Rule of law and national security concerns – whither human rights?

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Politicians have set out to make us anxious about National Security. In Australia, they have had generous assistance from the Press.

In the wake of the September 11 attack on America, Australia introduced some of the most draconian laws ever seen, supported by the idea that the laws would make us safer. Whether we are safer or not is difficult to judge. Since the laws were introduced substantially for their preventive effect, we can only speculate about what might might have happened if the laws had not been introduced.

In broadest outline, the new laws give extensive new powers to the Australian Security and Intelligence Organisation (ASIO) to limit people's rights by reference to Australia's national security interests, and allows for control orders and preventive detention.

Security Assessments

ASIO has power to perform security assessments. An adverse security assessment from ASIO can result in a person's passport being cancelled, or their job application being refused, or (for non-citizens) a visa being refused or cancelled. In those circumstances, getting access to the material which provided the foundation for ASIO's assessment may prove difficult or impossible.

Cancellation of a passport following an adverse ASIO security assessment may be challenged in the Administrative Appeals Tribunal (AAT). The AAT Act contains provisions enabling the Attorney-General to grant a certificate which, in substance, prevents the applicant and their lawyer from being present in the Tribunal while certain evidence is given and submissions made. Here is the text of one such certificate, issued early in 2006:

> I, Philip Maxwell Ruddock, the Attorney-General for the Commonwealth of Australia … hereby certify … that disclosure of the contents of the documents … described in the schedules hereto, and the schedules, would be contrary to the public interest because the disclosure would prejudice security.
>
> I further certify … that evidence proposed to be adduced and submissions proposed to be made by or on behalf of the Director-General of Security concerning the documents … are of such a nature that the disclosure of the evidence or submissions would be contrary to the public interest because it would prejudice security.
>
> As the responsible Minister … I do not consent to a person representing the applicant being present when evidence described … above is adduced and such submissions are made …

The practical effect of that certificate was that the Applicant who sought to review ASIO's decision to adversely assess him was not allowed to know the case against him. My junior and I went to the AAT to represent him, but we spent most of our time sitting outside the hearing room, wondering what was going on. When the AAT finally decided

the matter, they delivered reasons in two parts. The open reasons said that there was nothing in the material available to the Applicant to justify the adverse assessment. However they upheld the assessment on the basis of their secret reasons, which we are not allowed to see.

If a refugee is adversely assessed, they will be refused a visa. They do not have access to the AAT, but they can go to the Federal Court to challenge the decision to adversely assess. In one such case, the refugee swore that he had never done or said anything that would bring him within the reach of the (very wide) provisions of the ASIO legislation. That evidence was not challenged or contradicted. Instead, ASIO's argument was that, because the Court did not know what ASIO had taken into account in making its decision, the Court could not say they were wrong.

The Judge agreed.

As it happens, that refugee was accepted by Sweden as a permanent resident, after a one-hour interview. Whatever ASIO thought of him did not apparently trouble the Swedish authorities. He has lived peacefully in Sweden for the past 7 years.

Some refugees are not so lucky. At present in Australia there are about 50 refugees in immigration detention because, although they have been accepted as refugees, they have been adversely assessed by ASIO. They cannot be sent back to the country they have fled, because the central obligation under the Refugees Convention is not to "*refoule*" a person: that is, not to send them back to a place of persecution. The fact that they are a refugee makes it impossible to return them to their country of origin, but the ASIO assessment means that they are refused a visa. The Migration Act says that they must remain in detention until they get a visa or they are removed from Australia. Both doors are shut to them.

A High Court decision from 2004 means that a refugee can be held in detention for the rest of their life, without having committed any offence, and without even being told the reason for the adverse assessment.

It is a chilling thought that in Australia in 2014 a person who is legally entitled to remain in the country can be jailed forever, without being allowed to know why, and with no means of legal challenge. This is truly the stuff of a Kafka nightmare.

