

## BOATS, VOTES AND HUMAN RIGHTS

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Multiculturalism, Immigration and Human Rights at the University of Technology,  
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*"But who is to guard the guards themselves?" (Juvenal, vii 51)*

The doctrine of precedent is a basic principle of the Common Law. Lawyers, viewing recent developments in immigration law in Australia, especially regarding refugees, must have concern at the significant precedential effect of many of the legislative and policy initiatives in other areas of the law. We must question whether it is valid to effect many of the changes enumerated below on the justification that they only effect non-Australians (citizens or residents).

Many represent an unacceptable precedent which we all must oppose, particularly when those effected are amongst the most vulnerable in our community. How easy it is to marginalise and scapegoat one sector of the community for one or other reason. Anthropological theorists see such conduct in terms of the basic tribalism in a society, where the outsiders are ostracized ostensibly for the common good of the perceived majority. The essence of a true democracy must surely rest in its ability to protect all its component parts. It ought not permit a situation involving tyranny and oppression of the minority in the name of and by the majority.

Australia has prided itself on being one of the few countries which throughout the 20<sup>th</sup> Century saw no undemocratic government, a country guided by the rule of law.

As noted by Sir Ninian Stephen in an address given on 24 August 1999 to the St James Ethics Centre entitled 'The Rule of Law':

*"The rule of law is in effect an institutional morality which requires certain ethical values to be observed by those who govern and who administer public affairs. These values are very general ones and clearly enough include, in most general terms, equality of treatment of citizens in public affairs, procedural fairness and the requirement that governments operate under and act within the established law exercising their powers for lawful purposes. The phrase "the rule of law" has a splendid ring to it,*

*there are few politicians other than rigorous Marxists who can resist its siren song when speaking of the ideals they stand for, few writers on political science who deny its high virtue. Democracy and the rule of law seem almost companions in election speeches .... But the principles of the rule of law only have effective meaning if supported by accountability so that those who break the rule of law are held accountable for their breaches. Thus the criminal law must provide the citizen with an effective shield against private violence. So too there must be accountability in the civil law and especially in actions against the State. It is here and in the role of acting for the defence in criminal cases that the legal profession plays its essential part. Only then, without fear of retribution, lawyers can defend any accused and can seek to make the State and its agents answer before the Courts according to law for acts or omissions, does the rule of law indeed rule".*

Certain basic principles exist if a country is to give real effect to the Rule of Law, the essence of which is a system of governance whereby the Executive is controlled by law to ensure the protection of the individual liberties of the ruled. Government must obey the law, which in turn must be certain and have general operation. In other words, there must be equality before the law in a real sense. The separation of powers of the three tiers of government ensures the compliance by each with the law. As our Constitution provides, the judicial power vested in the courts determines that Government action complies with the law and that acts of officials fall within the terms of powers granted by the law. Judicial decisions provide essential precedential value and are the means by which Government is accountable and transparent. Finally, the existence of an independent judiciary fulfilling the above duties is meaningless if access by the aggrieved person to the courts is in effect denied. This would allow the power of the Executive to go unchecked and the Rule of Law would no longer operate.

It is no response to the above statements of principle to justify exclusion from access to the courts on the grounds of economic costs, the conferral of "benefits" on aliens, the existence of s 417 powers (which are unfettered and non-justiciable), or because of a belief in the inherent power of Government to "control the borders". As stressed above, Government is not above the law. The development of principles exempting one government department from judicial scrutiny represents an unacceptable precedent which the Refugee Council abhors, particularly when those affected are amongst the most vulnerable in our community.

It is now appropriate to consider recent developments in Australian immigration law within this context. At the outset, it should be noted that since the federation of Australia,

xenophobia and racism have played an important role in guiding the immigration debate in this country. One of the first acts of the new Australian Federal Parliament was the Immigration Restriction Bill. Debate in the House of Representatives reflected a common opinion of the Members that Australia faced a threat of invasion by coloured hoards. To quote from Isaac Isaacs (later to become a Justice of the High Court of Australia and the first Australian Governor-General in the parliamentary debate):

*"Those around us – our constituents of to-day, and our fellow countrymen – and those who come after us, will doubtless scrutinize our acts and our words to see if we have faithfully carried out with unswerving fidelity the principles upon which we have been sent here. Consequently, I am prepared to do all that is necessary to insure that Australia shall be white, and that we shall be free for all time from the contamination and the degrading influence of inferior races ... nature herself has painted in ineffaceable tints, and I would say in so many words that the colour line is the one that shall mark the distinction; the colour line is that which shall bar inferior races from entering Australia"*

*"I recognise to the fullest that here in Australia we have a white man's war. It is a struggle for life; it is a struggle for that higher and fuller life that all progressive nations must feel and share in. It is that struggle for victory over adverse circumstances which is the pride and glory of all advancing civilizations. It is a white man's war that we must face, and I would not suffer any black or tinted man to come in and block the path of progress. I would resist to the utmost, if it were necessary, any murky stream from disturbing the current of Australian life".*

