CONSTITUTIONAL IMPLICATIONS OF A ZOMBIE OUTBREAK

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ABSTRACT

A zombie apocalypse would require an unprecedented exercise of constitutional powers relating to defence and the maintenance of the Constitution. It would also have implications for civil liberties, in particular the detention of people to prevent the spread of the disease –in this regard it is disturbing to note that, so weak is current constitutional protection of the right to personal liberty, once detained a person would have no recourse to the courts for release. As governmental authority broke down, practicality would require that authority be exercised extra-constiutionally, and this makes relevant interesting precedents from the Commonwealth which determine such exercises of power are justifiable. Finally, it may well be the case that, in the aftermath of a zombie apocalypse, the old Commonwealth and State governments would not be re-established. This would raise questions concerning the legitimacy of successor regimes. It would also provide an opportunity for thoroughgoing constitutional reform - which has proved elusive in pre-zombie Australia - as well as the re-establishment of Indigenous sovereignty over parts of the country.

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I INTRODUCTION

This article explores the constitutional of a zombie apocalypse, focusing on issues which are likely to arise during selected periods of the outbreak. Some of these relate specifically to issues particularly relevant to periods when society faces an existential threat, while others are perennial. Part II addresses the executive and legislative powers of the Commonwealth to address a threat to the nation taking the form of a zombie outbreak. Part III discusses the implications of a national threat for the right to personal liberty. Part IV discusses whether, in exigent circumstances, the reserve powers of the Governor-General (or any authority acting in his or her stead) include a power to rule without regard to the Constitution. Part V examines the foundations of constitutional law by questioning upon what basis the legitimacy of a post-apocalyptic constitutional order would be determined and explores the opportunities that would be presented to reform Australian constitutional law and to revive Indigenous sovereignty.

II EXECUTIVE AND LEGISLATIVE POWER

The first issue to consider is what executive power would be available to the Commonwealth to take steps to deal with an outbreak of zombiism, and what legislative authority the Commonwealth Parliament could use to enact laws for that purpose. These matters would be relevant during the *tardo* and *affretando* stages of the plague, but which would become of academic interest once governmental authority broke down during the *mosso* stage.

A *Executive power*

The executive power conferred on the Commonwealth under s 61 of the Constitution extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

The power to maintain the Constitution includes the 'protection of the body politic or nation of Australia.'[1] Section 61 also incorporates the common law prerogative powers of the Crown, among which is the power to defend the country against external and internal threat.[2] As both the express s 61 power and the common law prerogative power are inherent executive powers, they do not require statutory authorisation for their exercise.[3] However, the prerogative in

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1 *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 83 [215] (Gummow, Crennan and Bell JJ).

2 *Davis v Commonwealth* (1988) 166 CLR 79, 110 (Brennan J).

3 Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Thomson Reuters, 4th ed, 2014) 160. Perhaps the most recent controversial exercise of the prerogative in a defence context was the invasion of Iraq in 2003. This, and the reported contemplation by former Prime-Minister Tony Abbott to commit troops to Ukraine after the downing of Air Malaysia flight MH 17, has led to calls for this aspect of the prerogative to be governed by statute and to require parliamentary authorisation for its exercise. See David Wroe, 'Tony Abbott's office floated sending Australian troops into Ukraine conflict, defence expert claims', *Sydney Morning Herald On-line*, 13 June 2016, < http://www.smh.com.au/federal-politics/federal-election-2016/tony-abbotts-office-floated-sending-australian-troops-into-ukraine-conflict-defence-expert-claims-20160612-gphbab.html>.

relation to domestic threats is now governed by provisions contained in the *Defence Act 1903* (Cth), which regulate the use of defence forces in aid of civil power.[4]

Section 51A of the Act provides that if the authorising ministers designated under the Act[5] determine that Commonwealth interests are threatened by domestic violence against which a State or Territory is unable provide protection, the defence forces may be called out on ministerial advice to the Governor-General and the Chief of the Defence Forces directed to protect Commonwealth interests against the violence.

