadig’s Appeal to the House of Lords was Dismissed*

Zadig then appealed to the House of Lords where Llewelyn Williams KC (with him F W Hurst)¹²⁵ represented him. Williams KC made a powerful submission that there must be some limitation to the regulations that can be made under the *Defence of the Realm (Consolidation) Act 1914*. He submitted that if the contention of the Crown was correct, the Executive has under the statute an unlimited power of making regulations for the safety of the realm. On this basis he submitted, ‘a regulation might be made enabling the Government to take a man and shoot him out of hand without trial’.¹²⁶ Williams further submitted that some limitation must be placed on the general words of the statute and that one such limitation was suggested by the terms of the Act itself. The Act contained no express provision for imprisonment without trial. The Act also provided that every British subject was entitled to a trial by jury for a breach of the regulations.¹²⁷ Williams also submitted:

It is not suggested that it might not be necessary for securing the safety of the realm to confer on the Government power to imprison a British subject without trial, but if the power of imprisonment is to be conferred at all it ought to be conferred by express words.¹²⁸

Williams urged that an interpretation be placed upon the Act that was not ‘repugnant to the traditions and *Constitution* of this country’.¹²⁹

This interpretation was certainly consistent with the views of Dicey who regarded it as a

123 *R v Governor of Brixton Prison* (Unreported, 21 December 1915). That the subject of those proceedings was a natural born subject was confirmed in argument by Sir Frederick Smith in *R v Halliday* [1916] 1 KB 738, 740.

124 4 & 5 Geo 5 c 17.

125 See also Francis Hirst, *The Consequences of the War to Great Britain* (1934), 109.

126 [1917] AC 260, 261.

127 *Defence of the Realm (Amendment) Act 1915* (5 Geo 5, c 31), s 1(1).

128 [1917] AC 260, 261–2.

129 *Ibid* 261.

broad and fundamental principle of English law that a British subject must be presumed to possess at all times in England his ordinary common-law rights, and especially his right to personal freedom, unless it can be conclusively shown, as it often may, that he is under given circumstances deprived of them, either by Act of Parliament or some well-established principle of law.¹³⁰

In this case the scheme of the Act of Parliament indicated that a British subject was entitled to a trial by jury for a breach of the regulations made under the *Defence of the Realm (Consolidation) Act 1914*.¹³¹ Was a British subject to be imprisoned at the will of the Executive without having a trial by jury? The House of Lords, by a majority, ruled that an order could be made under the regulation for the internment of a naturalised British subject. The House of Lords was presided over by Lord Finlay LC who emphasised that ‘the measure is not punitive but preventative’.¹³²

In *R v Halliday*¹³³ Lord Shaw of Dunfermline wrote a strong dissent, which made reference to important developments of constitutional history such as the Star Chamber and the French revolutionary Committee of Public Safety.¹³⁴ Lord Shaw mentioned that Blackstone had earlier written that the ‘confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government’.¹³⁵ Lord Shaw also made the point that the regulations had to be construed with some limitation. In his dissenting speech he asked whether, if the public safety and defence warrant the Government to incarcerate a citizen without trial, ‘do they stop at that, or do they warrant his execution without trial? ... may he not be shot out of hand?’¹³⁶ In fact, for a brief time during the Great War any British citizen, if found guilty of certain offences against the regulations under the *Defence of the Realm Acts* could, if arrested, be tried by court martial without the right to trial by jury. The legislation provided that ‘where it is proved that the offence is committed with the intention of assisting the enemy a person convicted of such an offence by a court martial shall be liable to suffer death’.¹³⁷

Perhaps the most important point that Lord Shaw made was that the appellant was a naturalised citizen. Lord Shaw remarked: ‘he owes submission to, and on the other he is entitled to the protection of, our laws’.¹³⁸ His Lordship remarked that it was

130 A V Dicey, *Introduction to the Study of the Law of the Constitution*, (8th ed, 1915, Liberty Classics 1982 reprint), 397.

131 *Defence of the Realm (Amendment) Act 1915*, s 1(1).

132 [1917] AC 260, 269.

133 *Ibid*.

134 [1917] AC 260, 291-292.

135 *Ibid* 300.

136 [1917] AC 260, 290-1.

137 *Defence of the Realm (Consolidation) Act 1914* (5 Geo 5, c 6), s 1 (5). This statute was assented to on 27 November 1914. This statute was passed in the House of Lords against the opposition of Lords Loreburn, Halsbury, Bryce and Parmoor. In order to enable the Bill to be quickly passed, Lord Chancellor Haldane gave an undertaking that no British citizen who was a civilian would be shot, if sentenced to death by court martial, at any time between then and the next session when the Act would be amended. The right of a British subject charged with such an offence which is triable by court martial to be tried by a civil court with a jury was given by the *Defence of the Realm Amendment Act 1915* (5 Geo 5, c 34), s 1(1). This latter statute was assented to on 16 March 1915. See Francis Hirst above n 130, 109. See also David Foxton, ‘*R v Halliday ex parte Zadig in Retrospect*’ (2003) 119 *Law Quarterly Review* 455, 464.

