The purpose of this chapter is to explain some meanings of the rule of law, and how they fit with ideas about the operation of a legal system comprising three independent arms of government. This will assist with an evaluation of the role of law in this contested area of refugee and asylum law and policy. In particular, this chapter introduces the reader to Ronald Dworkin’s idea of ‘law as integrity’ as one tool in such an evaluation.

The focus of this book upon the rule of law arises from an overall concern with how national legal responses to refugees and asylum seekers have developed, and what they reveal about the operation of the rule of law. The way that the rule of law operates at the national level in relation to refugees and asylum seekers determines the extent to which their rights in international law (especially, as explained in the previous chapter, the right to seek asylum and the right against refoulement) are respected. That is, it is important for practical reasons, as it has been left to state parties to international treaties to acknowledge and to implement the rights and status of asylum seekers and refugees. As explained in the previous chapter, the international rule of law is imperfect, and it is open to individual states to interpret and implement it according to their own needs and understanding. ¹ This book is concerned about the integrity or coherency of ‘dualist’ legal systems. The rule of law is important for that reason, but also because it shows how national refugee policy is developed, and the subtext that underlies national policy.

In this context, Ronald Dworkin’s idea of ‘law as integrity’ is appealing as a comparator and framework for analysis because it contains a concept of an integrated rule of law, reflecting the operation of a legal system. The idea of ‘integrity’ in a legal system also has a popular meaning associated with values of justice, equality and procedural fairness, and the independence of the three branches of government.\(^2\) It implies the existence of a morally coherent legal system which emphasizes the rights of individuals. But governments also use this term to describe the aims of their restrictive policies in relation to asylum seekers when the ‘national interest’ is invoked. When they talk about the ‘integrity’ of the asylum system, they often use the term to refer to inviolable territorial borders, and to policies which allow them to decide who is allowed to enter their territory and to share the benefits that they provide to the political community.\(^3\) Clearly this is another view of integrity which focuses upon the distributive consequences (the costs and benefits which accrue to the community) of policies in relation to refugees and asylum seekers. This other view of integrity looks to protect the ‘rights’ of the community from refugees and asylum seekers.

In this chapter, Dworkin’s integrated rule of law will be described as an addendum to the system of ‘checks and balances’ which is provided by three independent branches of government. The chapter begins with an explanation of different versions of the rule of law which embody formal and substantive (or normative) visions of law, and their application to refugee and asylum law and policy. Part Two, which focuses upon theories of adjudication, stresses the significant role of judges to protect the rights of refugees against *refoulement*. In this context, the implications of the difference between formal and substantive explanations for the concepts of judicial review and procedural fairness and the value of neutrality are discussed. In Part Three, the discussion turns to the role of the legislature and the idea of the ‘legislative principle’ – which can be equated to the responsible exercise and interpretation of legislative power. This part includes a discussion of how principles of legislative interpretation bring international law into our ‘dualist’ legal systems. Part Four discusses the role of ‘the community’ and of national boundaries in defining the rights of asylum seekers. In this part, we

\(^2\) Justice James Spigelman, *The Integrity Branch of Government* (2004) XLVIII Quadrant 7–8 at 50–7 suggests that administrative law through the doctrine of judicial review performs this role.

\(^3\) See Legomsky, Chapter 3 in this volume.
move away from legal concepts and from Dworkin’s theory to discussion of the political and ethical implications of excluding asylum seekers from legal systems. The combination of these arguments provides a better picture of how legal systems operate, and how national responses to issues about refugees and asylum seekers might be shaped.

Part one: contested meanings, overlapping consensus

The ‘Rule of Law’ is a phrase redolent with meaning and significance for lawyers and political scientists alike. The American legal philosopher, Ronald Dworkin, has described the rule of law as an ‘aspirational’ but ‘contested’ concept or ‘ideal’. So, it may be asked, why do we concentrate on this concept which is so contentious and which, moreover, has been treated with such scepticism by other recent commentators? It is precisely because of that scepticism and the need to understand the meaning of the rule of law, because of the significant consequences that it has for asylum seekers and refugees, that we embark upon this route. In this part, it is explained that the concept embodies both formal (or procedural) and substantive (or normative) visions of law. This has important implications for evaluating the way in which judges decide cases about asylum seekers and refugees in national jurisdictions.

In its most simple and non-contentious sense, the ‘rule of law’ refers to the idea of rule by law, but this then begs the question of the significance of the expression ‘rule of law’. What is the essence of ‘law’ and, for that matter, what are ‘laws’? Is a valid law simply one that arises from a legitimate and recognized source, and which conforms to formal criteria (such as procedural requirements and clarity), or do other criteria also determine its validity? And what do these ideas tell us about the nature of ‘law’ and of a legal system? These are all very important questions without easy answers, but which have enormous relevance to

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the problem of determining the rights of asylum seekers and refugees who depend upon states for implementation of their rights. Thus they raise one set of issues which challenge the limits of contemporary legal systems. To find some answers to these questions, we need to go back a little in legal history.

The well known late-nineteenth century English jurist, Albert Venn Dicey, famously employed the term ‘rule of law’ in two senses: first to embody the idea of lawful constraint of authority (the idea of ‘rule by law’), and secondly to signify the right to equal individual subjection to the law.7 But these twin ideas, summarized as ‘authority’ and ‘equality’, do not always lead to the same practical solutions where individual rights are concerned. There are many examples in the context of refugees and asylum seekers, as highlighted in the chapters of this book, where their rights have been denied in the ‘name of the law’. This brings to mind the well-known aphorism: ‘The existence of law is one thing; its merit or demerit another’.8 That is to say, self-evidently law and justice are not synonymous.

The contrast between authority and rights in Dicey’s formulation leads us to another idea – the distinction between law and politics. It reminds us that political scientists are also interested in the concept of the rule of law, and that law and government are inextricably interconnected. The idea of authority suggests a ‘formal’ or ‘thin’ vision of the rule of law – the fact that officials and citizens alike are bound by and required to act consistently with the law. In this vision of the rule of law, it might be said that a law is a law because it is a validly enacted. On the other hand, the notion of rights which arises from ideas of equality, citizenship and democracy, and the corresponding duties or responsibilities of the state, refers to the exercise of government power. It suggests that something more than formal validity is needed to make a law. This could be called a ‘thick’ or substantive vision of the rule of law,9 as it embodies values and norms.

Each of these views is a simplification of more complex ideas but, set out in this way, it can be seen that the dichotomy between the thin and the thick visions of the rule of law runs parallel to a division between law and politics. As Trevor Allan\(^\text{10}\) points out, in addition to the twin concepts of authority and equality set out above, Dicey’s Rule of Law also expressed political ideals, namely the ‘legal doctrine of parliamentary sovereignty and the political doctrine of the sovereignty of the people’. We return to these important ideas later in this chapter, where we discuss the role of the community and the rule of law. For the moment it is important to note that the meaning of ‘sovereignty’ under the rule of law can be either a legal (‘parliamentary sovereignty’) or a political (‘sovereignty of the people’) concept, and perhaps a combination of the two when we talk about ‘democracy’, for example. These are not issues that we can examine in detail here, but the reason for mentioning them is to show that the answer to the question: ‘What is the essence of “law”?’ needs to take account of these legal and political concepts.

Returning for the present to the twin ideas of authority and equality in Dicey’s theory, we can describe the ‘thin’ vision of the rule of law as one which stresses *posited* law or authority. This leads to enquiry into the nature of a legal system and the requirements of valid laws. This is described as legal positivism, and is regarded as the leading modern legal philosophy.\(^\text{11}\) Its most famous exponent is the English philosopher, Herbert L.A. Hart, who claimed that his theory of law was both descriptive and conceptual.\(^\text{12}\) Hart said that a legal system exists if a basic rule of recognition (or locus of authority), *accepted* by the system’s officials, is in place, and if the rules applied in that system as valid rules according to that rule of recognition are *generally obeyed*.\(^\text{13}\) While Hart’s concept of law is avowedly politically neutral, his most persistent critic,\(^\text{14}\) Ronald Dworkin, proposes a model of ‘law as integrity’ which

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\(^{10}\) Trevor R.S. Allan, *Law Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993), p. 11. Note that Allan suggests that both Dicey and Dworkin were concerned with ‘overall coherence and unity of the legal system’.


\(^{14}\) Tamanaha, *A General Jurisprudence of Law and Society*, p. 133.
is essentially focused upon political morality (in the sense explained below).

The law–morality debate has been defused to a certain extent by the development of two schools of legal positivism;\textsuperscript{15} namely the exclusive and the inclusive versions. These, it is claimed, were shaped by a defensive reaction to Dworkin’s critique of Hart.\textsuperscript{16} The exclusive or ‘hard’ version claims that what law is and what law ought to be are two different questions. To qualify as law under this version, ‘something must be posited through some social act or activity, either by enactment, decision or practice [emphasis in original]’.\textsuperscript{17} By contrast, the inclusive or ‘soft’ version of legal positivism allows some operation for moral principles. It claims that, while there is no necessary moral content of a legal rule, a particular legal system may make moral criteria necessary or sufficient for validity \textit{in that system}.\textsuperscript{18} Hart accepted this version of positivism in the posthumously published postscript to \textit{The Concept of Law}.\textsuperscript{19} Brian Bix suggests that the strongest argument for inclusive legal positivism is the ‘fit’ with the ‘way both legal officials and legal texts talk about the law’.\textsuperscript{20} Inclusive legal positivism accepts that moral criteria may be either a sufficient or necessary ground for legal validity in many circumstances. For example, the principles of equality and due process (which are discussed in Part two below) \textit{necessarily} have a moral basis.\textsuperscript{21}

This somewhat abstract discussion demonstrates several points. First, there is a range of views about the relationship between law and morality, which as we will see, affects views about how judges decide cases or \textit{should} decide cases (this relates to theories of adjudication, discussed in Part two). Secondly, it is difficult to describe the difference in views as a dichotomy; rather there is an overlapping consensus on the relationship between law and morality. In this context, the idea of a continuum of views may be a better analogy.\textsuperscript{22} Thirdly, this brief discussion illustrates the evolutionary nature of the rule of law.

\textsuperscript{15} Tamanaha, ‘The Contemporary Relevance of Legal Positivism’; Liam Murphy, ‘Concepts of Law’.

\textsuperscript{16} Tamanaha, ‘The Contemporary Relevance of Legal Positivism’ at 24.