Apart from threats to the nation as a whole, s 119 of the Constitution imposes a duty on the Commonwealth to defend the States. Section 119 provides as follows:

> The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

Consistent with this duty, s 51B of the Act provides that the authorising ministers may, upon application by a State, advise the Governor-General to direct the Chief of the Defence Force to protect the State against the domestic violence.[6]

Finally, s 51CA of the Act provides for an expedited procedure that can be used where the conditions specified in s 51A or 51B exist, but because 'a sudden and extraordinary emergency' exists, it is not practicable to use the procedures contained in those sections. The various provisions of 51AC authorise either the Prime Minister acting alone, the other two authorised ministers, or one of the authorising ministers along with the Deputy Prime Minister, the Minister of Foreign Affairs or the Treasurer to issue an order calling out the defence forces.

From the above it is clear that there is a firm constitutional basis upon which the Commonwealth could use executive power to deploy forces to meet a domestic zombie threat. Of course, once the provisions contained in the *Defence Act* were exhausted (because of the demise and / or zombification of the Governor-General and ministers) and the constitutional order destroyed, defence against the threat would of necessity devolve down to people not specifically authorised to manage it. Although acts they took directly related to suppressing zombies would be lawful under criminal law doctrines of defence and defence of others, the collapse of the constitutional order would raise the different problem of who would wield lawful governmental authority. This is discussed in Part IV of this article.

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4 For a comprehensive examination of the powers of the executive to deploy the defence forces domestically see Margaret White, 'The Executive and the Military' (2005) 28 *University of New South Wales Law Journal* 438.

5 Defined in s 51 as the Prime Minister, the Attorney General and the Minister of Defence.

6 Section 51C has parallel provisions relating to defence of Territories against domestic violence.

B *Legislative power*

There are two sources of legislative power, which would support laws directed towards addressing the zombie threat.

The s 51(vi) defence power confers upon the Commonwealth Parliament the power to legislate with respect to

> the naval and military defence of the Commonwealth and of the several States; and the control of the forces to execute and maintain the laws of the Commonwealth.

The first limb of s 51(vi) (relating to the naval and military defence of the Commonwealth) has been interpreted as including a capacity to legislate with respect to defence against threats both external and internal.[7] However, whether a non-military threat such as that posed by a zombie pandemic would fall within the ambit of this limb of the power is moot. Some suggest that those words support only laws directed towards the suppression of insurrection[8] which offence, if interpreted as requiring specific intent, could arguably not be said to be committed by zombies.

This difficulty can however be overcome as the second limb of the defence power (relating to the control of forces to execute and maintain the laws of the Commonwealth) empowers Parliament to legislate for domestic law-enforcement, and so would certainly provide a basis for any legislative measures necessary to counter a national threat posed by zombies.

A key feature of the defence power is that it varies in scope,[9] and thus the legislation it supports varies according to the circumstances in which the nation finds itself. Because s 51(vi) is a purposive power, a court assessing the validity of a law based on the power must determine whether the law is appropriate and adapted to the purpose of defence.[10] The court in *Australian Communist Party v Commonwealth*[11] identified three phases through which the power may expand and contract: (i) a core stage, always available, even in peacetime, (ii) an expanded stage, available both during times of tension falling short of war and during periods when the power contracts during the aftermath of war and (iii) the most expansive stage, available during times of war. Because the scope of the power depends upon prevailing conditions, a court's determination of whether a law is *intra vires* the power will depend upon its assessment of the facts that gave rise to those conditions. The High Court has held that courts may take judicial notice of such facts as are sufficiently notorious to be within the realm of public knowledge.[12] One would therefore predict that, as the zombie outbreak spread and its effects became more

7 *Thomas v Mowbray* (2007) 233 CLR 307.
8 John Pyke, *Constitutional Law* (Palgrave Macmillan, 2013) 218.
9 *Farey v Burvett* (1916) 21 CLR 433.
10 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 and *Polyukhovich v Commonwealth* (1991) 172 CLR 501.
11 (1951) 83 CLR 1.
12 *Stenhouse v Coleman* (1944) 69 CLR 457 and *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

serious, the defence power would expand to meet it, with implications for civil liberties. These are considered in Part III of this article.