138 [1917] AC 260, 276.

ultra vires of His Majesty in Council to issue under the guise of a regulation an authorization for the apprehension, seizure and internment without trial of any of the lieges. In my view Parliament never sanctioned, either in intention or by reason of the statutory words employed in the *Defence of the Realm Acts*, such a violent exercise of arbitrary power.¹³⁹

X AUSTRALIA

A Constitution of the Commonwealth of Australia

Robert Menzies examined the operation of the rule of law under the *Commonwealth Constitution*.¹⁴⁰ Menzies made the point that the Commonwealth Parliament 'is not by any means sovereign as the English Parliament is sovereign'. The view was correct because there were at the time constitutional limitations upon the Parliament of the Commonwealth of Australia, such as the *Colonial Laws Validity Act 1865*,¹⁴¹ which were later removed by the *Statute of Westminster 1931*¹⁴² and the *Australia Act 1986*.¹⁴³

Menzies thought that 'any excessive bestowal of power on the Executive will be inconsistent with the spirit of the *Constitution*'.¹⁴⁴ He based his opinion on the separation of powers doctrine: he remarked: 'It is a characteristic of our *Constitution* that it provides specifically for a division of powers: the spheres of the Legislature, the Executive, and the Judicature are clearly defined'.¹⁴⁵ His argument was indeed contrary to the remarks of Cussen J in *Wallach*, who had earlier remarked in discussing 'the powers of the Parliament of the Commonwealth', that: 'those powers are plenary and include a full power of delegation'.¹⁴⁶ In fact Menzies' view was remarkably prescient in that the High Court of Australia later ruled that the Commonwealth Parliament could not by regulation totally abdicate its legislative power to the Executive.¹⁴⁷ Justice Cussen also thought that it was significant that the regulations were subject to Parliamentary disallowance.¹⁴⁸ For this reason he thought that it was 'less unlikely that a full delegation was intended'.¹⁴⁹

139 Ibid 277.

140 *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 9 contains the *Commonwealth Constitution*.

141 28 & 29 Vict c 63.

142 22 Geo 5 c 4.

143 Section 2.

144 Robert G Menzies, above n 7.

145 Ibid.

146 [1915] VLR 476, 485.

147 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73.

148 It may be questioned what value the disallowance of a regulation may have as the Executive is committed to the regulation and the members of the Executive would dominate the Houses of Parliament. However, since the introduction of proportional voting for the Senate the Government has mostly not been in control of the Senate.

149 Above n 146.

B War Precautions Act 1914 (Cth)

The internment of naturalised British subjects in Australia was achieved under the *War Precautions Act 1914–1915*¹⁵⁰ which enabled the making of regulations by the Governor-General in Council for securing the public safety and defence of the Commonwealth of Australia. The Bill for the *War Precautions Act* was passed through the House of Representatives and the Senate and given Royal Assent on 28 October 1914. The Prime Minister (Andrew Fisher) moved a motion that the Standing Orders of the House of Representatives be suspended to enable the Bill to be passed through its remaining stages without delay'.¹⁵¹ A former Prime Minister (Joseph Cook) had regarded the motion as 'a little premature', and thought it was a 'dangerous precedent to establish to move the suspension of Standing Orders in order to deal with a Bill the contents of which are not known to honorable members'.¹⁵²

The members of the House of Representatives certainly discussed the ambit of the bill. One member, Sir William Irvine,¹⁵³ warned:

We all recognise that at a time of war the Executive is entitled to be invested with authority which Parliament would not think of entrusting to it in ordinary times. But before the Bill passes, it is desirable that honorable members should understand fully the immense range of the Executive power which it confers on the Governor-General in Council.¹⁵⁴

One member (Littleton E Groom) appreciated that the Bill enabled regulations to be made which authorised 'trial by court martial' of 'private persons'.¹⁵⁵

It was recognised from the outset that the *War Precautions Act* was intended to apply to naturalised British subjects who were of German birth or origin. The Attorney-General (William M Hughes), who later became the Prime Minister, pointed out in his second reading speech upon the Bill for the *War Precautions Act* that the measure enabled regulations to 'deal effectively with aliens, and, in certain circumstances, with naturalised persons'.¹⁵⁶ At that time there was no such status as Australian citizenship. Immigrants who were naturalised in Australia became British subjects. The Imperial Parliament had recently passed the *British Nationality and Status of Aliens Act 1914*.¹⁵⁷ This statute confirmed that the Government of any 'British possession' could continue to grant a

150 *War Precautions Act 1914* (Cth) as amended by the *War Precautions Act 1915* (Cth).

151 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 October 1914, 369 (Andrew Fisher MHR, Prime Minister).

152 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 October 1914, 369 (Joseph Cook).

153 Sir William Irvine later became Chief Justice of Victoria in 1918 after the death of Sir John Madden.

154 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 October 1914, 371 (William Irvine MHR).

155 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 October 1914, 372 (Littleton E Groom MHR).

156 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 October 1914, 372 (William M Hughes MHR).

157 4 & 5 Geo 5, c 17.

certificate of naturalization.¹⁵⁸ The *British Nationality and Status of Aliens Act 1914* extended to the Governments of the Dominions including Australia.¹⁵⁹

One member of the House of Representatives (Patrick Glynn) recognised that the Australian measure applied to naturalised persons and that this was a wider power than that conferred upon the Executive under the recently-passed *Imperial Aliens Restriction Act 1914*, which did not extend to naturalised persons. He said: 'I know that a Bill was introduced in the Imperial Parliament to fix certain localities in which aliens might be grouped so that they might be under supervision, but I am not aware that the provision of such a measure would extend to naturalised persons'.¹⁶⁰

Another member (William Guy Higgs) expressed concern as to whether the Government was 'making due provision for the protection that ought to be afforded to every person who comes to Australia at our invitation and who makes his home here'.¹⁶¹ He remarked:

I regret to find that there is a great deal of feeling against Germans who have come to Australia, and have made their homes here at our invitation – people who have raised their families here, and whose sons and daughters are in every respect good citizens of Australia ... We have sent agents to Germany to invite Germans to settle here. Queensland sent a representative to Germany to endeavour to secure immigrants for that State, and it had difficulty in obtaining any until our agents were able to inform the German Government that they could obtain here a good living as they could obtain in their own country.¹⁶²

During the passage of the Bill in the Senate, Senator Stewart expressed concern about paragraph (f) of clause 5, which enabled the Governor-General to make provision 'for applying to naturalised persons, with or without modifications, all or any provisions of any order relating to aliens'.¹⁶³ Senator Stewart remarked: 'I do not find fault with this clause, except with paragraph (f), which applies to naturalized aliens'.¹⁶⁴ Immediately after Senator Stewart expressed his reservations a number of Senators defended the necessity of the clause. Senator Lieutenant Colonel Sir A J Gould said: 'It is a very necessary provision'.¹⁶⁵ Senator Mullen said: 'Persons may get naturalized under false' ¹⁶⁶ representations. Despite such comments, Senator Stewart continued to express his reservations:

But we ought to assume that persons who become British subjects are not going to do anything which will injure the Commonwealth, and, unless there is very strong ground for suspicion, these persons ought to be treated exactly as the rest of the community are treated.¹⁶⁷

158 *British Nationality and Status of Aliens Act 1914*, s 8.