\textsuperscript{18} Bix, ‘Legal Positivism’, p. 20. \textsuperscript{19} Ibid. \textsuperscript{20} Ibid.

\textsuperscript{21} Ibid., p. 21. Inclusive legal positivism accepts that the use of moral criteria is a choice of the officials, not a characteristic of the legal system.

\textsuperscript{22} Dyzenhaus, ‘Recrafting the Rule of Law’, p. 3.
This last point is an essential one. The ideal of the rule of law is a dynamic one that has responded to and been shaped by particular political and constitutional events. For example, when Dicey wrote, he was responding in part to the imminent rise of the administrative state and to the defects that he saw in the French system of separate administrative courts. Before Dicey’s time, the idea of the rule of law was debated by political philosophers as the framework of our modern constitution took shape and the powers of the King developed into a concept of state. Our shared constitutional history was shaped by contests between the different arms of government. Indeed, it is said that Jeremy Bentham, the ‘father’ of legal positivism was inspired by a desire to curb the power of ‘activist’ judges.23 Today, the issue of the rights of refugees and asylum seekers provides yet another challenge to the rule of law when executive and judiciary battle for control of the issue, and reactive legislatures use legislation to implement the executive’s agenda.

The idea that law and politics are separate is a subtext which underlines legal positivist thinking.24 As David Dyzenhaus reminds us, the development of legal positivism led to the severance of the link between political theory and legal theory.25 While Dworkin’s theory is self-described as embodying political morality, it implies ‘politics’ in a special sense as elaborated below. By contrast Hart’s theory was purposefully apolitical and uncritical of the state.26 However, in a statement which encapsulates a popular view, Dennis Galligan (who critiques Hart’s theory) points to the limits of that view:

Modern legal orders are based on ideas and values that ought to win support and protection. The idea that law is relatively distinct from politics, that legislatures are limited in the use of their legislative authority, that officials hold power on trust and should answer for their use of it, and that law should be used as an instrument for both stability and achieving positive social goals, all warrant our support [emphasis added].27

As the discussion in this book illustrates, it is doubtful whether law and politics can be entirely separated in the context of the rights of refugees and asylum seekers.

23 Margaret Davies, Asking the Law Question (Sydney: Thomson Lawbook, 1994), p. 49.
27 Dennis J. Galligan, Law in Modern Society (Oxford University Press, 2007), p. 21 (emphasis added).
To summarize the discussion up to this point: while there is agreement on the need for a rule of law, there is disagreement on what the rule of law comprises. In simple terms it can be said that the rule of law embodies both formal (or procedural) and substantive (or normative) visions of law. The formal vision of law approximates to the idea of legal positivism within which a second consensus has formed on the relevance of morality to understanding the nature of the rule of law. But while there is some consensus on the point of morality, the relevance of political concepts to the rule of law is one that continues to divide legal philosophers.

In his approach to political morality, Dworkin provides a substantive vision of the law which has, in turn, inspired many other philosophers to question aspects of the positivist tradition, such as the nature of rules and discretions. But, before proceeding further, it is necessary to explain Dworkin’s ideas a little more fully, as they are central to understanding the distinction between formal (or procedural) and substantive (or normative) visions of law which are discussed in this chapter. They are also essential to understanding the discussion of the ‘legislative principle’ and the importance of ‘community’ in Parts three and four, respectively, of this chapter.

Dworkin’s interpretive theory of law as ‘integrity’

As explained above, Dworkin rejects the positivist idea that a legal system is explained simply by the existence of binding obligations. His theory has developed over the years after long reflection and debate. For example, in Taking Rights Seriously (1977), Dworkin was concerned to identify the policies and principles (values) which determine how legal systems function, as opposed to thinking about law as a system of rules. In A Matter of Principle (1985), Dworkin discussed the application of the principle of procedural fairness or ‘due process’ in adjudicating the rights of individuals. In Law’s Empire (1986), Dworkin focused on...
the role of judges in adjudicating and deciding issues in the legal system, particularly in ‘hard cases’.

Dworkin looks for the underlying principles or values which lead to a united or coherent legal system. Dworkin’s idea of ‘law as integrity’, although not unrelated to the popular meaning described at the beginning of this chapter, has a special meaning which focuses upon the operation of the rule of law. His theory of law is that the nature of legal argument lies in the best moral interpretation of existing social practices. His theory of justice is based upon the principle of equality of all human beings. His idea of ‘law as integrity’ is an interpretive theory of law which concentrates upon the role of judges in a legal system and upon their responsibility to decide cases by reference to precedent and basic principles or values. Dworkin requires judges to evaluate the justifying purpose or goal or principle to be applied. In his view, judges have to be politically neutral (in the sense of partisan) but not morally neutral. But on the other hand, his idea of justice, being based upon equality, reflects his view about political morality.

In Justice in Robes (2006), Dworkin explains that his interpretive theory functions by seeking the ‘best’ or ‘moral’ ‘justification’ in practice. This has two dimensions, which Dworkin terms the ‘fit’ and the ‘value’ of a practice:

First, a justification must roughly fit what it purports to justify . . .
Second, . . . it must also sufficiently describe some sufficiently important value that the practice serves [emphasis added].

For example, in the context of constitutional adjudication, he said:

Integrity asks them to find and apply the principles of constitutional morality that provide the best justification of their past decisions, not one by one, but as a body of constitutional law.

In Law’s Empire, in addition to an adjudicative principle about the role of judges, Dworkin also recognized a legislative principle which asks law

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33 Ibid.  
34 Dworkin, Law’s Empire, pp. 87–8; Dyzenhaus, ‘Recrafting the Rule of Law’, p. 9 says that Dworkin ‘illuminated the justifactory’ characteristic of the rule of law.  
36 Dworkin, Justice in Robes.  
37 Ibid., p. 15 (emphasis added).  
Dworkin explains that ‘law as integrity’ asks judges to assume, ‘so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process’. This theory is based on the assumed existence of coherent community goals and policies which are moral and fair, that is, ‘integrated’. This aspect of his theory raises a dilemma, as explained further in this chapter. Although his theory was not framed with the issues of asylum seekers in mind, it has the potential to be used to exclude ‘outsiders’.

Dworkin’s views have divided the community of legal philosophers. On the one hand, his supporters point to the notion of substantive rights implicit in the theory of political morality, arising from his overall concern with the value of equality. This is an aspect of his view that all persons should be treated with equal respect and concern. For example, it has been suggested that the antecedents of his views are a long line of legal humanists.

But his detractors have critiqued the non-positivist focus of his interpretive theory. For example, it has been said that:

Dworkin urges the citizenry to adopt a Protestant attitude to the law, figuring it out for ourselves rather than take it on authority. . . . Unlike the claim that it is not the case that all law imposes overriding duties to obey, the claim that we should not give the state the benefit of the doubt about what law is seems resistible.

In other words, although Dworkin describes his theory as one of ‘political morality’, it is found lacking as a theory about state power. Instead of discussing the idea of state power and its institutions, Dworkin focuses upon the concept of ‘community’, as explained further below. Another criticism is that the idea of ‘law as integrity’ depends on there being ‘initial agreement’ between the legislature, the courts, the administrative agencies, and the constitution. This reflects Dworkin’s concept of ‘community’ but also demonstrates that he does not view

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42 Murphy, ‘Concepts of Law’ at 13.
43 Notably, he was also critical of Hart’s theory on that basis.
the legal system as comprising three competing arms of government. Rather it is an integrated system of government sourced back to the community.

Recently, in *Justice in Robes*, Dworkin defended his interpretive theory of law. He said:

A proposition of law is true, I suggest, if it flows from principles of personal and political morality that provide the best interpretation of other propositions of law generally treated as true in contemporary legal practice.\(^{45}\)

It is important to appreciate that, in contrast to Hart’s theory of analytical jurisprudence, Dworkin’s theory is about legal practice. As others have pointed out, they were each talking about different aspects of the rule of law.\(^{46}\) However, the fact that Dworkin focused upon the practice of law has had an enormous impact in its own right.

Dworkin’s views have inspired the articulation of rule of law issues for discussion in this chapter and in this book. These are explained next.

**Rule of law issues**

There are many pressing issues which are highlighted in the chapters of this book in relation to the practical operation of the rule of law and the balance between the three arms of government. In the remainder of this chapter, the implications of these issues for the rule of law are discussed, using both the distinction between formal and substantive visions of law and by reference to Dworkin’s views. These can be grouped under the following headings:

- The judicial processes: Are the courts deferential to executive policy in their approach to refugee law? Is such deference shown in respect to certain types of decisions? Is the principle of procedural fairness respected in relation to refugees and asylum seekers? In the process of interpreting international treaty obligations, are the courts respecting human rights obligations?
- The administrative structures for decision making and their impact on the rule of law. As several chapters in this book indicate, there are serious issues about the independence of decision-making institutions


at this level and the quality of their decisions. Is independence a value in its own right? Does it apply at this level of governance?

- Is there a principle of neutrality in operation in this context (both at the administrative and at the judicial levels)? Are refugees and asylum seekers treated with equal respect in comparison with nationals in the legal system? If not, what justifies the distinction between these groups?

- The often excessive and hasty use of legislation to achieve policy objectives in this highly contested area of policy. Is such power exercised responsibly as a public trust, as Galligan’s statement set out above requires? Related to that is the issue of incorporation of obligations under international human rights treaties: Are states using their legislative powers responsibly to incorporate such obligations or, conversely are they failing to incorporate such obligations?

- Flowing from these queries is how to explain the exclusion of refugees and asylum seekers from legal protection. Is such response explained by how a particular legal community values refugees and asylum seekers? What legal doctrine justifies discrimination in this context?

To elaborate upon these issues, the remainder of this chapter focuses first upon judicial processes, because they are most relevant to the idea of formal and substantive concepts of law introduced in this section and to Dworkin’s theory. We then turn to the idea of the ‘legislative principle’, which includes an important discussion about incorporation and interpretation of international law obligations. Finally we deal with the more ‘political’ issue of why asylum seekers and refugees are excluded from legal protections.

**Part two: integrity and adjudication**

In this part we discuss the implications of formal and substantive explanations of the concepts of judicial review and procedural fairness, as these are two all-important concepts which protect asylum seekers and refugees from *refoulement*. This also incorporates a discussion of the value of neutrality and its place in formal and substantive visions of law. The significance of this discussion is that it shows that formal and substantive thinking about how the rule of law operates lead to different outcomes for refugees and asylum seekers.