Finally, apart from the defence power, the nationhood power, which is based on the s 61 executive power coupled with the s 51(xxxix) express incidental power, could also be used as a source of legislative authority. It confers upon the Commonwealth Parliament legislative power to enact laws on topics falling peculiarly within the responsibility of a national government. In *Burns v Ransley*[13] and *R v Sharkey*[14] the High Court held that the nationhood power could be used to protect the Commonwealth from internal attack and subversion. More generally, the nationhood power has been held to enable the Commonwealth to enact legislation pertaining to national celebrations[15] and to overcome the effects of the Global Financial Crisis.[16] There is therefore no doubt that it would extend to dealing with the existential threat posed to the nation by a zombie outbreak. Nevertheless, given that the High Court has held that the expenditure of money for a programme must be specifically authorised by appropriations legislation,[17] and that the no such item would have been included in Appropriations Acts given the speed of the outbreak, it is more likely that the Commonwealth would rely on the second limb of the defence power to address a zombie epidemic, as expenditure of money for the protection of the public from internal violence however caused, would fall within the ordinary annual appropriation for the defence force and the Australian Federal Police.

III PERSONAL LIBERTY DURING – AND BEFORE - A TIME OF OUTBREAK

Although one might expect that the right to personal liberty will be curtailed in the event of a zombie outbreak, perhaps what is more disturbing is that the is not that well protected under Australian constitutional law even in the absence of such a catastrophe.

As is notorious, the right to personal liberty, arguably the most important right apart from the right to life receives no express protection in the Commonwealth Constitution. In other words, we still await the fulfilment in our Constitution[18] of the promise of Magna Carta of 1215, clauses 39 and 40 of which provide as follows:

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13 (1949) 79 CLR 101.
14 (1949) 79 CLR 121.
15 *Davis v Commonwealth* (1988) 166 CLR 79.
16 *Pape v Commissioner of Taxation* (2009) 238 CLR 1.
17 *Williams v Commonwealth (No. 1) (School Chaplains Case)* (2012) 248 CLR 156.
18 It was a terrible irony that in the very week of the 800th anniversary of Magna Carta last year, the principal concern of the government was the drafting of legislation to allow deprivation of citizenship without the need to go to court – the very antithesis of due process promised by Article 39 of Magna Carta - see Eleanor Hall, 'What can Tony Abbott learn from the Magna Carta?' *Australian Broadcasting Corporation – The World Today,* 15 June 2015, <http://www.abc.net.au/news/2015-06-15/modern-australian-politicians-could-learn-from/6546728>.

> (39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.
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> (40) To no one will we sell, to no one deny or delay right or justice.

In the absence of textual protection of the right to liberty in the Constitution, such protection as the right has rests on the thin foundation of an implied right to due process under Chapter III as enunciated in *Lim v Minister for Immigration, Local Government and Ethnic Affairs*.[19] In that case, the High Court held that as the adjudication and punishment of criminal guilt was punitive in nature, it was an exclusively judicial function and for that reason the executive has no common-law power to detain citizens other than as part of a process in which the ultimate validity of detention is determined by the courts.[20] Similarly, the court held that the where statutory power to detain is conferred upon the executive, that too had to be overseen by the courts.