159 *British Nationality and Status of Aliens Act 1914*, First Schedule.

160 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 October 1914, 383 (Patrick Glynn MHR).

161 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 October 1914, 375 (William Guy Higgs MHR).

162 Ibid.

163 *War Precautions Act 1914*, s 5(f).

164 Commonwealth, *Parliamentary Debates*, Senate, 28 October 1914, 346 (Senator Stewart).

165 Ibid.

166 Ibid.

167 Ibid.

Senator Pearce, the Minister of Defence, thanked Senator Stewart for 'having raised this question, because it affords me an opportunity of clearing away a misconception which exists in the minds of many people regarding naturalized British subjects'.¹⁶⁸ It has already been mentioned that the German *Delbrück* Law of 1913 provided that a German citizen who obtained a release of citizenship was not entirely divested of German citizenship and could re-apply under that law for German citizenship. Senator Pearce did not explicitly mention this law, but said:

We can make what naturalization laws we like, but Austria and Germany say that, in spite of all our naturalization laws, their subjects still remain Austrian and German subjects. If German troops were to land in Australia, and a naturalized German came within their ambit and refused to obey their orders the penalty would be death. The German law would not recognise him as a British subject.¹⁶⁹

This statement was not entirely accurate because a person who obtained a release of German citizenship could only afterwards attain such citizenship upon re-application for such citizenship. There undoubtedly would have been some Germans who obtained British citizenship by naturalisation after a release of citizenship by a German Government. Those persons would still be regarded as having some residual rights to German citizenship, as a person who had obtained a release of citizenship in German could without any difficulty regain German citizenship. There was the question of the naturalised Germans who had been naturalised in Australia without obtaining a release of German citizenship. These persons undoubtedly would have been conscripted by the German authorities. This was appreciated by Senator Bakhap who remarked: 'As a matter of fact, Germany does not recognise any naturalization unless it is obtained with the consent of the German authorities'.¹⁷⁰ Senator Pearce agreed saying: 'That is so'.¹⁷¹

Senator Pearce explained the reason why the measure was intended to apply to naturalised citizens:

Whilst up to the outbreak of war we conferred upon Austrian and German subjects the privileges of naturalization, in the eyes of the Austrian and German law those persons are still Austrian and German subjects. Therefore, it may be necessary for use to take precautions to prevent those persons from leaving the Commonwealth; to see that they are placed under surveillance; and that they are not permitted to move freely from place to place.¹⁷²

There was also the unstated concern about the operation of the German intelligence network in the Southern Pacific. There was no suggestion that paragraph (f) would enable the making of regulations to intern naturalised British subjects. The fact that the penalty for a breach of the regulations was £100 or six months' imprisonment, or both, was consistent with there not being such a drastic regime imposed by the *War Precautions Act*. Senator Pearce thought that such a penalty 'is quite sufficient'.¹⁷³

168 Ibid.

169 Ibid.

170 Ibid.

171 Ibid.

172 Ibid.

173 Ibid.

The internment of naturalised persons was achieved under regulation 55 which was contained in an Order in Council made under the *War Precautions Act*. Regulation 55 provided:

Where the Minister has reason to believe that any naturalized person is disaffected or disloyal he may by warrant under his hand order him to be detained in military custody in such places as he thinks fit for the duration of the present state of war.

It might be observed that regulation 55 expressly authorised the Minister to intern 'any naturalized person'. From the outset the wartime legislation in Australia enabled the Governor-General to make Orders in Council to apply 'to naturalized persons, with or without modifications, all or any provisions of any order relating to aliens'.¹⁷⁴ In that respect the legislation went much further than the *Defence of the Realm (Consolidation) Act 1914* that was considered in *Zadig's* case.

In Australia during the Great War some 6890 persons of German or Austro-Hungarian origin were interned, of whom 4500 were Australian residents. The Government also interned those naval and merchant sailors who were in Australia when war was declared. There were also German citizens who were transported to Australia from South-East Asia at the request of the Imperial authorities. Some 1100 Austro-Hungarians as well as approximately 700 minority groups from the Austro-Hungarian Empire, such as Croats, Serbs and Dalmatians, were also interned. Many of those interned were naturalised business leaders, including Edmund Resch, a leading Sydney brewer who had resided in Australia for 50 years. Five Honorary German Consuls were interred,¹⁷⁵ most of whom were naturalised British subjects.¹⁷⁶ In Queensland nine Lutheran pastors were interned, including six naturalised British subjects. One famous interned citizen was Pastor Friedrich Fischer who, along with his parents, was born in South Australia. One of Australia's leading orthopaedic surgeons, Dr Maximilian Herz, was interned.

The prevailing policy was seen as the destruction of the German-Australian community, achieved in part by the closure of German clubs. In 1917 in South Australia most Lutheran schools were closed by Act of Parliament.¹⁷⁷ The fate of the Lutheran schools was not assisted by their persistence in teaching in the German language, presumably as the teaching materials and religious texts were printed in German. There were also well-founded perceptions concerning *Deutschtum*, which promoted ideas of the superiority of German culture.¹⁷⁸

174 *War Precautions Act 1914*, s 5 (f).