The role of the courts and judges as one set of ‘officials’ in the legal system challenges legal positivist thinking, which prefers to operate under ‘posited’ laws. This is particularly the case in the context of
refugees and asylum seekers, where policy is contentious. For example, governments are inclined to think that the courts, judges and administrative decision makers are undermining the will of parliament, whereas refugee advocates claim that the courts and judges are too deferential to government policy. Here it is argued that a substantive adjudicative role can be justified as conforming to the underlying human rights basis of refugee law.

Hart and Dworkin: theories of adjudication

In recent years several important debates about the role of judges in a democracy have shaped theories of adjudication around the role of judges in statutory interpretation. These issues are highly relevant to refugees and asylum seekers, as their rights and status are defined in national laws and constitutions which the courts and judges are called upon to interpret in the light of international human rights obligations.

In this section, the distinction between Hart’s and Dworkin’s theories of adjudication is explained by reference to the formal (positivist) and the substantive versions of the rule of law, and the implications of this distinction are elucidated. The positivist theory of statutory intention links the judge’s role back to the sovereign legislature so that legislative intent is interpreted as the will of parliament, and parliament is conceived as representing the majority of the polity. This can be described as a formal view of the law. But the theory is challenged by decisions in which the judicial role is more ‘activist’ – where a purposive interpretation is given to a constitution or statute or Bill of Rights, or where the application of customary law (rather than parliament’s edict) is involved.47 In the context of refugees and asylum seekers where international law and human rights are involved and ‘good faith’ interpretation is required of treaty obligations, this imposes an additional challenge to legal positivist theory.48

In relation to constitutional review (where there is a written constitution), there is debate over whether a constitution should be interpreted according to a fixed or historical meaning, or whether contemporary circumstances should be taken into account.49 This is the ‘originalism’ debate about whether the objective or subjective intentions of the

48 As explained in Part Three of this chapter, this process is also linked back to parliament.
makers of the constitution are relevant. Dworkin’s view on this debate is clear. He said that the role of judges is to uncover the existence of fundamental moral and political rights in the exercise of an independent judicial role. The difference between these views loosely accords with the formal–substantive divide, with the ‘original’ approach approximating to the positivist view. Dworkin’s view about the constitutional review function of judges also reflects his views about the ‘polity’. It grew out of a political philosophy that rejects the idea that democracy can be reduced to the simple formula of majority rule. Dworkin’s concept of political morality which derives from the ‘community’ is a theory about the sovereignty of the people.

It is unsurprising that Hart did not develop a theory of adjudication beyond a formal view of the role of judges. Under his concept of law, judges are officials bound by the rule of recognition under a system of law comprised of the union of primary and secondary rules. Under his ‘conventional’ approach, judges – like other officials – are bound by a ‘pact’ to accept and apply the laws. His theory has been described as one about ‘sources’ or ‘pedigree’. He did not delve into how judges apply the law. For Hart, the ‘internal point of view’ was simply ‘the practical attitude of rule acceptance’. But for Dworkin this was not enough – he wanted to know more about the process of adjudication in the legal system, about how judges conceive the ‘internal point of view’. Dworkin critiqued Hart’s model based on ‘pedigree’ as ‘conventionalism’, pointing out the underlying values of predictability and stability in such a model.

By contrast, Dworkin’s focus was on the protection of substantive values, as the following discussion demonstrates. In Taking Rights Seriously, Dworkin developed a theory of adjudication that stressed the role of the judge to apply principles and policies. In his attack on positivism, Dworkin stressed the need for the application of standards in legal reasoning. He replaced the concept of rules with principles and policies. In particular he analysed and explained the important role of

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50 Covell, The Defence of Natural Law, p. 152.
53 Ibid.
54 Bix, ‘Legal Positivism’, p. 32. It has been pointed out that this critique prompted the development of inclusive legal positivism: see Bix, ‘Legal Positivism’, p. 33.
55 Dworkin, Taking Rights Seriously.
judicial decision making as an application of standards. Dworkin’s theory of adjudication made a valuable contribution to the understanding of the role of the judge. Dworkin argued that the rule of recognition could not account for legal principles, nor could it differentiate between those that were useful and those that were not.\(^{56}\)

In *Law’s Empire*, Dworkin explains that ‘law as integrity’ requires judges to assume, ‘so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process’.\(^{58}\) This is an aspect of his theory that law is interpretive – that it is both the product of and the inspiration for comprehensive interpretation of legal practice.\(^{59}\) This interpretive theory of integrity is based on the assumed existence of community or communal goals and policies which are moral and fair or ‘integral’.\(^{60}\) Because the community has evolving needs, he stresses that the standards have to be compromised by what ‘is possible’.

Dworkin’s standards of integrity and procedural due process are sourced back to a political community, and are based upon substantive, universal values. For Dworkin, integrity is a principle over and above justice, fairness and procedural due process. It presupposes that legal rights and duties were created by a single author – the community personified – expressing a coherent conception of justice and fairness.\(^{61}\) Justice refers to the outcome and involves an ‘ought’ evaluation of moral and political rights. Fairness relates to the structure for making decisions. It is concerned with consistency and ‘due process’.

In *Law’s Empire*, Dworkin’s main concern was with the adjudicative principle.\(^{62}\) There we see his concern with a coherent legal system in which judges make interpretative decisions under his rights-based concept of the rule of law. But in discussing the role of judges in relation to legislation, Dworkin recognized the link with the legislative principle. He stressed that judges were bound by the principle of legislative supremacy to accept the legitimacy of statutes. But he also stressed that the criteria of ‘fit’ and ‘value’ apply to justify a decision.

As he explained in *Justice in Robes*, this requires the formal rules (such as constitutional principles and other matters of procedure) to be taken

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\(^{60}\) Cf. the critique of Trevor Allan, ‘Justice and Fairness in Law’s Empire’ (1993) 52 *Cambridge Law Journal* 64.


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into account. But Dworkin explained that judges may disagree about the underlying values that a practice incorporates. In relation to legislative meaning he says:

The reasons we have for supposing that a body constituted as that body is constituted has the power to make laws are reasons of political morality, and if lawyers disagree about the precise character of those moral obligations they will inevitably disagree on at least one occasion about what law the legislature has in fact made.63

In this passage Dworkin suggests that while it is for judges to check that legislation conforms to constitutional norms, such as the principle of equal protection, the judges cannot question the authority of the legislation as such. However, the judge must look for its underlying values. In relation to legislative interpretation he said:

[W]e must defend our choice as the best justification of the complex practice of legislation, and that will require us to defend it in a particular conception of democratic or other political morality.64

These views make an interesting contrast with those of Sir Gerard Brennan when he was a Justice of the High Court of Australia. Relevantly, Sir Gerard expressed a view about the role of judges in interpreting legislation. In an article entitled ‘Courts, Democracy and the Law’,65 Sir Gerard discussed the relationship between the three branches of government. In particular, he was concerned to reconcile the judicial review role of the judiciary (which he termed ‘the third branch of government’) with the doctrine of the separation of powers. In a passage which clearly recognizes the formal–substantive dichotomy, he said that the rule of law ensures that the text of a statute is interpreted in accordance with the values of the common law, but that the courts are powerless to remedy injustice in the face of unjust legislation enacted within power.66

In this and other contexts, he made it clear that in cases of conflict between valid legislation and the common law, the legislation would prevail.

In contrast to Dworkin’s approach, Sir Gerard’s view suggests an unquestioning acceptance of the formal validity of legislation, rather than a preliminary review of its content for consistency with fundamental norms.67 It suggests that judges have no role in determining the

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63 Dworkin, Justice in Robes, p. 16. 64 Ibid., p. 17.
67 As explained below, this process should occur when there is an issue of legislative interpretation of treaty obligations.
content of the law. This, as explained in this book, is often the predo-
minant approach of courts on issues which concern interpretation of
both executive powers and refugee rights. In such cases, the courts often
defer to executive power.

By contrast, Dworkin’s approach is that legal interpretation ‘pretty
much always involves moral judgment since determining what the law
is requires us to make moral sense of otherwise inconclusive legal
sources’.68 As the discussion about judicial review in the next section
illustrates, Dworkin’s theory of adjudication, which focuses upon the
‘justifactory’ role of judges and upon substantive values, has influenced
the thinking of a generation of scholars.69

Judicial review and the democratic state
The crucial point about the judicial review debate (which essentially
mirrors the argument about theories of adjudication) is that a formal
(positivist) theory emphasizes parliamentary sovereignty whereas a
substantive theory explains and justifies the role of the judge to inter-
pret the law in the light of fundamental principles or values. As the
discussion in this book demonstrates, the availability of judicial review
is essential to protect refugees and asylum seekers from refoulement,
particularly as there are widespread concerns over the quality of admi-
ниstrative decisions. It is therefore disturbing to see that in four of the
jurisdictions discussed in this book (the USA, Canada, the UK and
Australia), the national governments have attempted to limit or restrict
access to judicial review by refugees and asylum seekers in an attempt to
curb the rising number of applications for review.

The judicial review debate, which arose in the late 1980s in response
to an increase in the volume and scope of judicial review of adminis-
trative decisions, framed the challenge about the role of judges in terms
of formal versus substantive theory.70 In this debate, the protagonists
delved deep into the history of the ‘ultra vires’ doctrine71 and the theory
of separation of powers. In simple terms, the protagonists were divided
according to whether they believed in a formal or substantive explana-
tion for judicial review.

68 Murphy, ‘Concepts of Law’ at 2.
69 E.g. Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical
70 This section is based on Susan Kneebone, ‘What is the Basis of Judicial Review?’ (2001)
12 Public Law Review 95. The debate is explained more fully in that article.
In Dawn Oliver’s 1987 article, it was argued that judicial review has moved on from the ultra vires rule to a concern for the protection of individuals, and for the control of power per se, rather than powers or vires as such.72 That is, there was an implicit rejection of the ‘red light’ theory of judicial review,73 namely that the purpose of judicial review is predominantly remedial, to contain administrative action within the bounds of legality.74 This article is the root of the view that judicial review is a common law principle rather than a principle of parliamentary sovereignty.