The right to due process as formulated in *Lim* is however subject to significant shortcomings: First the court found that the power to detain non-citizens who do not have permission to be in Australia for the purpose of deportation or the determination of an application to enter Australia is non-punitive and so a power to detain in those circumstances could be conferred upon the executive by Parliament. Yet it is difficult to see how detention of persons who have committed no offence and have sought to exercise the right to apply for asylum can be anything other than punitive. The objectively punitive nature of such detention is confirmed by the fact that even though decisions taken by officers of the Commonwealth under migration detention legislation is subject to review under s 75(v) of the Constitution, that review does not give the courts the power to engage in substantive review of the reasonableness of a decision and, as was shown in *Al-Kateb v Godwin*,[21] which can lead to a person being detained *ad infinitum* –and surely no detention can be more punitive. Furthermore, in *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*,[22] the court held that the fact that the conditions of detention were inhumane (indeed, one can argue that detention in the absence of criminal guilt is inherently psychologically inhumane) did not make detention punitive.

The other shortcoming in *Lim* derives from the fact that the court held that non-punitive detention by judicially-unsupervised executive order is permissible in 'exceptional cases', which the court did not define but said would include the detention of persons who were mentally ill or who were carrying communicable diseases. Subsequently, in *Kruger v Commonwealth*,[23] Gummow J added the detention of children for their own protection to the

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19 (1992) 176 CLR 1.
20 Ibid 114 (Brennan, Deane and Dawson JJ).
21 (2004) 219 CLR 562.
22 (2004) 219 CLR 486.
23 (1997) 190 CLR 1.

list of exceptions and also stated that 'The categories of non-punitive, involuntary detention are not closed'.[24] This approach is troubling for three reasons:

First, if categories of non-justiciable detention exist, how is a person (or someone acting on their behalf) to engage the courts in determining whether their detention actually falls within one of those categories? In *Lim* the court held that while Parliament could authorise detention under the *Migration Act 1958* (Cth) of categories of person alleged to be in Australia unlawfully, the executive could not be given an unreviewable power to determine whether a person fell into one of those categories, as that would be to vest judicial power in the executive. Presumably therefore a writ of *habeas corpus* can be sought and a challenge to detention brought on the basis that it does not fall within one of the exceptional categories such as carrying a communicable disease which would be relevant in the case of a zombie plague, but it is unfortunate that the court in *Lim* did not qualify its statement to reflect that entitlement. If *Lim* is read as meaning that related to one of the exceptional categories fell wholly outside the ambit of judicial scrutiny, it could lead to black-hole detention into which a person could disappear without any remedy.

Second, ought there ever to be circumstances in which detention by executive order is ever justifiable in a free society? Why, even in cases of mental illness, communicable disease or child protection should there not be a requirement for judicial confirmation that reasonable grounds for detention exist? The consequences of not having a constitutionally-protected right to due process for all types of detention were illustrated by the cases of Vivian Alvarez Solon, deported from Australia even though she was an Australian citizen, and Cornelia Rau, who was also an Australian citizen and who was held in immigration detention after she was unable to identify herself because of mental illness. Both women were able to be detained because neither the State laws relating to the detention of people with mental illness nor the deportation provisions of the *Migration Act 1958* (Cth) require judicial authorisation for deprivation of liberty[25] - which would certainly lead such laws to be invalidated if we had a constitutional right to individual liberty and due process. Perhaps the most worrying aspect of the Rau and Solon cases was that they were found to be only two of more than 247 cases of unlawful detention over 14 years.[26]

Third, the fact that in *Lim* the court excluded detention in certain circumstances from the ambit of judicial oversight means that in those circumstances the proportionality standard which applies in cases where constitutional rights are limited has no application. In other words, detention of persons falling into one of those categories is potentially open-ended because no

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24 Ibid 162.

25 See the parliamentary discussion paper Peter Prince, 'The detention of Cornelia Rau: Legal issues, (Parliamentary Library, Parliament of Australia, 2005) < http://www.aph.gov.au/binaries/library/pubs/rb/2004-05/05rb14.pdf > and the report of the Commonwealth Ombudsman into the detention and deportation of Vivian Solon: Commonwealth Ombudsman, ' Inquiry into the Circumstances of the Vivian Alvarez Solon Matter' (Report 03/2005, Commonwealth Ombusdman, Commonwealth of Australia, 2005) <https://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/alvarez_report03.pdf>.