175 Melbourne: William Adena; Brisbane: Eugen Hirschfeld MD; Perth: Ludwig Ratazzi; Hobart: Alfred Dehle; Newcastle: Otto Johannsen. In South Australia Consul Mueckle, whose son was fighting in France, after being wounded in Gallipoli, was released from internment and placed under house arrest.

176 See, Gerhard Fischer, *Enemy Aliens: Internment and the Homefront Experience in Australia 1914–1920*, (1989); Jürgen Tampke and Colin Doxford *Australia, Willkommen: A History of the Germans in Australia* (1990).

177 *Education Act Amendment Act 1916 (SA)*, s 5. The Schedule lists 49 Lutheran schools.

178 See, Morton Prince, *The Creed of Deutschtum, and other War Essays* (1918).

XI WALLACH AND HABEAS CORPUS

Wallach's case¹⁷⁹ was examined by Menzies in *The Rule of Law During the War*. The case concerned Franz Wallach who was born in Germany in Frankfurt am Main on 16 January 1871. He had resided in Australia since 1893. In 1895 he had obtained from the Prussian Government a release of his Prussian citizenship.¹⁸⁰ In 1899 he had obtained from the Government of the Colony of Victoria letters of naturalisation as a British subject. At the time of his internment on 10 July 1915, Wallach was the managing director of the Australian Metal Company.¹⁸¹ Unlike the general manager of the Australian Metal Company, Walter Hugo Schmidt,¹⁸² who was also interned on 10 July 1915, Wallach challenged the right of the Minister of Defence to detain him. Wallach's challenge was based on constitutional grounds as well as whether the recitals in the warrant were a sufficient basis for his detention. Wallach obtained from the Supreme Court of Victoria an order for the issue of a writ of *habeas corpus* against Major Archibald Lloyd, 'Commandant of the Concentration Camp at Lagwarrin'.¹⁸³ In his return to the writ Major Lloyd stated that Wallach was detained under the authority of a warrant under the hand of the Minister for Defence under the *War Precautions Act 1914-15* and regulations made under that Act.

There was no dispute in this case that Wallach was a naturalised British subject. Indeed the warrant of the Commonwealth Minister for Defence that was issued on 9 July 1915 recited that Wallach was 'a person naturalized in the Commonwealth of Australia'. The warrant also recited that Franz Wallach 'is believed to me to be disaffected or disloyal'.¹⁸⁴ A later warrant of the Minister that was issued on 31 July 1915 recited that 'on information furnished to me, I have reason to believe, and do believe, that Franz Wallach is disaffected or disloyal'.¹⁸⁵ The terms of the later warrant mirrored the actual words of regulation 55 which provided:

Where the Minister has reason to believe that any naturalized person is disaffected

179 The court papers of the *Wallach* case are located in the Victorian Public Record Series 37, box number 24, case file number 2874. Series 37 is named: Supreme Court of Victoria, *Habeas Corpus* Jurisdiction, case files 1840 to 1922.

180 However, even though Wallach had a formal release of Prussian citizenship, the *Delbrück* Law of 1913 enabled him to later claim German nationality: see Arnold McNair, 'British Nationality and Alien Status in Time of War' (1919) 35 *Law Quarterly Review* 213, 225.

181 Contemporary records in the National Archives of Australia, including military intelligence files, confirm that the authorities believed that the Australian Metal Company was owned by the British registered company Merton Metallurgical, which was under the control of the Frankfurt company Metallgesellschaft. It would seem that one agenda of Attorney-General Hughes was to eliminate the Australian Metal Company which had long-term contracts to supply iron ore to Germany. Whilst both Imperial and Australian trading with the enemy legislation would have prevented the performance of the contracts during the war, the Government, which would have been motivated by strategic considerations, may have been concerned that under international law the contracts may survive any peace treaty.

182 Schmidt was naturalised on 20 August 1914.

183 *R v Lloyd; Ex parte Wallach* [1915] VLR 476, 477.

184 (1915) 21 *Argus* LR 295 at 296. See also (1915) 20 CLR 299, 300.

185 *Ibid.* See also (1915) 20 CLR 299, 300.

or disloyal he may by warrant under his hand order him to be detained in military custody in such places as he thinks fit for the duration of the present state of war.

This warrant superseded an earlier warrant under which Wallach was detained and which had merely stated that Wallach was disaffected or disloyal and did not follow the actual terms of the regulation.

Wallach's case squarely raised the issue of whether British subjects could be interned in disregard of the fundamental traditions of the British constitutional tradition. One of those fundamental traditions was *habeas corpus*. Chief Justice Madden regarded the case 'as a matter of stupendous importance – the suspension of the *Habeas Corpus Act* and the forfeiture of the liberty of a British subject without any right of appeal'.¹⁸⁶ The Chief Justice thought

that to warrant a result like that, one would require the greatest assurance by the express authority of the Act and the instrument itself, and, in my opinion, Parliament would not have given an authority of that sort except in the clearest language.¹⁸⁷

There was some issue whether the Supreme Court of Victoria had jurisdiction under s 39 of the *Judiciary Act 1903* (Cth) to enquire into the detention of Wallach by a Commonwealth officer.¹⁸⁸ Mann, who appeared for the Commonwealth, cited American authority¹⁸⁹ in support of his submission that the court did not have jurisdiction to call on a Commonwealth officer in *habeas corpus* proceedings to justify his act in discharge of a function created by Federal authority. However, as Madden CJ pointed out, in America there was no State jurisdiction under the *Constitution*, while in Australia the Commonwealth has given jurisdiction to the State Supreme Courts to deal with such cases.¹⁹⁰