The speaker concluded by noting

*"I believe that it is possible for us, while treasuring our heritage as a portion of this Empire, whilst standing loyally and faithfully to the flag, to rear here without aggression a stalwart and strong race, which will not be degraded or contaminated by any influences such as we fear, and which we hope to exclude by a measure like that which we are now considering".*

Mr McDonald, another Member, noted

*"I am not going into the question whether we should allow coloured aliens to enter the Commonwealth. We are pretty well unanimous on that point. Only one honourable gentleman has had the courage to say that he believes we should develop this country with the assistance of coloured labour, and while I admire the courage which he displays, I, and I think most other honourable members, entirely differ from the view which he takes".*

Almost a century later Pauline Hanson's One Nation Party attracted a million votes at a Federal election. That party espoused similar philosophies.

The mainstream political parties in Australia have argued that Australia maintains a non-discriminatory immigration policy. With respect, the reality suggests that nothing could be farther from the truth. See analysis in article:

The guiding philosophy behind the immigration debate rests on the belief, accepted in international law, that a sovereign nation has the absolute discretion to **control** the entry of aliens into its territory. Quite frankly and unashamedly, the debate, if that is what it is, is all about control. The tinkering that takes place with the immigration laws is designed to better further these controls. A government which is able in a macho way to control the borders is seen to be protecting Australia from invasions and, quite simply, there are votes in it to be won.

Over the years, different approaches have been taken in relation to the way in which such control mechanisms are to be maintained. Inevitably, laws which are introduced which restrict entry, will in some way bring into focus our human rights obligations. The challenge to our politicians is to ensure that such laws as are enacted and policies which are pursued comply with internationally accepted standards in relation to human rights and reflect Australia's well publicised commitment to them and to apply the rule of law.

Before the 1980's, control was ensured by a legal system which vested an absolute discretion in the Minister and conferred no rights on aliens. The nadir in this thinking may be

represented by the High Court decision in *Salemi –v- Mackellar* (2) 1977 137 CLR 396. The State was empowered to protect society and this could function well if there was an honest and benevolent administration.

During the late 1970's and 1980's significant legal developments began to chip away at this armoury of protection. The enactment of the Administrative Decisions (Judicial Review) Act, 1977 and the Freedom of Information Act 1982, and the significant decision in *Kioa –v- West* (1985) 159 CLR 550 all individually and collectively led to an empowerment of aliens who could challenge the legality of administrative decision making through the Courts. The rules of natural justice were now clearly accessible to aliens. In 1989, the Migration Act 1958 was completely re-written and the previous discretionary regime was replaced by a complex regulatory regime. The complexity of the new system led to various judicial pronouncements, such as Lockhart J in *Qiu –v- Minister for Immigration* (1994) 55 FCR at page 443 describing it as labyrinthine and Justice Einfeld in *Buksh* (1991) 102 ALR 647, noting that the Act and regulations are "a minefield of complexity ...incomprehensible for normal people". Just some weeks ago, Mr Bacon the Premier of Tasmania, condemned the complexity of immigration laws, "They are like a maze. They are impossible for me to understand. I have very good advice and we work our way through it. But how on earth people, particularly with limited English, are expected to understand all the different categories, and rules that apply to them, is beyond me". The intention of the new regime was to make the administration of the migration portfolio transparent and fair, within the context of the political accountability of the Minister. These are laudable objectives provided there is a truly even playing field for all, and basic and fundamental legal protections are maintained.

Enter the refugee dilemma.

With the collapse of the Cold War and technological developments, the 1990's has seen a level of population mobility never before experienced in human history. Unfortunately, tyranny and dictatorship did not die with the collapse of the Soviet system. Civil wars, political repression and human rights violations continue around the world in diverse regions causing misery and human flight. The international treaty regime designed to give protection to those fleeing persecution, the Convention relating to the Status of Refugees 1951 and its 1964 Protocol and more recently the Convention on the Elimination of Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, amongst other international

treaties, are designed to protect the victims of human rights violations. Significantly, the Refugee Convention places the legal obligation on signatory states not to refoule (repatriate) recognised refugees to the countries they have fled. Australia is a signatory to this Convention and Protocol and its provisions are incorporated into Australia's domestic law via the Migration Act. Whilst a signatory to the Torture Convention, no similar domestic legal protections are given to persons fleeing torture. The onus placed on Australia to protect refugees within our borders is a significant chink in the wall of control that the Migration Act provides. Inevitably, increasingly large numbers of people have sought to rely on this protection, seeking justification in Australia's internationally and publicly espoused commitment to the principles of human rights. By so doing, however, they challenge the power of the Executive to control the entry of aliens into Australia.

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