Subsequently, a spirited defence of the parliamentary sovereignty principle was advanced.75 It was argued that the ultra vires doctrine is best explained as a principle of parliamentary sovereignty or supremacy, that is, as based on legislative intent, while at the same time acknowledging that the modern law of judicial review is a judicial creation.76 This view was justified by the need to maintain the principle of parliamentary sovereignty as a basic constitutional doctrine. It used the analogy of the fig leaf to explain that it ‘preserves decencies’.77 For that reason, it described the ultra vires doctrine as a ‘gentle but necessary discipline’78 for the judiciary.79 Its major concern was to harness the opportunity for unbridled judicial creativity.80

Paul Craig, who is firmly on the other side of the debate, rejects the ‘fig leaf’ metaphor for the ultra vires doctrine.81 Craig argues on the basis of the historical development of the remedies and the grounds of judicial review, in particular jurisdictional error and natural justice,

74 This is an idea which fits with the ‘authority’ or formal/positivist explanation of law.
76 Ibid. at 134. 77 Ibid. at 135. 78 Ibid. at 137.
that the doctrine has a common law foundation. He refers to this as the ‘traditional’ view, as opposed to the ‘modern’ or statutory interpretation (‘fig leaf’) view described above.

This debate reflects the difference between the views that judges on judicial review primarily exercise delegated legislative authority, as distinct from common law authority which is concerned with individual rights.\textsuperscript{82} The parliamentary sovereignty argument supports a positivist theory, whereas the rights argument is a substantive argument. As Dyzenhaus expresses it, the two corners of the ring represent the institutional restraint model versus the rule of reason (as embodied in Dicey’s twin ideas, authority and equality).\textsuperscript{83} As Dyzenhaus explains, the advantage of the latter (rule of reason) ‘liberal antipositivist’ view is that it emphasizes that judges have a crucial role in upholding the values of the legal order.\textsuperscript{84}

The next sections of this part deal with the related concepts or principles of neutrality and procedural fairness. Importantly, both these principles, which have enormous practical relevance to refugees and asylum seekers (because of the ever present risk of \textit{refoulement}), are supported by both formal and substantive visions of the rule of law, which fits with the ‘inclusive’ legal positivist view that equality and due process \textit{necessarily} have a moral basis. But in the case of procedural fairness, there is another factor which is used to limit its application to refugees and asylum seekers.

\textbf{Neutrality and judicial (institutional) independence}

In the orthodox statement of the common law principle of natural justice or procedural fairness which is discussed in the next section, due process and decisional neutrality are twinned concepts. The focus in this section is upon neutrality as a value applied to institutions.\textsuperscript{85} Neutrality is tremendously important for asylum seekers and refugees for two

\textsuperscript{82} This argument is explained more fully in Kneebone, ‘What is the Basis of Judicial Review?’ at 97–99.
\textsuperscript{83} Dyzenhaus, ‘Recrafting the Rule of Law’, p. 2.
\textsuperscript{84} David Dyzenhaus, ‘The Politics of Deference: Judicial Review and Democracy’ in Taggart (ed.), \textit{The Province of Administrative Law}, Chapter 13. Dyzenhaus explains this term as reflecting Blackstone’s theory that the common law is the legal repository of moral values, and that the common law is itself a creation of the people. He contrasts this with ‘democratic positivism’.
reasons. First, because access to a neutral hearing is the foundation of the right to seek asylum and, secondly, because it guarantees the right to non-refoulement. Yet as the chapters in this book reveal, industrialized states perceive their legal systems as being at risk of inundation and abuse by refugees and asylum seekers and do their best by direct and indirect legal means to minimize their attempts to access territory and to use the legal system. The indirect means include the use of accelerated and ‘fast track’ procedures for those who turn up at the borders. Such procedures, as discussion in this book details, compromise the standard of the hearing.

Neutrality, like procedural fairness, can be justified for both formal and substantive reasons. As an instrumental or formal concept, neutrality is justified for reasons of efficiency or accountability. In this sense, neutrality as accountability is associated with judicial independence and the separation of powers doctrine, to support the idea that judges should be free from political interference. The neutrality or impartiality of judges (and decision makers at other levels) is a value which is respected by legal positivists in its own right as freedom from political interference leading to the best outcomes (see Legomsky, Chapter 3). Judicial independence and neutrality are thus objectives of the separation of powers.

Sir Gerard Brennan, whose views were discussed above, had a particular approach to the role of the courts as ‘the third branch of government’, which supports the idea that judicial independence is a principle of public policy tied to the concept of neutrality. He stressed the role of judges as apolitical, neutral and legitimated by public or community confidence. Judicial review (which he intended in a broad sense), he said ‘has no support other than public confidence’. He did not rest the adjudicative function upon the inherent role of the courts to review delegated legislative action, but rather upon ‘the assignment . . . of that function by the general consent of the community’. That is, he

86 Dyzenhaus, ‘Recrafting the Rule of Law’, p. 7 points out that Bentham subscribed to this ideal as a fact of political control.
89 Ibid., p. 18.
supports judicial independence or neutrality as a political or democratic value. This view fits with Dicey’s concern to counter arbitrary power in accordance with a system of governance which operates by separation of powers.90

In the jurisdictions covered in this book, important decisions about refugee status are made at the administrative level of government. And in all jurisdictions, concerns are raised about the neutrality and independence of decision making at that level, which include concerns about the fact that governments prioritize efficiency over ‘administrative justice’ (as O’Sullivan expresses it in Chapter 5). It is therefore important to be able to argue that neutrality applies at that level of decision making, and that it is not simply an attribute of judicial independence.

It is interesting to see that, in this book, Legomsky primarily supports the ideal of neutrality for administrative decision makers on the basis of separation of powers, and additionally on the basis of protection of individual (substantive) rights. Macklin (in Chapter 2) points out substantive reasons for applying a concept of neutrality in this context. This is because refugees and asylum seekers are outsiders in the legal system. Yet neutrality applied as a principle of equality of treatment ensures that non-citizens are treated equally to nationals. Neutrality as a principle of equality or non-discrimination thus has substantive outcomes.

This discussion shows us that neutrality in institutional decision making is important for both instrumental and substantive reasons, which in principle apply to both judicial and administrative decision makers.

By way of comparison, there is an important point in Dworkin’s theory which indicates his underlying substantive premise. While Dworkin agrees that judges must be politically independent, he made it explicit that judges cannot be morally neutral. He said that he expects judges to apply the principles of political morality. This is an integral part of his theory of adjudication and ‘law as integrity’. His idea of justice, being based upon equality, reflects his view about political morality.91 In other words, he agrees that political neutrality means better substantive outcomes.


91 Guest, Ronald Dworkin, p. 1; Covell, The Defence of Natural Law, p. 145.
Neutrality and procedural fairness

In this section we highlight the importance of decisional neutrality in the sense of an impartial decision, as embodied in the requirement of an individual unbiased decision under the natural justice or procedural fairness principle. This is important for refugees and asylum seekers, for ensuring access to a hearing and protection against refoulement, as stated above. It is also necessary to comply with the Convention relating to the Status of Refugees (Refugee Convention), which contains a definition of ‘refugee’ that focuses upon an individual’s fear of persecution, as explained in the previous chapter. Yet it is the application of this principle which best illustrates the tension in contemporary legal systems. In the jurisdictions surveyed in this book, governments have been concerned about the pressure that the requirement to give individual hearings to large numbers of asylum seekers poses to their legal system, and have attempted to limit the number of hearings conducted, either by direct or indirect means (or to limit access to judicial review from such hearings, as mentioned above).

This discussion of procedural fairness and decisional neutrality highlights another important challenge to the rule of law as it applies to refugees and asylum seekers in this context, namely their status as non-citizens in national legal systems. Thus this discussion links to Part four below, namely the exclusion of non-citizens from legal systems under a theory of communitarian liberalism.

To get to that point it is necessary to first explain the meaning of procedural fairness, how it has both formal and substantive rationales, and why it might be argued that it does not apply to non-citizen refugees and asylum seekers. In this respect we begin to see the limits (and the scope) of the rule of law and of Dworkin’s theory.

Two different aspects can be extrapolated from the natural justice principle (which is these days referred to as ‘procedural fairness’).

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93 Ibid., Art. 1A(2).
94 This defines liberal justice in terms of the application of community standards. It can thus lead to exclusion of non-members of the community. See Catherine Dauvergne, ‘Beyond Justice: The Consequences of Liberalism for Immigration Law’ (1997) 10 Canadian Journal of Law and Jurisprudence (no 2) 323.
First, it represents an ideal of justice (this can be referred to as ‘the justice value’), which is of unquestionable antiquity. In this sense it clearly embodies a universal substantive standard. As explained below, it also contains instrumental or procedural standards. Secondly, it is a principle of practical application available to those to whom the threshold right to be heard is extended. This can be referred to as ‘the participation principle’. The important point about extending natural justice to an individual is that it enables the person to participate meaningfully in the process of decision making.

The justice value defines the natural justice principle by reference to both universal substantive and procedural standards, whereas the participation principle implicitly limits the right to participate in a hearing by reference to distributive justice principles as explained below. It is the participation principle which best explains the limits of the reach of the universal doctrine of natural justice, and its non-application to non-citizens.

The ‘justice value’ stems from the fact that the rules of natural justice incorporate fundamental ideas or values about the substance of the principle. These include: equality, non-discrimination, impartiality and basic fairness. The natural justice principle also has an inherent instrumental value which highlights the value of fair procedures for securing accurate outcomes. In this sense, the justice value incorporates both substantive and procedural standards, which are interconnected. The fact that when conducting judicial review the courts explain their role as being to determine whether procedural rather than substantive fairness was accorded does not detract from that proposition. That is, the courts emphasize the limits of the process of judicial review, and eschew interfering with substantive outcomes. To define that role, the courts have, in recent years, preferred the term ‘procedural fairness’ to natural justice.

96 R v. Chancellor of the University of Cambridge (Dr Bentley’s case) (1723) 1 Str 552 at 567 (93 ER 698 at 704) citing the example of Adam and Eve in the Garden of Paradise. See also Dr Bonham’s case (1610) 8 Co Rep 113b (77 ER 646).

97 That is, principles about how the benefits of a society are distributed or shared. If this is combined with a theory about who comprise that society or polity it becomes a political theory, e.g. under liberal democratic theory based upon the concept of government by consent as discussed in Part Four of this chapter.