Chief Justice Madden remarked that 'when Parliament proposes to allow anyone, without appeal, to imprison a British subject, one would expect it to say so in language which is unmistakeable, as is customarily done in such matters'.¹⁹¹ The Chief Justice said: 'Is it in the least likely that Parliament would give into the hands of any one individual in the community the right to suspend, or give such authority as would have the effect of suspending, the *Habeas Corpus Act* as against a British subject?'¹⁹² He also pointed out that when the *Habeas Corpus Act* is suspended: 'It is done definitely by an Act of Parliament ... It is quite clear that Parliament does not do such a thing lightly. It certainly does not allow it to be done by a side wind, that is, as far as I know anything has been done heretofore'.¹⁹³ The Chief Justice considered that the *War Precautions Act* did not give such authority, remarking: 'Regulation 55 seems to me to go beyond any power which, looking at the language of the Act, can reasonably be supposed to have been intended to be conferred'.¹⁹⁴

186 [1915] VLR 476, 500.

187 Ibid.

188 [1915] VLR 476, 485 (Cussen J), 479–480 (Mann and Mitchell QC, in argument). See also *Ah Sheung v Lindberg* [1906] VLR 326.

189 (1871) 13 Wal 397 (*Tarble's Case*) cited in argument: [1915] VLR 476, 479.

190 [1915] VLR 476, 495.

191 Ibid 498.

192 Ibid 499.

193 Ibid 497.

194 Ibid 508.

This case was undoubtedly something of a *cause célèbre* not the least because E Mitchell KC, who was counsel for Wallach, applied for leave to call Senator Pearce, the Minister of Defence, as a witness in the proceedings and to examine him as to the grounds of his belief of Wallach's disaffection or loyalty. Chief Justice Madden pointed out that Wallach had himself given extensive affidavit evidence

in which he declares that he is a British subject, and that he was naturalized a good many years ago, and he sets out the whole of his operations for a good many years, and finally swears positively he has never done any disloyal thing or any disaffected thing, and is not disloyal and is not disaffected.¹⁹⁵

The Chief Justice remarked:

The Minister, of course, is not bound to swallow all that. He is not bound to accept it absolutely, if he has something better against him; but where the man who is detained, a British subject, swears that he is not disloyal and not disaffected, and where he swears in detail what he has been doing and how is he engaged, then if those who detain him will say nothing, for any reason whatsoever, he is entitled, in my opinion, to be heard.¹⁹⁶

In his affidavit Wallach deposed to his loyalty to Australia including the fact that he had married an Australian whose three brothers (Bruce, Tom and Jim Wilson) had all enlisted in the Australian Imperial Forces ('AIF').¹⁹⁷

Mann objected to the Minister being examined as to the grounds of his belief of Wallach's disaffection or loyalty, and filed an affidavit from the Acting Secretary of the Department of Defence which stated that Franz Wallach was detained after the Minister received confidential information and that it 'would be injurious to the public interests and safety of the Commonwealth that the said information or the sources from which it was received to be disclosed'.¹⁹⁸ Chief Justice Madden said:

The affidavit which has been filed merely repeats the facts stated in the return, and makes a statement which the Minister may make if he is in Court. Our duty, when privilege is raised, is to see if there is genuine and real ground for raising and asserting it. If such ground exists it is the duty of the Court to guard the right jealously. But the Court should not be content with the mere assertion of privilege made on behalf of the Minister.¹⁹⁹

The court did not make any formal order for the attendance of the Minister. Chief Justice Madden remarked: 'If the Minister is informed of the fact that the Court considers that he ought to be here, that will be sufficient'.²⁰⁰ At that time the Commonwealth Government offices, including the Department of Defence, were located in Melbourne.²⁰¹ The Minister was called as a witness and objected to answering questions regarding the nature of the alleged act or disaffection or disloyalty of Wallach. In this respect Madden CJ regarded himself as bound by

¹⁹⁵ Ibid 505–6.

¹⁹⁶ Ibid.

¹⁹⁷ See Victorian Public Record Series 37, box number 24, case file number 2874.

¹⁹⁸ [1915] VLR 476, 480.

¹⁹⁹ Ibid 481.

²⁰⁰ Ibid.

²⁰¹ *Commonwealth Constitution*, s 123.

authority of the High Court of Australia²⁰² to hold that the mere claim of privilege of the Minister could not stop any enquiry by the court. However, as a majority of the court on this issue (a'Beckett and Cussen JJ) considered that the Minister could claim privilege, the examination of the Minister was stopped.²⁰³ The reasoning of Madden CJ is consistent with the later decision of the High Court of Australia in *Sankey v Whitlam*²⁰⁴ that the court will assess the validity of any claim to privilege based on the public interest.

On 9 August 1915 Franz Wallach was released from custody by the Full Court of the Supreme Court of Victoria. The Full Court by a majority (Madden CJ and a'Beckett J) ruled that regulation 55 was *ultra vires* and therefore invalid. Justice Cussen in dissent considered that regulation 55 was valid. Only the Chief Justice considered that the return to the writ of *habeas corpus* was defective in not disclosing the facts upon which the Minister formed the requisite belief as required by regulation 55. In his dissenting judgment Cussen J remarked that the warrant of the Minister was sufficient authority having 'regard to the fact that the Minister must deal promptly, and if necessary by telegram with persons anywhere in Australia'.²⁰⁵ Justice Cussen considered that the *War Precautions Act* 'does not enable a person to go into the truth of the recitals in the warrant'.²⁰⁶

The Chief Justice gave his reasons for judgment after Cussen J who then felt the need to make some words of explanation, stating:

His Honour the Chief Justice seemed to be under the impression that I had definitely decided this matter was not examinable in any Court. I did not intend to convey that meaning by what I said, as I think will be clear in reading my judgment after an opportunity of considering it.²⁰⁷