Of course, we need ASIO. Of course ASIO needs to be able to perform most of its functions under a cloak of secrecy. But ASIO's role is to protect Australia's security interests. With that in mind, it is worth looking at the considerations which ASIO is able to take into account when determining to adversely assess a person. It is not easy to work out what considerations ASIO takes into account, because the regulations setting them out are secret: we are not allowed to know them. So here is a legal novelty: a person may be imprisoned for life but is not allowed to know the legal test which is relevant, nor are they allowed to know the facts which have been taken account of.

Let's make no mistake about this: people are being jailed without charge and without trial, and face the prospect of a much longer time in jail than if they had actually broken the law and had been convicted.

The problem is exemplified by the case of Ranjini. Shortly before Mothers Day 2012, Ranjini and her two children, aged 6 and 9 years, were removed from the community and

placed in detention at Villawood. Villawood is in Sydney. Ranjini's husband lives and works in Melbourne. We know that Ranjini was assessed as a refugee because her first husband had been a driver for the Tamil Tigers. He was killed by the Rajapaksa government. She would be at risk of persecution if she returned to Sri Lanka. So far as we can tell, , Ranjini was adversely assessed by ASIO because she might be a risk to Sri Lanka if she returned there. In short, the same facts which entitle her to protection also condemn her to a life in detention. She and her children have now been in detention for two years. They remain in detention to this day.

In December 2004 the House of Lords decided a case concerning UK anti-terrorist laws which allow terror suspects to be held without trial indefinitely. By a majority of 8 to 1 they held that the law impermissibly breached the democratic right to liberty. Lord Hope said that "the right to liberty belongs to each and every individual". Lord Bingham traced these rights to Magna Carta, and made the point that the struggle for democracy has long focused on the need to protect individual liberty against the might of executive government. Lord Nicholls said:

> "Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford. Wholly exceptional circumstances must exist before this extreme step can be justified."

Lord Hoffman said:

> " For these reasons I think … that the appeal ought to be allowed. Others of your Lordships who are also in favour of allowing the appeal would do so, not because there is no emergency threatening the life of the nation, but on the ground that a power of detention confined to foreigners is irrational and discriminatory. I would prefer not to express a view on this point. I said that the power of detention is at present confined to foreigners and I would not like to give the impression that all that was necessary was to extend the power to United Kingdom citizens as well. In my opinion, such a power in any form is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory."

"Boat people"

Australians have a deep concern about boat people: a concern which stands trembling at the frontier which paranoia shares with delusion.

Political concern about boat people reached crisis point in August 2001, when a Norwegian cargo ship, the Tampa, rescued 434 Afghan Hazaras who were fleeing the Taliban. Of all the boat-people who have arrived in Australia in the past 15 years, Hazaras are the largest single group. About 99% of them have been recognised by Australia as refugees legally entitled to our protection. That is not surprising. Hazaras first came to the place we now call Afghanistan many centuries ago. They were Buddhist then. In the 6th century, they carved the immense Buddhas at Bamiyan. Centuries later,

they became Muslim. To their misfortune, they embraced the Shi'a branch of Islam, while the other tribal groups in Afghanistan were Sunni Muslims.

In February 2001, the Taliban destroyed the great Buddhas at Bamiyan. It was an act of desecration that was deplored the world over. But it was also a visible symbol of the simple truth that the Taliban do not regard Shi'a as true Muslims, so killing a Shia is an act of devotion.

That is the simple truth in Afghanistan today, and equally so in Quetta, Pakistan, where a number of Afghan Hazaras have fled for safety, only to find themselves facing increasing threats from the Taliban.

It is easy for us to deplore this sort of secular-tribal conflict. It is less easy to do this if we recognize a few basic cultural facts. First, that the God worshipped by Muslims, whom they call Allah, is the same God worshipped by Christians and Jews. Second, that the split between Shi'a and Sunni Muslims is a close parallel to the split between Catholic and Protestant Christians. Third, that the Catholic-Protestant divide resulted in horrific cruelty in England in the 16th and 17th centuries and equivalent abuses in Ireland during most of the 20th century. It is easy to dismiss the visible turbulence within Islam until we recognize that Christianity has a strikingly similar history of violent intolerance.