26 David Crawshaw, 'Damning reports slam immigration dept', *Australian Associated Press*, 2 July 2007.

court would be able to inquire whether the use of detention or, when justified, its duration, was a proportionate response to the circumstances supposedly justifying the detention.[27]

The implications of this during a zombie outbreak are that since the existence of a communicable disease is one of the exceptional categories identified in *Lim*, the state would be able to detain persons who were alleged to be infected without having to prove that they actually were infected, without the person having the right to contest the reasonableness of their detention before the courts and with the detention potentially continuing *ad infinitum*. Of course, the mechanisms of judicial review would no longer be available once constitutional authority had broken down, but it is concerning that even during the *tardo* and *affretando* stages people could be detained without due process. Indeed, one can go further and state that *even in the absence of a zombie threat* Australian constitutional law vests the state with an unreviewable power to detain, which is surely a sign that the inclusion of a non-derogable right to personal liberty needs to be included in the Constitution.[28]

IV ABROGATION OF THE CONSTITUTION UNDER THE DOCTRINE OF NECESSITY

Where would lawful authority to govern reside once governmental structures had broken down during the *prestissimo* stage of the outbreak? Although it has never become a live issue in Australia, the courts in several Commonwealth jurisdictions have recognised the existence of a doctrine of necessity under which unconstitutional acts may be taken for the purpose of securing constitutional government in the future. The doctrine was first recognised in 1955 in Pakistan in the case of *Federation of Pakistan v Maulvi Tamizuddin Khan*[29] in which the court validated the acts of the Governor-General, who had permanently dissolved the Constituent Assembly (which had been elected both to draft a Constitution for the country and to serve as

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27 Perhaps this should come as no surprise, given that limitless immigration detention was held to be lawful in *Al-Kateb v Godwin* (2004) 219 CLR 562.

28 A suitable model is provided by the South African Constitution, the relevant provisions of which state as follows:

12 Freedom and security of the person

(1) Everyone has the right to freedom and security of the person, which includes the right
(a) not to be deprived of freedom arbitrarily or without just cause;
(b) not to be detained without trial;
(c)
The right is made effective by the procedural right contained in s 35(2)(d) which provides that any person is detained has the right to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful to be released;

Significantly, while s 37 of the Constitution permits derogation from some rights during a state of emergency, s 37(5) lists s 35(2)(d) as one of the rights declared which is non-derogable.

29 PLD 1955 FC 240.

its first legislature) in what he claimed were extraordinary ground that the Parliament was no longer representative of the people. The court based its decision on Bracton's maxim 'what is otherwise not lawful is made lawful by necessity'.[30]

A number of points emerge from this precedent: First, in so far as it purports to allow unconstitutional action, the doctrine obviously lies outside the normal scope of the reserve powers, which are part of the mechanism of responsible government. Second, care is needed in determining whether exigent circumstances warranting use of the doctrine actually exist - the Pakistan example was heavily criticised, as it is a truism to say that almost every legislature will, at some point in its life, no longer represent the popular will. Third, although an assumption of power under the doctrine is supposedly subject to the requirement that it occur for the purpose of protecting the constitutional order – in other words, the doctrine appears to justify a trade-off between a breach of constitutionalism the short term against the protection of constitutionalism in the long term – that will not always be the case, as the example of Fiji (discussed below) demonstrates.