However, Cussen J may have been somewhat provocative in earlier stating: 'We are construing a *War Precautions Act*. We might arrive at an entirely different conclusion if we were construing, say, a *Police Offences Act*'.²⁰⁸ In his words of explanation he added:

His Honour also stated that my construction of this Act and this regulation would result in the repeal of *Magna Charta* and the suspension of the *Habeas Corpus Act*. I assume that His Honour was referring to that provision of *Magna Charta* which says that no free man shall be taken or imprisoned unless by lawful judgment of his peers or by the law of the land, but I fail to see why an Act of Parliament, because it is given a certain construction, should be treated as the law of the land.²⁰⁹

However, immediately after he made those remarks Madden CJ riposted: 'Of course it is, if it is an Act of Parliament'.²¹⁰ Indeed, this was the very point that was pivotal to the reasoning of the Chief Justice. Regulation 55 was not an Act of

202 *Marconi's Wireless Telegraph Co Ltd v The Commonwealth* (1913) 16 CLR 178.

203 [1915] VLR 476, 484.

204 (1978) 142 CLR 1.

205 [1915] VLR 476, 489.

206 *Ibid* 493.

207 *Ibid* 508–9.

208 *Ibid* 488.

209 *Ibid* 508–9.

210 (1915) 21 Argus LR 295 at 309. This riposte of the Chief Justice was not reported in the *Victorian Law Reports*.

Parliament, nor did the Act of Parliament authorise the making of a regulation to detain a British subject without trial.

The Chief Justice had emphasised that

the Court should insist more and more upon the necessity of an expressed and absolute declaration of Parliament's will in this matter, by which a British subject has been arrested, taken to a place of imprisonment and ordered to remain there till the end of this war – a perfectly indefinite time – unless some intervening order be made against him, and that nobody can question it.²¹¹

Melbourne's *The Argus* newspaper published an editorial on 10 August 1915 which commented that if the Bill of the *War Precautions Act*

had contained a specific clause declaring that a British subject might be arrested and interned on a warrant issued by a military officer, or a policeman, or a Minister, without any appeal to a court of justice, or any evidence being to back the warrant, such a clause would have been negated by an overwhelming majority in either House.²¹²

The same editorial extensively discussed *Wallach's* case:

A war such as the present overturns our notions on many subjects, and the question which arises today is whether the case of Franz Wallach, who has been interned on a warrant issued by the Minister of Defence, released on appeal by the Supreme Court, and rearrested and interned by virtue of a regulation passed since the proceedings in the Supreme Court commenced, shall upset all of our notions as to the protection afforded by the *Habeas Corpus Act* to a British subject.²¹³

The editorial continued:

What would happen to a naturalised British subject in Germany? Probably short shrift would be afforded to any British person who had become a German. But here we live under British rule. We are fighting Germany because we loath her principles and methods, and wish to destroy them. Therefore we should not imitate them.²¹⁴

In the view of the editorial:

Magna Charta and the *Habeas Corpus Act* are, under these regulations, suspended as effectively as if we are living under martial law ... The right of the Court to protect the liberty of British subjects should not be taken away, excepting in circumstances which would justify the proclamation of martial law; and those circumstances have certainly not arisen in Australia.²¹⁵

211 [1915] VLR 476, 497.

212 Editorial, *The Argus* (Melbourne), 10 August, 1915, 6.

213 Ibid.

214 Ibid.

215 Ibid.

A High Court of Australia

Franz Wallach was released from custody on 9 August 1915 by order of the Full Court of the Supreme Court of Victoria. However, his release was short-lived for he was soon placed in custody again. According to *The Argus*, he was rearrested under a new regulation that was issued after he initiated *habeas corpus* proceedings.²¹⁶ The Commonwealth also announced that they would appeal against the decision of the Full Court.²¹⁷ The High Court of Australia heard argument on 7 September 1915. The report of the case before the High Court of Australia listed the solicitors for the respondent as Malleson, Stewart, Stawell & Nankivell who had represented Wallach before the Supreme Court of Victoria. However, the report reveals that: 'There was no appearance for the respondent'.²¹⁸

The judgments of the justices of the High Court do not reveal that the respondent was re-arrested after he was discharged from custody by order of the Full Court. The High Court allowed the appeal and held that the regulation was constitutional and that the Minister was the sole judge of the sufficiency of the material on which a decision to intern was based.²¹⁹ The order made by the Court in allowing the appeal was: 'Respondent remanded into custody'.²²⁰ Anybody reading the formal order as contained in the report, might be pardoned for assuming that the respondent was only imprisoned after the appeal was allowed. The report of the case somewhat surprisingly does not disclose whether any arrangements were made to allow the respondent to attend the hearing of the appeal as this was a matter concerning the liberty of the subject. It might be mentioned that the House of Lords had later made arrangements for Zadig to attend the hearing of his appeal.²²¹ For the hearing of the appeal the High Court sat in Melbourne and the attendance of the respondent from the nearby Langwarrin concentration camp would not have been inconvenient.

The non-appearance of the respondent was commented upon by Higgins J who remarked:

It is unfortunate that we have not had the assistance of counsel briefed to uphold the order absolute of discharge; but I feel more confidence in coming to a conclusion because we have before us the carefully reasoned judgments of the Judges of the Supreme Court of Victoria stating at length the opposing views as to the legal position.²²²

However, Higgins J had failed to point out that the judgments of the Supreme Court were not relevant to the consideration of the jurisdictional basis of the High Court of Australia to entertain an appeal on *habeas corpus* proceedings. At the time there was a time-honoured practice that there was no appeal from an

216 Ibid.

217 Ibid.

218 (1915) 20 CLR 299, 302.

219 *Lloyd v Wallach* (1915) 20 CLR 299.