The Taliban have, since the end of the Russian occupation, been determined to exterminate the Hazaras. The Howard government knew this when the Tampa steamed into Australian waters and Australian politics. But Howard was troubled by Pauline Hanson's One Nation party. He took a calculated position on Tampa: his plan was that a tough anti-boat people stand would draw supporters back from One Nation to the Coalition. He set up the so-called Pacific Solution while the Tampa litigation was being fought out.

The judgment at first instance in the Tampa case was handed down at 2.15pm, Melbourne time, on 11 September 2001. Twelve hours later the attack on America happened. From that moment, Australian politicians refused to notice the important distinction between Muslims and Muslim extremists. All of a sudden, Muslims fleeing extremists were to be treated like criminals.

It is not an offence against Australian law to arrive in Australia, without papers, without a visa and seek asylum. But Australia has a system of indefinite mandatory detention. Finding fundamental rights in the interstices of the Constitution has shortcomings, and those shortcomings were first exposed in a case called *Lim* in 1992 which tested the early mandatory detention legislation. (We have a very peculiar attitude to people who turn up without an invitation, which is odd because Australians are a nation of gatecrashers and the Aborigines have been conspicuously silent about people turning up in small boats).

In *Lim's* case the question was this: Where the Parliament says that a non-citizen who comes to the country and does not have a visa must be detained until they get a visa or until they are removed, does this breach the separation of powers? Punishment is central to the judicial power, so the question becomes: is it punishment to lock a person up for an indeterminate time pending visa processing? If so, detention of asylum seekers would be a breach of the separation of powers. But the court said no – that's not how it works. This is detention for an administrative purpose and if the detention is for a

legitimate administrative purpose, then it is valid and does not offend the separation of powers.

The potential of *Lim's* case came into sharp relief in 2004 in the *al Kateb* case. Ahmed al Kateb had come to Australia seeking protection. The Migration Act said that a non-citizen who does not have a visa must be detained, and remain in detention until they get a visa or they are removed from Australia. Al Kateb was a non-citizen without a visa. Therefore he was put into detention. He was initially refused a visa. He could have sought judicial review but that would typically mean another year in detention. He found detention so oppressive that he said instead: I cannot take it any further. Remove me from Australia. I'll sign any documents that are necessary.

But he could not be removed from Australia because he was stateless and there was nowhere he could be sent. He was in that rather bleak position of not being allowed to be anywhere. The Howard Government argued all the way to the High Court that, although Mr al Kateb had not broken any law and was not suspected of being a danger to anyone, he could remain in detention for the rest of his life. By a majority of 4 to 3, in August of 2004, the High Court held that that is what the Act means and with that meaning it is Constitutionally valid.

Mandatory detention has been supplemented by forcible removal to Manus Island (part of PNG) or to Nauru. Although Australia spends vast amounts of money running concentration camps in those countries, it claims officially that they are nothing to do with it: that what happens in the detention centres in Manus and Nauru is the work of the governments of PNG and Nauru.

The conditions in those places are harsh, and deliberately so. They are part of the Abbott government's policy of deterrence: a policy which, taken literally, must mean that coming to Australia looks less attractive than facing the Taliban, or genocide in Rajapaksa's Sri Lanka.

The realities of the deterrence policy were played out during the September 2013 election. For the first time in Australia's political history both major parties tried to out-do each other in their promises of cruelty to a particular group of human beings. It is not hard to guess that they would not have won any votes by promising cruelty to animals.

Australians, for the most part, think Human Rights matter. But in September 2 013 it was politically expedient to promise cruelty to human beings. It is difficult to predict where it will end. But it is not possible to dismiss lightly the idea that, 50 or 60 years from now, it might surprise people to know that there was a time when we took human rights seriously.

Dreyfus

In July 1906, Alfred Dreyfus was finally pardoned. The affair which bears his name had lasted 12 years before Dreyfus was vindicated. He had been convicted of treason in a trial held in secret. The crucial evidence against him was not shown to him or his counsel. It was ultimately shown to have been a forgery. It took 12 years for this gross violation of justice to be acknowledged and corrected.