Natural justice thus incorporates a theory of *substantive* procedural justice, rather than merely being a mere procedural rule about the distribution of benefits, or of distributive justice.\(^{101}\)

However, the participation principle limits the right to participate in a hearing by reference to distributive principles of a different kind; namely, as Macklin expresses it,\(^ {102}\) participation in democratic processes. But as Macklin points out, asylum seekers and refugees are not part of ‘the polity’.\(^ {103}\) For that reason, as she says, they are heavily dependent on the judiciary to protect their rights. Under common law legal systems, limitations on the universal or common law right to natural justice are defined by reference to legislative intention,\(^ {104}\) or parliamentary sovereignty. That method of limitation can be rationalized as, or analogized to, a political or constitutional principle that provides an opportunity for citizen participation in a democracy. The non-citizen is therefore prey to the application of that limitation. Although, in many decisions, the courts have made no distinction between citizens and non-citizens,\(^ {105}\) the decisions are not consistent.\(^ {106}\) There is no guarantee of a right of non-citizens to participate in the making of decisions that affect them.\(^ {107}\)

Macklin discusses the Canadian decision of *Singh v. Minister for Employment and Immigration*\(^ {108}\) in which natural justice (or procedural fairness) was applied to a group of asylum seekers, as a principle of universal and ‘fundamental’ justice which applies to citizens and non-citizens alike. Importantly, in the *Singh* decision, the court rejected the government’s ‘instrumental’ arguments about ‘administrative convenience’ as a criterion for denying the claimants access to a hearing, and focused instead on the effect that denial of the right would have on the claimants (that is, *refoulement*). Macklin’s discussion in Chapter 2 illustrates both the formal (procedural, instrumental) and substantive (‘deontological’) values of procedural fairness, and shows how the Canadian court extended such rights to non-citizens.

\(^{101}\) John Rawls, *A Theory of Justice*, revised ed. (Oxford University Press, 1999), pp. 73–78. Rawls’ is a theory which applies to a society conceived as a closed or bordered system separate from other societies. Rawls uses a ’refurbished’ version of the social contract argument.


As we will see in Part four, the exclusion of non-citizens can be justified under a theory of communitarian liberalism. That is, on the need for closed societies and borders. As outsiders in a community, it is suggested that non-citizens do not have the right to share our institutions and resources. Although the natural justice principle can be justified in terms of instrumental outcomes, as suggested above, or even in terms of social justice, often the justification for exclusion of the right to participate is broadly political. It can be linked to distributive justice principles to the exclusion of instrumental values, as explained in Part four.

This discussion highlights the fundamental importance of judges and other decision makers (and legislatures) to ensure that procedural fairness is observed for refugees and asylum seekers for whom the outcome of denial is the very real risk of refoulement. However, ironically under national legal systems, the fragility of the principle in relation to such refugees and asylum seekers stems from their very status as non-citizens. In the last section of this chapter, we explore further the reasons for their exclusion from participation in legal procedures, and in particular why they are denied access to a hearing and the right to be processed for asylum.

Before concluding this part, we consider briefly what guidance we can take from Dworkin’s views on procedural fairness. In Law’s Empire, Dworkin described procedural due process (which he equates with procedural fairness) as a matter of principle. That is, it is a standard to be observed as a requirement of justice or fairness, rather than a goal to be achieved. But, as we noted above, Dworkin’s standards of integrity and procedural due process are sourced back to a political community. For Dworkin, integrity is a principle over and above justice, fairness and procedural due process. It presupposes that legal rights and duties were created by a single author – the community personified – expressing a coherent conception of justice and fairness. This view, as we shall see, may lead us back to the same conclusion about exclusion as with the participation principle.

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109 This defines liberal justice in terms of the application of community standards. It can thus lead to exclusion of non-members of the community. See Catherine Dauvergne, ‘Beyond Justice’.


111 Dworkin, Taking Rights Seriously, p. 22.

112 Dworkin, Law’s Empire, p. 225.
By contrast, in considering the interpretive and adjudicative role of judges in relation to statutory interpretation and judicial review, the difference between formal and substantive theories of adjudication is important. Whereas a formal theory of adjudication might lead to a deferential approach, Dworkin’s interpretive theory of law as ‘integrity’ focuses upon equality of rights and the substance of the law.

We turn now to the examination of a second aspect of Dworkin’s interpretive theory of law – the legislative principle, which is one of the two basic sub-principles or standards of integrity that he recognizes. This principle, as we will see, is linked to the adjudicative principle and is enormously important in implementing the rights of refugees and asylum seekers in national legal systems.

Part three: the legislative principle

One of the issues addressed in this book is whether, in the context of the rights of refugees and asylum seekers, there is a ‘coherent legislative principle’ in operation. Under Dworkin’s theory this is a principle directed at both legislators and at interpreters of legislation. It requires that law makers make morally coherent ‘sets of laws’, and it requires judges and those who apply legislation to interpret such legislation in accordance with his interpretive theory of law. In Justice in Robes, he describes legislative interpretation as involving judgements of political morality, of determining what interpretation is consistent with the limits of power as interpreted.

As the chapters in this book explain, in this context there are concerns about the use of legislative power and about the interpretation of such power. There are concerns about the circumstances in which governments legislate (or fail to legislate), about compliance with formal and democratic processes, and about the interpretation of legislation implementing refugee rights in national legal systems.

As Galligan points out, the idea that public power is held on trust for achieving ‘social goals’ is important. Galligan suggests that legislative powers should be used to pursue ‘social goals for the common good’. He suggests that powers which are used for ‘capricious’ reasons or which are ‘captured by special interests’ might not conform to that test. In Chapters 4 and 5 (Australia and the UK), the extensive use of legislation is highlighted. This use of legislation to achieve the ruling government’s

113 Galligan, Law in Modern Society, p. 258.
policy agenda in this context is troubling.\textsuperscript{114} Whilst positivist theory characterizes legislation as the embodiment of parliament’s will as the elected representatives of the people, behind-the-scenes reports suggest that in the relationship between the legislative and executive arms of government, the balance of power has swung to the executive arm of government.\textsuperscript{115} Indeed, it may be that the executive is overly responsive to populist views.\textsuperscript{116} O’Sullivan in Chapter 5, discussing the UK, describes such legislation as ‘reactive’. Dworkin’s principle of legislative integrity presupposes that the legislature coherently expresses the community’s conception of justice and fairness.\textsuperscript{117} It is unclear whether this is always the case, as the discussions in this book illustrate.

One question considered in this part is whether legislators are exercising their powers responsibly in relation to the incorporation of treaty obligations which affect the rights of refugees and asylum seekers, especially the Refugee Convention. The issue of the extent of incorporation of treaty obligations raises the question of whether the ‘trust’ imposed on legislators is being properly carried out. Another question concerns interpretation of legislation which incorporates treaty obligations.

The use of legislation to overturn judicial decisions whose outcomes the executive disapproves of (this has occurred in both Australia and the UK) is another feature of the use of legislative power in this context. This is objectionable for different reasons. As Colin Harvey has expressed it, by such action governments show their ‘lack of concern for principle in the face of public policy imperatives’.\textsuperscript{118} Such use of the legislative power threatens the principle of judicial independence and neutrality discussed above. Under Dworkin’s concept of law it shows a lack of integrity; an absence of an integrated legal system.

In addition to the broad use of legislative power, there are also concerns about compliance with the formal processes for the

\textsuperscript{117} Dworkin, \textit{Law’s Empire}, p. 225.
introduction of legislation in this context. These are issues about transparency. For example, in Chapter 5, O’Sullivan details issues about lack of consultation and scrutiny in the UK, and about the use of secondary legislation rather than primary legislation where fundamental rights are affected. That is, the detail about rights is contained in legislation which has not been subjected to parliamentary scrutiny.\textsuperscript{119} In Chapter 4, which tells the Australian story, there are tales of extensive public inquiries leading to recommendations for legislative changes which have been ignored by the government. Another Australian feature is the extensive conferral of broad discretionary powers, which are difficult to challenge. The conferral of broad discretionary powers is also common in the USA, as shown in Chapter 3.

For Dworkin, legislative integrity is a formal virtue which is part and parcel of his view of the community as composed of fraternal members, with reciprocal obligations.\textsuperscript{120} That is, it embodies his conception of the state as a distinctive collective entity, rather than as a body governing by the implied consent of the people.\textsuperscript{121} In \textit{Law’s Empire}, Dworkin gives the example of ‘checkerboard statutes’ as the ‘most dramatic violation’ of the ideal of integrity. He requires that there be equal treatment of all persons under his principle of equality.\textsuperscript{122} Specifically, he pointed to the inconsistency between statutes permitting slavery and the guarantee of equal protection in the 14th amendment of the US constitution.\textsuperscript{123} That is, the legislative principle should guide legislators to respect the right to equal protection.\textsuperscript{124} In \textit{Law’s Empire}, Dworkin argues that the legislative principle is so much part of our political practice that no competent interpretation of the practice can ignore it.\textsuperscript{125}

\textbf{Incorporation of treaty obligations}

The legislative principle has a potentially important role in determining the relationship between national and international law. Under the ‘dualist’ systems of law which operate in all the jurisdictions discussed in this book, there is a need for specific legislative incorporation of such

\textsuperscript{119} Contrast Legomsky’s account (Chapter 3 in this volume) of the USA where the parliamentary model does not operate. As he explains, Congress has spelt out the detail of the legislation.

\textsuperscript{120} Covell, \textit{The Defence of Natural Law}, pp. 163–164.

\textsuperscript{121} \textit{Ibid.}, pp. 164 and 167.

\textsuperscript{122} \textit{Ibid.}, p. 164.

\textsuperscript{123} \textit{Ibid.}, p. 184.

\textsuperscript{124} \textit{Ibid.}, p. 185.

\textsuperscript{125} Dworkin, \textit{Law’s Empire}, p. 176.
(which arises from the principle of parliamentary sovereignty in the Westminster systems). The usual explanation for this is that the rule of law is based upon the separation of legislative, executive and judicial powers. On a strict view of the separation of powers, it follows that, as entry into a treaty arises from executive action, it requires a specific act of legislative incorporation to become part of domestic law.

In practice, as the comparison of Australia and New Zealand in Chapter 4 illustrates, the extent and the manner in which a state chooses to incorporate its obligations under the Refugee Convention has a strong impact on the extent to which the rights of refugees are respected in the national legal system. By contrast, in the UK (see Chapter 5), there is evidence that the incorporation of the European Convention of Human Rights (ECHR) through the Human Rights Act (UK) has had the practical effect of expanding the scope of protection beyond that provided by the Refugee Convention.

Many states, such as Australia, subscribe to a strict ‘positivist’ or ‘statist’ view of their international treaty obligations. That is, they regard treaty obligations as governing the relationship between states at the international level, rather than as creating obligations or enforceable rights for individuals. While fundamental human rights are matters of international obligation, states bear the primary responsibility for the protection of human rights. As Guy Goodwin-Gill says, ‘the challenge lies in the space between obligation and implementation’. Thus the manner and extent of incorporation does matter.