220 Ibid 314.

221 David Foxton, 'R v Halliday ex parte Zadig in Retrospect' (2003) 119 *Law Quarterly Review* 455, 480.

222 (1915) 20 CLR 299, 309–310.

order releasing a prisoner on *habeas corpus* proceedings.²²³ It may well be that such jurisdiction was conferred by the wide terms of the *Commonwealth Constitution* s 73. However, as the respondent did not make an appearance, the point was not raised. Later, in *Wall v R*²²⁴ Higgins J remarked that in *Wallach's* case 'there was no appearance for the respondent and the point was not argued that there could be no appeal from the order releasing him on a *habeas*'.²²⁵

The non-appearance of the respondent also meant that a potential constitutional argument was not placed before the court. This argument would have been based upon the supremacy of Imperial legislation relating to British nationality. It has already been pointed out that the Commonwealth Parliament was subject to the constraints of the *Colonial Laws Validity Act 1865*,²²⁶ under which it could not pass legislation repugnant to Imperial legislation that expressly extended to a colony. This is the reason why the High Court of Australia had later ruled in 1925²²⁷ that the Commonwealth Parliament could not pass legislation which was repugnant to the Imperial *Merchant Shipping Act 1894*. This was despite the fact that the Imperial Parliament in passing the *Commonwealth Constitution* expressly empowered the Commonwealth Parliament to pass laws with respect to 'navigation and shipping'.²²⁸ The constraints upon the Commonwealth Parliament that were imposed by the *Colonial Laws Validity Act 1865*²²⁹ were only removed when the *Statute of Westminster 1931*²³⁰ was adopted by the Commonwealth Parliament in 1942.²³¹

Wallach was a British subject and the Imperial *British Nationality and Status of Aliens Act 1914*²³² s 3 gave a naturalised British citizen 'to all intents and purposes the status of a natural-born British subject'. An argument was certainly available that the Commonwealth Parliament could not treat a naturalised British citizen in a different manner from a natural-born British subject. To do so would be contrary to an Imperial statute that then expressly extended to all British possessions, including Australia. The Commonwealth Parliament could not expressly or impliedly repeal an Imperial statute that expressly applied to Australia. It may have been the case that the significance of the newly-passed *British Nationality and Status of Aliens Act* was not then fully appreciated. By way of contrast, the Canadian *War Measures Act 1914*,²³³ which enabled regulations to be made for the detention of persons, was not expressed to apply to naturalised British subjects.

223 See, *Cox v Hakes* (1890) 15 App Cas 506; *Secretary of State for Home Affairs v O'Brien* [1923] AC 603.

224 (1927) 39 CLR 245.

225 (1927) 39 CLR 245, 262.

226 28 & 29 Vict c 63.

227 *Union Steamship Co. of New Zealand Ltd. v Commonwealth* (1925) 36 CLR 130.

228 *Commonwealth Constitution*, s 98. See also, Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (3rd ed, 2002), 153.

229 28 & 29 Vict, c 63.

230 22 Geo 5, c 4.

231 *Statute of Westminster Adoption Act 1942* (Cth).

232 4 & 5 Geo 5, c 17.

233 5 Geo 5, c 2 (Canada).

Robert Menzies commented upon the decision in *Wallach*: ‘This very modern resuscitation of the Minister’s arbitrary power is, true enough, a Parliamentary creation’.²³⁴ Menzies thought that the Minister’s arbitrary power ‘is in direct conflict with the Rule of Law’ presumably because of the power of arbitrary detention without the need to have any evidence to support that detention. However, he added that ‘permanent liberty is often best achieved only by a temporary sacrifice of individual freedom’.²³⁵

Wallach was finally released from internment on 26 April 1919. Schmidt was released on 4 May 1920. Unlike some other prominent naturalised citizens of German origin,²³⁶ both Wallach and Schmidt do not appear to have been deported after they were released from custody.

XII CONCLUSION

Once it appeared in 1885, the *Introduction to the Study of the Law of the Constitution* achieved a significance which it has never really lost.²³⁷ Lecturers in constitutional law still refer to Dicey’s formulation of the rule of law. The constitutional law lectures of the late Professor R Lumb at The University of Queensland emphasised the influence of Dicey. The influence of Dicey is still appreciated in some commentaries on the rule of law,²³⁸ although some modern commentaries on the modern state now fail to acknowledge his influence.²³⁹ One commentator regarded his account of the rule of law as Anglo-Saxon parochialism.²⁴⁰ Another commentator said that Dicey had ‘a negative version of rights, viewing them as residual liberties rather than as positive entitlements’.²⁴¹ Some have also thought that his formulation of the rule of law is vulnerable at a time of crisis. Dicey was well aware of this himself. He was certainly aware that the rights of a subject could be taken away by Parliament and that criminal and illegal conduct on the part of officers of the State can be the subject of acts of indemnity that were passed after *habeas corpus* was suspended after

234 Robert G Menzies, *The Rule of Law During the War* above n 7, 24.

235 Ibid.

236 See, e.g., Edward Edwards (formerly Eichengren), the former manager of the Continental Motor Tyres; born, 14 March 1878; naturalised, 14 March 1878; deported, 29 May 1919.

237 Alfred Brian Simpson, *Human Rights and the End of Empire* above n 28, 33.

238 David Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order* above n 36, 10–11; Lawrence B. Solum, ‘Equity and the Rule of Law’ in Ian Shapiro (ed), *The Rule of Law* (1994), 122. The influence of Dicey is comprehensively discussed in Alfred Brian Simpson, *Human Rights and the End of Empire* above n 28, Chapter 1.