A contrasting judicial pronouncement on the doctrine occurred in Grenada, in the wake of a military coup in 1983 which had overthrown a regime led by Maurice Bishop, which had itself seized power unconstitutionally in 1979. Members of the armed forces who had conducted the coup were charged with murder before courts which had been established by the Bishop regime and which had been declared lawful by the Governor-General after the coup. In *Mitchell v Director of Public Prosecutions*[31] the Grenada Court of Appeal upheld the legality of the courts on the basis of the doctrine of necessity, finding that, in the absence of constitutionally-valid courts, the courts established by the Bishop regime were temporarily valid, pending the re-establishment of courts in accordance with the Grenada Constitution of 1973.[32] Haynes P laid down five conditions which needed to be satisfied in order for the doctrine of necessity to validate otherwise unconstitutional action:[33]

(i) an imperative necessity must arise because of the existence of exceptional circumstances not provided for in the Constitution, for immediate action to be taken to protect or preserve some vital function to the State;
(ii) there must be no other course of action reasonably available;
(iii) any such action must be reasonably necessary in the interest of peace, order, and good government; but it must not do more than is necessary or legislate beyond that;
(iv) it must not impair the just rights of citizens under the Constitution;
(v) it must not be one the sole effect and intention of which is to consolidate or strengthen the revolution as such.

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30 Bracton, *On the Laws and Customs of England* (Samuel Thorne trans, Harvard University Press, 1959) vol 2, 269 [trans of *De Legibus et Consuetedinibus Angliae* (first published c 1220)].
31 [1986] LRC (Const.) 35.
32 For an analysis of *Mitchell* see Simeon McIntosh, *Kelsen in the "Grenada Court": Essays in Revolutionary Legality* (Ian Randle Publishers, 2008).
33 *Mitchell v Director of Public* Prosecutions [1986] LRC (Const.) 88-9.

In 2000 in the aftermath of one of four coups to occur in Fiji in recent decades,[34] the Fiji Court of Appeal was called upon to determine whether the assumption of power by Commodore Frank Bainimarama in the wake of a coup by George Speight was lawful. In *Republic of Fiji v Prasad*[35] the court applied the criteria established in *Mitchell v Director of Public Prosecutions* to hold that while Bainimarama's exercise of power in the immediate aftermath of the coup to re-establish order was justified under the doctrine of necessity, his subsequent actions in abrogating the Constitution were not. The same reasoning was again applied by the Fiji Court of Appeal in *Qarase v Bainimarama,*[36] in which the court held that the acts of the then President, Ratu Josefa Iloilo, and Commodore Bainimarama in dissolving Parliament and dismissing the Prime Minister could not be justified under the doctrine of necessity because they were directed towards the usurpation of constitutional authority, not its preservation. Unfortunately, however, the Bainimarama regime then abrogated the Constitution and dismissed the judges.

In light of the above one can say that during an outbreak of zombiism an assumption of governmental power by the Governor-General (or, after his demise and that of the Executive Council, anyone else who was in a position of wielding *de facto* authority over police and military forces)[37] would be lawful, so long as that assumption of power was directed towards the ultimate restoration of constitutionalism. It would also be true to say that as the institutions of government progressively failed, the power that could be wielded unconstitutionally would become proportionately greater.

Ultimately, in the final stages of the *mosso* period, once centralised governmental authority (both State and Commonwealth) had broken down, one could predict conflict between competing groups of bureaucrats and military personnel trying to assert authority. The most likely end-point of this process would likely be the coalescence of survivors around defended strong-points, in which authority was wielded by those with the physical means to do so. Whether the acts of those people would be justifiable in accordance with the rules formulated by Haynes P would vary from case to case, but one would imagine that in many instances the temptation to retain power indefinitely, rather than to wield it only pending the restoration of constitutional government and with respect for human rights, would be overwhelming. In other words, in many places authority would devolve to petty tyrants.

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34 Two coups occurred in 1987, followed by coups in 2000 and 2006.
35 [2001] NZAR 385, [48-51] (Casey, Barker, Kapi, Ward and Handley JJA).
36 [2009] FCJA 9, [132] (Powell, Lloyd and Douglas JJA).
37 Noting that there is no prescribed hierarchy of authority under either common law or statute which would determine where lawful lay in such circumstances.