127 Note that in the USA a similar principle operates. There the distinction is between self-executing and non-self-executing statutes. In practice, very few statutes are considered to be self-executing.
128 Chapter 4 in this volume.
130 In relation to Canada, it has been suggested that there is an inclination to treat all international law as ‘inspirational’ but not ‘obligatory’ – Jutta Brunnée and Stephen J. Toope, ‘A Hesitant Embrace: Baker and the Application of International Law by Canadian Courts’ in Dyzenhaus (ed.), The Unity of the Public Law, Chapter 14.
Because states regard treaty obligations as a matter between states, they often choose not to incorporate them fully, or at all. In such situations, the issue of whether there is effective implementation is raised. International law requires the ‘good faith’ implementation by a state of its international obligations. This principle is expressed in Article 26 of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention): ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’ Moreover Article 27 of the Vienna Convention plainly states that: ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’ Arguably, the ‘margin of appreciation’ doctrine – the discretion that states are given for implementing treaties in national law – is conditioned by this principle of good faith.

In particular, in many jurisdictions there is legislative modification of the Refugee Convention definition of a refugee which not only waters down obligations but also hinders ‘transnational judicial conversation’, and international effort to achieve consistency in interpretation of the refugee definition. However, in addition to the question of the extent of incorporation of treaty obligations, the issue of compliance with the ‘legislative principle’ arises in relation to interpretation of national legislation which incorporates treaty obligations, or national legislation which impacts upon treaty obligations.

**Interpretation of treaty obligations**

Article 31(1) of the Vienna Convention requires that a treaty ‘shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. Although the Vienna Convention postdated the Refugee Convention, it is important to note that this approach to interpretation accords with the Preamble of the Refugee Convention,

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134 See also Vienna Convention, Art. 18, which requires states to refrain from acts which would defeat the object and purpose of a treaty.


136 Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, 2007), p. 28 has described international jurisprudence as ‘patchwork’.
which makes it clear that its object and purpose is to assure to refugees ‘the widest possible exercise of . . . fundamental rights and freedoms’.  

In relation to interpretation of the Refugee Convention, it seems that the ‘dominant view’ is that its provisions should be interpreted within a human rights framework. This applies, in particular, to the elements of the refugee definition in Article 1A(2) of the Refugee Convention, which are themselves undefined. Therefore, if states fail to interpret the definition within a human rights framework, it can be argued that they are not complying with this ‘good faith’ obligation. This is an issue in Australia, where the courts are inclined to give primacy to the national legislation, rather than to the Refugee Convention (see Chapter 4). In other jurisdictions also, there is a tendency to review exercises of power under administrative law principles.

At the national level, it is well established that legislation implementing treaty obligations must be interpreted consistently with the treaty. This presumption can be traced back to the nineteenth century. However, being a mere presumption, it can be overridden by contrary legislative intention, thus preserving the principle of parliamentary sovereignty. In recent years, the most important debates about interpretation have taken place around the scope of unincorporated treaty obligations. These debates raise fundamental issues about the relationship between national and international law, and about the role of human rights in national legal systems. As the discussion in this book illustrates, there are important differences between states which reflect national perceptions about the role of international law in national legal systems.

As a substantial proportion of specific treaty obligations (including most of the Refugee Convention) are unincorporated in most of the jurisdictions covered in this book, principles about their interpretation are highly relevant. In the case of unincorporated treaties there are two

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138 Foster, International Refugee Law and Socio-Economic Rights, p. 28. See also ibid. Chapter 2. But note that there is disagreement about which human rights treaties are relevant and, in particular, about the relevance of customary law. That is, some refugee lawyers take a more ‘positivist’ view than others about what ‘the International Bill of Rights’, as it has been termed, comprises. See the discussion of the scope of the non-refoulement principle in the Introduction to this volume.

sets of principles which govern their interpretation under the general or
common law. There is, first, the presumption that a statute is not
intended to be in conflict with international law and should be inter-
preted as far as possible consistently with such law (the presumption of
consistency).140 Secondly, there are common law presumptions about
fundamental rights.141 These presumptions are sometimes referred to
collectively as the ‘principle of legality’. However, in common law jur-
risdictions, the principle of parliamentary sovereignty can ultimately
trump treaty obligations under a ‘dualist’ system of law.142

Thus, similar presumptions about conflicting rules of national and
international law apply to both incorporated and unincorporated treaty
obligations. It is presumed that, in the absence of a contradictory
 provision, statutes are not to be in conflict with international law. This
gives rise to the proposition that, in cases of ambiguity in legisla-
tion, the courts should prefer an approach that favours the treaty.
In Australia, the application of this principle of ambiguity has led to
conflicting judicial interpretation of legislation governing the rights of
asylum seekers and refugees, in relation to mandatory detention.143

In New Zealand, Canada and the UK, the presumption which applies
in cases of ambiguity has been codified. Under the New Zealand Bill
of Rights Act 1990, s. 6, judges have a positive obligation to interpret
statutes consistently with the rights and freedoms contained in the Bill
of Rights. A similar position applies in the UK, where the Human Rights

140 Daniels v. R [1968] SCR 517 at 541; Mabo v. Queensland (No 2) (1992) 175 CLR 1 at 42
Commonwealth (1945) 70 CLR 60; New Zealand Airline Pilots Association v. Attorney-
General [1997] 3 NZLR 269. One New Zealand authority suggests that an unincor-
porated treaty obligation is a mandatory relevant consideration: Tavita v. Minister for
Immigration [1994] 2 NZLR 257 (see Geiringer, ‘Tavita and all that’). For discussion of
the general principles of interpretation, see Rosalie Balkin, ‘International Law and
Domestic Law’ in Sam Blay (ed.), Public International Law: An Australian Perspective
(Melbourne: Oxford University Press, 1997), Chapter 5; James Crawford and William
R. Edeson, ‘International Law and Australian Law’ in Kevin W. Ryan (ed.), Inter-
national Law in Australia, 2nd edn. (Sydney: Lawbook, 1984), Chapter 4.

141 E.g. Coco v. R (1994) 179 CLR 427 at 437; Bropho v. Western Australia (1990) 171 CLR 1
at 17–18.

142 E.g. in Lim v. Minister for Immigration (1992) 176 CLR 1 (discussed in Chapter 4 of this
volume) it was decided that the Migration Act 1958 (Cth) s. 54T which provided that
the amendments in issue in that case were to apply despite ‘any inconsistency with
Australian law’ displaced the presumption. As O’Sullivan notes in Chapter 5, the UK
Human Rights Act 1998, s. 6(2) reflects the principle of parliamentary sovereignty.
See the discussion of Al-Kateb v. Godwin (2004) 219 CLR 562 in Chapter 4 in this
volume.
Act 1998, s. 3, requires courts to interpret legislation ‘so far as possible’ to be compatible with the ECHR. However the Canadian Charter of Rights and Freedoms is more far-reaching, as it permits the Supreme Court to invalidate legislation for inconsistency with the Charter. In Canada it has been decided that the presumption of consistency is not dependent on an ambiguity.\footnote{Baker v. Canada (Ministry of Citizenship and Immigration) [1999] 2 SCR 817 at para. 70.}

The issue of the normative or substantive effect of international law in the national legal systems covered in this book has played out not through discussion of human rights principles but through the application of administrative law principles, in many cases involving legislation and the rights of refugees and asylum seekers. As discussion in this book reveals, varying approaches have been adopted in the different jurisdictions. This shows the contested nature of the national–international law relationship.

This discussion in this part demonstrates concerns with the health of the legislative principle as it applies in this context. It illustrates the interconnectedness of the ‘national’ and the ‘international’ rule of law and the role of national legislators in determining that relationship. It raises the question, as Macklin expresses it in Chapter 2, of whether the rule of law is only a state-based or national concept. As the discussion in Part Four demonstrates, arguments for the rights of asylum seekers and refugees may need to go beyond state-based explanations in order to protect their rights under international law.

**Part four: liberty, equality, and fraternity: the rights of outsiders**

As various chapters in this book demonstrate, there are many practices, including restrictive entry measures, which states utilize in order to keep refugees and asylum seekers away from the territory and national legal systems. Such measures are often taken to implement ‘border control’ in the ‘national interest’ (see Chapters 2, 3 and 5 in particular). In the introductory chapter of this book, ‘Introduction: Refugees and Asylum Seekers in the International Context – Rights and Realities’, it was explained that the ‘right to seek asylum’ does not correspond to any duty on the part of a state to permit entry to refugees and asylum seekers, or indeed an obligation to process them. The right to freedom of movement is a qualified one, in which international law privileges nationals.
and persons ‘lawfully within the territory’\textsuperscript{145} ahead of non-nationals. The territorial sovereignty which states exercise over outsiders ensures that the notion of a boundary is a practical obstacle to exercise of the right to seek asylum.

The legal status of refugees and asylum seekers as non-citizens or as ‘illegal immigrants’ is often central to state responses. In the USA and Australia, in particular, there is a clear relationship between the status of asylum seekers as ‘aliens’ and the application of immigration law and policy. In both these states there are policies which run counter to the rights of asylum seekers, directed at controlling the border and the problem of ‘illegal immigrants’. It seems that through these policies and the implementing laws, refugees and asylum seekers are defined into national legal systems as outsiders, by way of ‘exclusionary inclusion’.\textsuperscript{146} That is, they are defined by way of exclusive rather than inclusive concepts, as non-citizen aliens.

Despite the principle of non-discrimination which the Refugee Convention applies to all refugees, the principle of equality manifestly is not applied evenly to such persons within the legal system.\textsuperscript{147} Linda Bosniak has referred to this as the law’s ‘conflicted understanding of the difference that alienage makes’.\textsuperscript{148} This is because for some purposes the law treats these aliens as equal to nationals or citizens, but for others it does not. Bosniak asks:

\[\text{T}o \text{ what extent is discrimination between citizens and aliens a legitimate expression of the government’s power to regulate the border and control the composition of membership of the community? How far does sovereignty reach before it must give way to equality?}\textsuperscript{149}\]

Further, although the concept of human rights which governs the rights of refugees and asylum seekers focuses on persons not citizens, such


\textsuperscript{147} Refugee Convention, Art. 3. For an elaboration of this principle see Hathaway, The Rights of Refugees, pp. 1–13.