239 See, eg, Norman Dorson & Prosser Gifford (eds), *Democracy and the Rule of Law* (2001).

240 See, Judith Shklar, ‘Political Theory and the Rule of Law’ in Shklar, *Political Thought & Political Thinkers* (1999), 21 at 26 cited by David Dyzenhaus, ‘An Unfortunate Outburst of Anglo-Saxon Parochialism’ (2005) 68 *Modern Law Review* 673. Interestingly, Margaret Thatcher wrote: ‘For Dicey, writing in 1885, and for me reading him some seventy years later, the rule of law still had a very English, or at least Anglo-Saxon, feel to it’: see Margaret Thatcher, *The Path to Power* (1995), 84–5.

241 Conor Gearty, *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (1997), 64 quoted in Alfred Brian Simpson, *Human Rights and the End of Empire* above n 28, 35.

insurrection.²⁴² Indeed one of the first guiding principles that Dicey wrote about was parliamentary sovereignty; that is the subject of Part I of the *Introduction to the Study of the Law of the Constitution*. What Dicey was concerned about was the fact that rights such as the right to personal freedom and the right to freedom of discussion could not be taken away by mere acts of executive despotism. Parliament could certainly take away those rights. In the *Wallach* and *Zadig* cases the issue was whether the Act of Parliament in question enabled a regulation to be made to allow for the detention of naturalised British subjects, and thus abrogate his or her right to personal freedom.

It is difficult to ascertain how the work of Dicey informed the task of the courts in cases where the internment of a person was being challenged. In some respects, the practice that then prevailed that the works of a 'living author' could not be cited in court makes this difficult.²⁴³ However, it is most probable that Dicey was influential in internment cases. As we have seen Dicey regarded it as the broad and fundamental principle of English law that a British subject must be presumed to possess at all times in England his ordinary common-law rights, and especially his right to personal freedom, unless it can be conclusively shown, as it often may, that he is under given circumstances deprived of them, either by Act of Parliament or some well-established principle of law.²⁴⁴

This approach was adopted by Lord Shaw in the House of Lords and by Madden CJ of the Supreme Court of Victoria; these jurists had regard to the work of Dicey. Certainly these judges did not cite any court precedent as authority for this 'broad and fundamental principle of English law' of Dicey that they applied.

The influence of Dicey still lingers. In times of crisis the Executive Government will inevitably want to restrain the liberty of certain citizens yet, in such cases, there will be tensions between the rule of law and Parliamentary sovereignty. Whilst Dicey recognised that some hard-won rights of liberty might be abrogated, he recognised that they could only be abrogated by the Parliament and not by the Crown or the Executive. We do not need Dicey to remind us that Parliament has the power to abrogate those rights. In these days when

242 A V Dicey, *Introduction to the Study of the Law of the Constitution*, (8th ed, 1915, Liberty Classics 1982 reprint), 142-5.

243 In cases such as *Union Bank v Munster* (1887) 37 Ch D 51 Kekewich J remarked: 'It is to my mind much to be regretted, and it is a regret that I believe every Judge on the bench shares, that text-books are more and more quoted in Court – I mean of course text books by living authors – and some Judges have gone so far as to say that they shall not be quoted'. This practice was in no ways uniform and there are instances of the citation of the works of eminent living authors such as Scrutton: see *Proctor Garrett Marston Ltd v Oakwin Steamship Co Ltd* [1926] 1 KB 244. Perhaps, the high water mark of the practice of the courts in not citing 'living authors' is seen in the judgment of Lord Tomlin in *Donohue v Stevenson* [1932] AC 562, 565: 'The law books give no assistance, because the work of living authors, however deservedly eminent, cannot be used as authority, though the opinions they express many demand attention'. However, in 1947 Denning J considered that the notion that 'works are not authority except after the author's death has long been exploded': (1947) 63 *Law Quarterly Review* 516. Today the courts have no difficulty with the citation of works of living authors: see *Fury Shipping Co Ltd v State Trading Corporation of India Ltd* [1972] 1 Lloyd's Rep 509; *Geveran Trading Co Ltd v Skjevesland* [2003] BPIR 73.

244 A V Dicey, *Introduction to the Study of the Law of the Constitution*, (8th ed, 1915, Liberty Classics 1982 reprint), 397.

constitutional history is no longer part of many curricula,²⁴⁵ we need Dicey to remind us of the important aspects of the English *Constitution* and remind us that the rights within ought not to be lightly abrogated. The judgment of Sir John Madden²⁴⁶ should be venerated, just as much as are the judgments of Lord Shaw²⁴⁷ and Lord Atkin,²⁴⁸ as exemplifying the best British traditions of safeguarding the liberty of the subject.

245 In 2001 Sir Harry Gibbs remarked: 'The institutions that we value most – our democracy, the rule of law, and a liberal society – all have their origins in Great Britain. Unfortunately with the decline in the teaching of history, too many people are unaware of the long struggle, over the centuries, by which Great Britain became a free society under a constitutional monarch.' (Annual Neville Bonner Oration, All Saints Church, Brisbane, 8 October 2001).

246 Sir John Madden was the second son of John Madden, solicitor, of Cork, Ireland, and was born there in 1844. As well as holding the Chief Justiceship he was the Lieutenant-Governor of the State of Victoria and was thus at the apex of the establishment in Victoria. He was a graduate of the University of Melbourne (BA, 1864; LLB, 1865; LLD, 1869). He was knighted in 1893, made a KCMG in 1899, and GCMG in 1906. He died whilst in office as Chief Justice in 1918.

247 David Foxton, 'R v Halliday ex parte Zadig in Retrospect' (2003) 119 *Law Quarterly Review* 455, 494, referring to 'Lord Shaw's unfairly neglected judgment'.

248 Robert Heuston, 'Liversidge v Anderson in Retrospect' (1970) 86 *Law Quarterly Review* 33; Robert Heuston, 'Liversidge v Anderson: Two Footnotes' (1971) 87 *Law Quarterly Review* 161; Lord Bingham of Cornhill, *The Business of Judging* (2000), 211 ff.