V A NEW POST-APOCALYPTIC GRUNDNORM?

A related but separate issue to the doctrine of necessity (where unconstitutional acts directed towards the ultimate re-establishment of constitutional government may be justified) is that of legitimacy (which involves whether an unconstitutional regime is lawful). It would be a mistake to assume that, even if the zombie plague is overcome - which would take a long time as it would require the killing of all zombies - the constitutional *status quo* ante would automatically be restored. Indeed, it would be extremely difficult for a single political authority to be re-established over a country as large as Australia in the *allargando* phase, taking into account the destruction of transport and communication infrastructure, the significant decrease in population and the rise of local polities that would have occurred during the *prestissimo* stage. How would the legitimacy of new polities be assessed?[38]

There are two main approaches to legitimacy. The first has its origins in the positivist theories of Hans Kelsen and in particular the doctrine of effectiveness, in terms of which legal rules are deemed to be legitimate if issued by a law-maker or institution whose authority is recognised in the sense of being generally obeyed by the ruled.[39] According to this theory, the moral content of law is irrelevant to its legitimacy, the sole criterion of which is effectiveness. Furthermore, it matters not whether general obedience is obtained by maintaining the support of the ruled or only their unwilling acquiescence.[40] Kelsen's theory has the advantage that the existence of a law-making authority will be able to be identified simply by observing whose rules are generally obeyed. Its disadvantages are that even a tyranny can be legitimate in accordance with its terms. It also allows a regime to take power unconstitutionally and for its dictates to become law, so long as that regime is successful in displacing the authority of the old regime – indeed the theory encourages ruthlessness in so doing, because a successful stamping out of the authority of the old, constitutional, regime is critical to the legitimacy of the new regime.

The other approach to legitimacy can be described as a natural law theory because it has in common with natural law the idea that law is valid[41] only if it complies with some external moral norm and if the authority producing it rules with the consent (not mere acquiescence) of the population.[42] The advantage of this theory is that it is consistent with human dignity in that

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38 For an overview of legitimacy and coup regimes see John Hatchard and Tunde Ogowewo, *Tackling the Unconstitutional Overthrow of Democracies: Emerging Trends in the Commonwealth* (Commonwealth Secretariat, 2003).

39 Hans Kelsen, *General Theory of Law and State* (Harvard University Press, 1949).

40 For examples of the application of this theory see *R v Ndhlovu* 1968 (4) SA 515 (RAD) 532 [B-D] (Beadle CJ) and *Mokotso v The King* [1989] LRC (Const.) 24, 131-3 (Cullinan CJ).

41 An illustration of the consistency of this approach with natural law is provided by the cases which arose in post-Nazi Germany, when courts refused to apply laws that were contrary to fundamental norms of justice – see Lon Fuller, 'Positivism and Fidelity to Law - A Reply to Professor Hart' (1957-58) 71 *Harvard Law Review* 630 and Thomas Mertens 'Nazism., Legal Positivism and Radbruch's Thesis on Statutory Injustice' (2003) 14(3) *Law and Critique* 277.

42 The requirement of genuine consent of the population as a requirement for legitimacy was applied by the Fiji Court of Appeal in a decision where it was called upon to assess the legitimacy of the regime established by Commodore Frank Bianimarama – see *Republic of Fiji v Prasad* [2001] NZAR 385, [72-74] (Casey, Barker, Kapi, Ward and Handley JJA).

under it regimes which grossly infringe human rights (and thus they laws they purport to enact) are illegitimate. The disadvantage of the theory is that as compliance with human rights norms is a matter of degree, it is difficult to determine the point at which a regime fails the test. Furthermore, even in cases where a regime is plainly illegitimate under the test, declaring it so would usually leave a legal vacuum with no competitor regime in existence – although a solution to this lies in courts which are faced with questions over the validity of laws enacted by such regimes validating those laws which are not offensive to fundamental rights.