\textsuperscript{149} \textit{Ibid.}, p. 39.
rights require translation into national legal systems under our ‘dual’ legal systems. The legal doctrine of parliamentary sovereignty also links refugees and asylum seekers and their human rights to the nation through the legislative principle in the ‘contested’ ways described above. There is a legal impasse between the notion of territorial–parliamentary–state–sovereignty which reinforces the lack of a legally enforceable right to seek asylum, and the non-extraterritorial application of the right against *refoulement*. This has given rise to a theoretical debate between supporters for and against the notion of ‘open’ versus ‘closed’ borders. For example, to argue for broader respect for the right to seek asylum is seen as an argument for ‘choice’ and as advocating for ‘open’ borders. Similarly, support is also seen to arise for open borders from ‘cosmopolitans’ who stress the importance of global justice and universal human rights in determining the rights of refugees.

To extract ourselves from this *legal* impasse, it is helpful to turn to political doctrines to seek an explanation for the exclusion of ‘outsiders’. The purpose of this discussion is to seek explanations for the exclusion of ‘outsiders’ by states. The first broad doctrine that comes to mind is the *political* concept of the sovereignty of the people, the idea of government by consent. In this framework, there are a number of complex ideas largely focused upon the ethical or moral rights of individuals and states. The concept of ‘community’ is central to these ideas. They include arguments about the right of states to self-determination, to determine who shall ‘belong’ to their community. There are also

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152 Peter and Renata Singer, ‘The Ethics of Refugee Policy’ in Mark Gibney (ed.), *Open Borders?*, Chapter 4, pp. 111–30.

153 For the purpose of this discussion, it is assumed that refugees and asylum seekers are ‘security neutral’, that they do not pose a risk to the community for reasons of security. It is not intended to discuss the provisions in the Refugee Convention (Arts. 1F, 31(2), 33 (2)) which deal with exceptions to refugee status on the basis of (loosely) security issues. These issues are considered in Chapters 2, 3 and 5 of this volume.
arguments about justice, that is, about the distributive implications of an ‘open’ versus a ‘closed’ border policy. Such arguments need to be balanced against the needs of refugees and asylum seekers, which are recognized by the human rights framework.

The argument for closed borders is one that resonates with state interests. It has two relevant aspects: it assumes the existence of a ‘bounded’ territory and the right of the ‘community’ to exclude those who are not its members. The first feature is familiar in legal language – it is explicitly represented by the legal argument for territorial–sovereignty nexus, which was referred to above. The second feature, the idea of ‘community’ and the right to confer membership on newcomers is implicit in refugee law. As stated above, refugees are consistently defined in state or national policy by exclusion, that is, as persons outside the legal system. They are defined by way of ‘exclusionary inclusion’, as non-citizens. To structure this discussion, we look first at liberal arguments for exclusion and liberal understandings of the ‘community’. We then situate Dworkin’s views within that understanding. After reaching yet another impasse with those views, we turn to broader ethical arguments and explanations for the exclusion of refugees and asylum seekers.

Liberal theory and the community

The political philosophy of government by consent incorporates the liberal notion that members of that society are free to act within the confines of the rights recognized by that society. However such theory runs into difficulty in attempting to construct an argument in favour of refugee rights. This is because refugees are not part of the compact – they cannot consent because they are outsiders. The paradox of liberal theory is that it presupposes a bounded community or society whose rights are put ahead of the universal rights of refugees. This idea, known as ‘communitarian liberalism’, leads to a conflict between liberal principles and the autonomy or liberty of the individual. Catherine Dauvergne argues that, because liberal theory first presumes a community and then explores theories of fairness and justice within that concept, it does not yield a standard of justice which is useful for assessing the rights of refugees.\footnote{154 Catherine Dauvergne, ‘Beyond Justice’.
Michael Walzer is one of the political philosophers critiqued by Dauvergne. Walzer’s discussion of community membership is the classic work which attempts to explain the philosophical justification for bounded communities and exclusionary immigration policies. Walzer starts from the idea of a bounded world in order to examine the concept of distributive justice. He explains that, as members of a political community, we must distribute and share, and that membership (or citizenship) is the ‘primary social good’ which we can confer on outsiders. He suggests two principles upon which membership is conferred. First, the principle of ‘mutual aid’ involves an objective or external and collective ‘cost–benefit’ analysis of the risks and costs involved in admitting a new member. The second is an internal principle under which the existing members decide which individuals should become the new members, on the basis of ‘neighbourhood’, ‘family’ and ‘club’ analogies. That is, the existing members look for persons with shared characteristics.

Walzer’s principle of ‘mutual aid’ creates a link between national identity and territory. It involves an objective or external and collective ‘cost–benefit’ analysis of the risks and costs involved in admitting a new member, which can operate roughly as a ‘Good Samaritan’ standard. Walzer ties this to the fact that states control territory. He supports the sovereign right of a state to decide who shall become a member of the society within its territory. He recognizes that sometimes the first (individual) principle discussed above and the second (collective) principle can conflict. Importantly, he says that the idea of national identity involves a link between the people and the land.

Thus Walzer argues that our understanding of what membership means in our community is an issue of distributive justice. His is an argument for closed borders subject to the ‘need’ of the community. Rather than taking a strict utilitarian approach (which looks to maximize benefits), Walzer takes the principle of mutual aid as the basis upon which a community can distribute membership. However, he concedes that refugees are ‘one group of needy outsiders whose claims cannot be met by [the principle of mutual aid by] yielding territory or exporting wealth – only by taking people in’.

156 Specifically he took Rawls’ ‘refurbished social contract’ as his base argument.
158 Walzer, Spheres of Justice, p. 48.
This attempt to argue for refugee rights highlights that such exist as an exception to the legal entitlement and states can, and do, exclude such rights, as the discussion in this book highlights. Although refugee rights are universal human rights, they are often not recognized by national legal systems. Dauvergne concludes that ‘communitarian liberalism’, which emphasizes the ‘beneficence’ or discretion of states in recognizing such rights, fails to provide principled guidance for legal systems. She says that such policy is based on humanitarianism and that it is amoral for this reason in not recognizing universal human rights.\textsuperscript{159}

As Christina Boswell says ‘liberal theories run the risk of over-reaching themselves’ – such theories set up expectations about ‘individual and collective ethical agency’ which cannot be redeemed in practice.\textsuperscript{160} The notion of bounded communities defeats our efforts to construct a rights-based approach to refugees which is not an argument for open borders. We therefore turn back to Dworkin’s concept of the ‘community’ and its role in relation to outsiders.

Dworkin and the community

The concept of a fraternal, personalized community is crucial to Dworkin’s theory of integrity. The theory of integrity presupposes that legal rights and duties were created by a single author – the community personified – expressing a coherent conception of justice and fairness.\textsuperscript{161} In his view, the community is a ‘distinct moral agent because the social and intellectual practices that treat the community in this way should be protected’.\textsuperscript{162} His interpretive theory of law, as explained, is sourced back to this idea of community. As Dworkin was at pains to point out in \textit{Law’s Empire} and in \textit{Justice in Robes}, his theory also requires a coherency between the legislative and adjudicative functions which is sourced back to a political community. In particular, he explained the need for justification in his interpretive theory of law. But who are the members of this community and what rights do ‘outsiders’ have under this conception?

Dworkin’s community is not based upon liberal theory (the sovereignty of the people) but is rather an anti-liberal approach, based upon the idea of a collective, fraternal entity. Dworkin rejects both a social

\textsuperscript{159} Dauvergne, ‘Amorality and Humanitarianism in Immigration Law’ at 620–23.


\textsuperscript{161} Dworkin, \textit{Law’s Empire}, p. 225.  \textsuperscript{162} \textit{Ibid.}, p. 188.
contract theory of individual natural rights and a utilitarian approach pursuant to which the needs of the majority prevail, as they conflict with his maxim of equality.\textsuperscript{163}

The right to participate as a member of the community is central to Dworkin’s theory of integrity (and of procedural fairness). Dworkin’s theory is internal or communal in the sense that it is intended to explain the meaning of integrity within a cohesive political community, rather than across boundaries or in an international community. It was not intended to apply to the context of strangers in a community, so what follows is somewhat conjectural.

Dworkin’s principle of procedural due process requires the consistent weighting of moral harm, and amounts to the right to be treated equally. His view is that the participation of any member of a democratic community ought not to be limited by assumptions about worth, talent or ability.\textsuperscript{164} It is limited to the concept of community and compromise solutions, rather than to an abstract, absolute right to equality. In relation to procedural due process, Dworkin recognized that this did not give an individual the right to as much protection as a decision maker could provide. As with his basic principle of integrity, he acknowledged the overriding standard of the community.

According to Dworkin, membership of the social group or community carries with it mutual obligations based upon reciprocity and mutual concern.\textsuperscript{165} The community or group must show equal concern for the well-being of others in the group in the interests of integrity. The wishes of each member of the group or community are to count on a par with the wishes of any other member.\textsuperscript{166} Thus, potentially under his theory, persons can be excluded by the community if it is in the community’s interests. Dworkin admits that on occasions the principle of integrity requires that the community be unfair to others outside the group – but for reasons that are good for the group. On such occasions, integrity conflicts with justice and fairness, but his view is that an outcome consistent with political integrity will always be principled.

He acknowledges the overriding political community standard. Thus, he suggests, those whose concept of justice is based on concern for those outside the group treat their association as only a de facto accident of

\textsuperscript{163} Guest, \textit{Ronald Dworkin}, Chapters 3 and 9 explain this as a concept of ‘egalitarian utilitarianism’.
\textsuperscript{164} \textit{Ibid.}, p. 100. \textsuperscript{165} Michael Walzer, \textit{Spheres of Justice}, pp. 31–63.
\textsuperscript{166} Guest, \textit{Ronald Dworkin}, p. 232.
history or geography, and not as a true associative community. That is, integrity, although an ideal or principle, has to be applied in a realistic way – Dworkin uses the phrase ‘so far as this is possible’ frequently in explaining the concept of integrity, so as to recognize the compromises that have to be made. This means that judges may sometimes be required to defer to popular morality. He explains that integrity would not be needed as a distinct political virtue in a utopian state. He thus envisages that, for political reasons, a community might decide to exclude certain persons or groups of persons from the right to participate.