Two matters made the Dreyfus Affair possible: a secret trial using secret evidence; and racial/religious prejudice which ran so deep it blinded people to any concern about the quality of justice accorded to Dreyfus (who was a French Jew).

Anti-Semitism may no longer exist in Australia in the virulent form which characterized Western Europe up until the end of the Second World War. However, there are groups who are sufficiently unpopular that most members of the general community do not regard their rights as important enough to deserve protection. Those unpopular groups include alleged terrorists, people with mental disorders, and Muslims. It might fairly be said that, since 9/11, hostility to Muslims is as sharp as anti-Semitism had been until 1945.

The Australian Government's disregard for the basic rights of David Hicks and Mamdouh Habib illustrated the problem. We ignored the fact they were both held and tortured in Guantanamo Bay by our allies, the USA. We knew Habib was transferred to Egypt for torture. We knew that the Americans told Hicks that, even if he was charged and found not guilty, he would not be released from Guantanamo. We knew these things but, broadly speaking, the Australian public was not troubled, because Habib is a Muslim and Hicks was thought to be a Muslim sympathizer.

It comes as a nasty surprise to know that draconian orders based on secret evidence are a legal reality in Australia. Where these orders affect a member of an unpopular group, most Australian's do not seem much troubled.

Under Division 105 of Australia's Commonwealth Criminal Code the Federal Police may obtain a Preventative Detention Order (PDO), which will result in a person being jailed for up to 14 days without having been charged with, much less convicted of, any offence. The PDO is obtained in the absence of the person. When taken into custody, the person is given a copy of the PDO and a 'summary of the grounds' on which it was made — but not the evidence on which it was obtained.

The summary of the grounds need not include any information which is likely to prejudice national security within the meaning of the National Security Information (Criminal and Civil Proceedings) Act (2004) — the NSI Act.

Under Division 104 of the Criminal Code the Federal Police may obtain a Control Order, which can confine a person to a single address for up to 12 months, without telephone or internet access. Control Orders are obtained in secret. When the subject of the order is served with the Control Order, they are given a summary of the grounds on which it was made, but not the evidence which supported it.

In this way, a person's freedom of movement can be grossly interfered with for up to 12 months without them knowing the evidence on which the Control Order was obtained. Again, the summary of the grounds on which the Control Order was obtained need not include any information which is likely to prejudice national security.

The NSI Act is arguably the most draconian piece of legislation ever passed by an Australian Parliament in peace time.

The Act says that, if a party to a court case believes that they will disclose, in the case, information that relates to national security, or the party intends to call a witness who

would disclose such information, then the party must notify the Commonwealth Attorney-General, the opposite party and the court.

The court is then required to adjourn the trial until the Attorney-General acts on the matter. If the Attorney-General chooses, they may sign a ‘conclusive certificate’ to the effect that the proposed evidence or witness would be likely to prejudice Australia’s national security interests. The certificate must then be provided to the court which must then hold a hearing to decide whether to prevent the evidence or witness from being called.

During that hearing, the court must be closed — the Act authorizes the court to exclude both the relevant party and their counsel. In deciding the balance between the interests of a fair trial and national security interests, the NSI Act directs the court to give the greatest weight to the Attorney-General’s certificate.

These provisions of the NSI Act are immediately alarming to anyone who understands the essential elements of a fair trial. They are all the more alarming when it is understood that ‘likely to prejudice national security’ is defined to mean that there is a ‘real, and not merely remote, possibility that the disclosure will prejudice national security’; and ‘national security’ is defined as: ‘Australia’s defence, security, international relations or law enforcement interests.’ These terms are defined very broadly, so the reach of the Act is very great.

Fair trials are one of the basic assumptions of a democracy. It seems a pity that we have abandoned the possibility of fair trials, ostensibly to save democracy from terrorists.

As Lord Hoffmann said: the life of the nation is less threatened by terrorism than it is by laws like these.