Although the assumption of sovereignty over Australia by the United Kingdom, and thus the enactment of all laws subsequently passed by colonial, Commonwealth, State and Territory governments was legitimate in Kelsinian terms, the fact that it was achieved through the dispossession, displacement and, in many instances, the massacre, of Indigenous people means that it would not be seen as such under natural law. Nevertheless, given the passage of time since the assumption of sovereignty, it is unsurprising that the courts have held the Crown's acquisition of authority to be unchallengeable before Australian courts in *Mabo v Queensland (No. 2)*,[43] and that Indigenous law was extinguished as a consequence.[44]

Similarly, the courts have rejected any argument that laws might be invalid on grounds that they fail to meet external norms of justice, holding that within the scope of its legislative powers (and subject to the few rights protected by the Constitution) statutes enacted by the Commonwealth Parliament may not be challenged on substantive grounds. There are numerous decisions to the same effect at State level.

Things would be very different in the wake of a zombie apocalypse in which Commonwealth and State governments had been swept away with little or no change of being re-established. This break in legal continuity would mark a change in the grundnorm in Kelsinian terms, as legal authority would now be traced to the acquisition of power by a number of new law-making authorities exercising effective control in various parts of the country. While all these regimes would pass the Kelsinian test of legitimacy, those which were tyrannical would fail the natural law test. It is unreasonable to expect that courts in the latter type of polity would have the courage (and perhaps unwisdom) to pronounce negatively on the validity of the regimes of which they are a part. However, one would predict that the courts of other polities in which norms of justice were in operation would be confident to pronounce upon the validity of such regimes and of the laws promulgated by them, an issue which would arise when such courts were called upon to decide whether to enforce the laws of other polities in cases involving conflict of laws. Here it is likely that a distinction would be drawn between laws offending against fundamental rights and quotidian laws regulating matters such as contracts.

One of the most significant consequences of the breakdown of previous constitutional structures would be the opportunity it would provide for the re-establishment of Indigenous sovereignty over large parts of Australia. The fact that a significant proportion of the

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43 (1992) 175 CLR 1, 60 (Brennan J).

44 See cases such as *Coe v Commonwealth (No. 2)* (1993) 118 ALR 193, *Walker v New South Wales* (1994) 182 CLR 45 and *Thorpe v Commonwealth (No. 3)* (1997) 71 AJLR 767.

Indigenous population lives in widely-dispersed remote settlements would mean that it would to some extent be protected from the zombie apocalypse and would therefore be well-placed to re-assert the sovereignty that was lost at the time of settlement. This would also mean a resurgence in the application of Indigenous law which, despite claims to the contrary, has remained immanent in Indigenous communities even though not recognised by the legal system established after 1788.[45]

The emergence of new polities throughout what was once the Commonwealth of Australia would require the drafting of new constitutions *ab initio*. This would provide an opportunity for comprehensive constitutional reform such as has not been politically possible under the current Commonwealth Constitution with its inhibiting amendment process. Drafters of constitutions would be able to implement new electoral systems, provide for proper legislative scrutiny of the executive and offer effective protection for human rights, matters in relation to which the current Constitution is so manifestly deficient.[46] It is a mark of how difficult constitutional reform is in Australia that a zombie apocalypse may offer the best chance of its taking place.

[45] For a discussion of the continued relevance of customary law to Indigenous communities see Bruce Debelle, 'Aboriginal Customary Law and the Common Law', in Elliott Johnston, Martin Hinton and Daryle Rigney (eds), *Indigenous Australians and the Law* (Cavendish, 1997) 81.

[46] For a general discussion of constitutional reform see Bede Harris, *Freedom, Democracy and Accountability – A Vision for a New Australian Constitution* (Vivid Publishing, 2012).