As mentioned above, Dworkin’s theory of integrity has been critiqued for its failure to analyse the nature of legal institutions and for its lack of theory about the state. In *Justice in Robes*, Dworkin recognizes that ‘politically important values like liberty and equality are in deep conflict with one another so that compromise among them is necessary’. After characterizing that conflict as itself a ‘fundamental value’, he continues:

> In the end some unguided and subjective choice among values is necessary, and that fact challenges my assumption that one interpretation of overall legal practice or even some local area of law can sensibly be defended as overall best.

It is unclear whether the critique of communitarian liberalism which is made against Dworkin is justified. It may be that he would admit asylum seekers to the community where it did not harm the collective but enhanced its fraternal characteristic. But this may then lead him in the same direction as Walzer, in terms of allowing only a limited number to take up membership. There does not seem to be a significant difference between the liberal version of the ‘rights of strangers’ and Dworkin’s anti-liberal approach.

The above discussion highlights the limits of both liberal theory and Dworkin’s theory to account for the rights of asylum seekers and refugees, other than as exceptions to the law. To conclude, we turn to some ethical arguments which take the focus off the rights of asylum seekers and instead highlight the needs of the political community and the responsibility of states. This may have the effect of forcing a commitment to the rights of asylum seekers.

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168 See Allan, ‘Justice and Fairness in Law’s Empire’ at 66.
169 Murphy, ‘Concepts of Law’.
171 *Ibid*.
172 Dauvergne has argued that his views are in the same ‘communitarian liberal’ tradition as Rawls and Walzer. See Dauvergne, ‘Amorality and Humanitarianism in Immigration Law’. 
Ethical arguments

In his book entitled *The Ethics and Politics of Asylum*, the political scientist Matthew J. Gibney provides some useful tools for critiquing the implications of the exclusion of outsiders from legal systems. Gibney provides a fresh perspective on the matter of inclusion and community, which enables us to move away from the territorial–sovereignty argument to a concern with political institutions as such. This shifts from focusing upon the status of asylum seekers as outsider non-citizens, to focusing upon their needs as disenfranchised persons and the responsibility of the international community.

Gibney makes a more nuanced argument for ‘closed’ borders. His aim is to determine the limits of the right of states to control entry to their territory. He argues that to allow asylum seekers untrammelled access to refugee status determination procedures by granting a ‘right of asylum’ would lead to inequality on a global scale by creating inequalities between states, because the ‘burden’ of asylum would fall inequitably on states (as for example it did in the case of Germany in the early 1990s and as it has on the UK in recent years – see Chapter 5 in this book). He also argues that privileging those who turn up at the border over those who do not is arbitrary from a moral perspective. Moreover, he argues that the moral issues raised by refugeehood do not require more than that the people concerned are provided with a secure new state, not necessarily one of their own choosing. Thus he opposes the idea that refugees can have a moral right to choose their destination.

With respect to his argument about spontaneous refugees and ‘choice’, there are arguments, based upon empirical evidence, which suggest that the routes that asylum seekers take are based upon a complex set of factors, related to available routes and social factors in some instances. As a special category of ‘forced migrants’, the notion of ‘choice’ in this context is in any event a difficult one. There is room in Gibney’s

analysis for freedom of choice for those asylum seekers who have no alternative but to flee and who need protection. But unless processing of asylum seekers is fair and effective, those needs will not be identified. However, it is not necessary to accept Gibney’s views about ‘choice’ in order to follow the remainder of his argument, which is more concerned with what happens within the border.

Gibney’s definition of ‘ethical’ in this context is ‘a moral standard or value’ which also takes into account the ‘political reality’. He attempts to define normative prescriptions for action that take into account what states could actually do. A concern he expresses in his book is with what is ‘politically possible’, and how states can be persuaded to respond more ethically (and consequently more generously) to the refugee problem. Gibney develops a ‘humanitarian principle’, to modify the traditional sovereign state exclusionist argument, by pointing to the responsibility of states to respect the non-refoulement principle and to resettle refugees. He argues that states have an obligation to assist refugees when the costs of doing so are low. He says: ‘Humanitarianism has no respect for distance; it is owed to all refugees on the basis of need alone.’

Gibney’s argument is thus clearly addressed to industrialized states in particular. Their role is explained through the ‘harm’ principle, which stresses the importance of states as agents in the creation of the refugee problem. As he explains, states are more than a culture or a territory. They are actors and agents in an interconnected global environment. States have a responsibility for asylum seekers when there is a risk of refoulement or where there is a causal link between its actions and the reasons for seeking refuge. Gibney advocates that states should respond by more generous resettlement of refugees, as a means of sharing the burden in a global crisis.

Gibney develops two powerful critiques which are useful for assessing the legal implications discussed above. First, he offers insights into the territorial–sovereignty argument. He is concerned that arguments that are used to exclude people on the basis of control of territory should not be overstated. This is partly because the moral claim to such territory is often contested. However, he recognizes that a territorial nexus may

178 Ibid., p. 240.  179 See the discussion in the Introduction to this volume.
be relevant to create a proximate relationship or causal link, so as to engage the non-refoulement obligation and the harm principle. Under his ‘harm principle’, physical proximity is but one way in which a causal relation can arise.

Secondly, the ideas of community and membership are more important reasons, in Gibney’s view, for including or excluding people from a territory. However, the model of community membership that he develops is based upon the idea of a ‘political culture’, rather than one based on culture as such (as, for example, Walzer’s views might suggest). He is concerned that ‘exclusionary inclusion’ on the basis of culture and ethnicity should not be overstated as a reason for membership. Rather, he emphasizes the political nature of the state’s institutions, through the bonds of membership. He recognizes that these institutions or bonds, in turn, may not be completely independent of cultural and ethnic ties. Thus his concern is with protecting the interests of voting citizens because this is a means of preserving the important political institutions of a state. He considers that states are only justified in restricting the entry of non-citizens in order to protect the institutions and values of the liberal democratic welfare state. Importantly, he analyses this concept of political community as a collective extension of the individual’s right to self-determination.

In the field of international refugee law, it is often stressed that protection under the Refugee Convention is a surrogate for the bond of ‘trust, loyalty and protection’ which has broken down between the citizen and her/his state. Shacknove argues that the basic needs of refugees include ‘liberty of political participation’, in addition to physical security. Gibney’s argument develops this idea of political participation, which could also be used to argue for the application of principles of procedural fairness for refugees and asylum seekers. It is potentially a more inclusive view, which contrasts with that of John A. Scanlan and Otis T. Kent and others who privilege citizens per se against outsiders because of their status. Scanlan and Kent said that: ‘universal

pp. 61–107 argue that a defensive concept of state is embedded in nations which have acquired territory through force.


184 Andrew Shacknove, ‘Who is a Refugee?’ (1985) 95 Ethics 274. 185 Ibid. at 280.
moral principles must be reducible to the interest of citizens’. For them the ethical equals the interests of citizens.

Thus Gibney enables us to move away from the territorial–sovereignty argument to a concern with political institutions as such and the responsibility of states in this contested area.

Part five: conclusions

In this chapter we canvassed the notion of formal and substantive versions of the rule of law, and the effect that this may have on an understanding of how a legal system operates. We also considered Ronald Dworkin’s idea of ‘law as integrity’ as a comparator and framework, as it contains a concept of an integrated rule of law, reflecting the operation of a legal system which is focused upon the ‘community’. These ideas have implications for the role that judges can play in protecting the rights of refugees, and for the role of the executive and the legislature in defining policy and the rights of refugees in this context. Apart from foreshadowing particular concerns about how legislative power is exercised, we highlighted the important role of legislation in bringing international law into national legal systems. This is how states accept the responsibilities to which Gibney pointed in the previous section (and which were explained in the Introduction to this book). Finally, we looked at political and ethical explanations for the ‘exclusionary inclusive’ characterization of asylum seekers and refugees in our legal systems. We saw that ethical arguments, which recognize the status of refugees in international law, lead to a more inclusive view.

In relation to the rule of law, we saw that there are two main versions: first, the positivist view based upon the idea of authority; and secondly, the substantive view of law, which focuses upon rights. Within these versions of the rule of law, there are overlapping views about the distinction between law and morality, or between law and politics. Turning to the adjudicative role of judges, we saw that the two versions of the rule of law lead to different justifications for such a role in relation to statutory interpretation and the doctrine of judicial review, which have a great practical impact on refugee rights. We also discovered that, despite the fact that both versions of the rule of law support the idea of equality or neutrality and of procedural fairness for all persons, that it is the

status of asylum seekers and refugees under state laws which leads to their exclusion from access to the territory or legal system of the state.

In Part four, we turned to political theory for guidance, but found that under both communitarian liberalism and Dworkin’s view there is little to reassure us about the role of law in the absence of an independent judiciary committed to the protection of the rights of refugees and asylum seekers. While Dworkin’s concept of an integrated rule of law provides a clearer explanation for the operation of a legal system which is potentially inclusive of refugee rights, it is unclear whether it avoids altogether the ‘exclusionary inclusive’ characterization of asylum seekers and refugees in our legal systems. As a number of commentators have suggested, whatever theory of law is appealed to, protection of rights requires a strong cultural ethic which, in turn, depends upon ‘a shared political ideal’ amongst citizens and officials about the value of such rights. But that culture or ‘community’ cannot exist unless states accept their responsibility under international law to protect the rights of asylum seekers and refugees, and unless their legal systems operate to protect rather than to frustrate the exercise of such rights.

Despite the possible limitations of Dworkin’s concept of ‘community’, his ideas about norms or values and how a legal system operates provide a useful framework for discussion and analysis. Thus, in this book, Dworkin’s model of ‘law as integrity’ is used as a foil to respond to the following questions (see Chapter 6) which elucidate the operation of legal systems:

- Is there a coherent legislative principle? Of what significance is the method and extent of incorporation of the Refugee Convention and related international law and human rights instruments into the legislation of the national legal system? Are differences in the constitutional and legislative frameworks significant?
- Of what significance are differences in the nature and structure of decision making at the administrative level? And of adjudicative structures for decision making (including opportunities for appeal/review) – are they determinative of ‘rights-respecting’ legal systems?
- How integral is the adjudicative process? What values underpin judicial reasoning? Are the courts deferential to executive policy in their approach to refugee law? Of what significance are differences in

the constitutional and the human rights framework for the adjudicative role?
- What are the limits of the integrity principle? How are refugees and asylum seekers defined by the legal system, and what forms of status and rights are granted by the state? That is, are refugees and asylum seekers defined as full members of the communities in which they seek protection?

We turn now to the rule of law experiences of the individual jurisdictions in relation to refugees and asylum seekers.