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David Hicks and the Death of a Legal System

By Dr. Binoy Kampmark
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In the annals of obscene legal history, that of David Hicks, whose terrorism conviction was just quashed by the United States Court of Military Commission Review, must rank highly.[1] It is also instructive on various levels: what is says about his treatment by the US legal system; and what it reveals about the attitudes of the Australian government.

Australians tend to demonise or sanctify their legal villains, casting a social net around them that either protects, or asphyxiates them. If one is an Irish scribbling horse thief with murderous tendencies and eccentric battle dress sense, then one is bound to get a spot in the hero's pantheon. The book collecting, education promoting judge who sentenced him to death receives the opposite treatment: snubbed by the juggernaut of historical folklore.

Hicks, from the start, was not quite that horse thief, Ned Kelly. But he did engage in the mischief that would earn him demerit points after September 11, 2001. He travelled to Pakistan. He spent time at al Qaeda training camps in Afghanistan. He drank of that radicalisation soup that has gotten Europe, Australasia and the United States worried.

In the scheme of grand power politics, he found himself involved with an organisation that did not always have the official designation of terrorism – after all, elements of al Qaeda, and their hosts, the Taliban, had been recipients of US-funding during and in the aftermath of the Cold War. The Taliban's opponents, the Northern Alliance, captured Hicks, and surrendered him to the US in late 2001.

In confinement within the Guantánamo camp system, subject to around the clock artificial light, inedible food, forced drugging, beatings and a range of other indignities, Hicks received the brunt of juridical inventiveness. The US Military Commissions, designed to specifically target non-US citizens, was born. Being neither courts-martial nor civilian courts, they amputated due process and merged the role of jury and judge. The rule on hearsay was thrown out. The commissions restricted the accused's right to hear all the evidence. Appeals to any other court, foreign or US, would be cut. And the death penalty might well be applied.

In 2006, the US Supreme Court in *Hamdan v Rumsfeld* held that the Bush administration did not have the power to create such commissions without Congressional authorisation, a feature that ran foul of such instruments as the Geneva Conventions.[2] Not to be deterred, the then Australian Prime Minister, John Howard kept insisting that "I do not want [Hicks] to come back to Australia without first facing trial in the United States." Let the Americans do it, "because if he comes back to Australia he can't be tried". Hicks, in other words, was already guilty in the minds of Australia's top officials. "Of what?" posed his military defense lawyer Michael Mori. "Howard didn't know. How should he be tried? Howard did not know."

Hicks became the first, and most dubious scalp, of the reconstituted commission system. Much of the account of his defence is discussed by Mori, a freshly recruited defence lawyer who was rapidly blooded in the byzantine legal labyrinth being constructed around his client. His account, discussed in *In the Company of Cowards* (2014) reflects, not merely on Hicks defence, but the atrophying of a legal system.

Two vital issues came up in Hicks's attempt to seek his ultimately successful appeal. The first central legal disfigurement here lay in the pre-trial machinations that placed Hicks on the road to conceding guilt for a lesser sentence. In accepting this "Alford plea", the hope was to insulate the entire treatment of his plight, and by implication those in similar cases, from further legal scrutiny.

On March 30, 2007, Hicks pleaded guilty to the dubious charge of providing material support "from in or about December 2000 through in or about December 2001,... to an international terrorist organisation engaged in hostilities against the United States, namely al Qaeda, which the accused knew to be such an organization that engaged, or engages in terrorism". The rather inventive, and retrospective charges, had been brought in February 2007, with the attempted murder charge subsequently dropped.

He was then sentenced to confinement for seven years, with the question on what would count to time already served. (The latter point is important: the prosecutors were reluctant to budge on the issue, but conceded to the balance of nine months.) On May 20, 2007, Hicks returned to Australia, serving time at Adelaide's Yatala prison, and was out by December.

What was significant in this case was that Hicks, his defense counsel and the convening authority had signed a pre-trial agreement indicating that the appellant had offered to plead guilty to the first charge provided he "voluntarily and expressly waive all rights to appeal or collaterally attack my conviction, sentence, or any other matter relating to this prosecution whether such a right to appeal or collateral attack arises under the Military Commission Act of 2006, or any other provision of the United States or Australian law."

Then comes a good deal of legal stumbling. The review commission, after accepting it had jurisdiction over the appeal, attacked the verdict in a very specific way. The first waiver was deemed to have been made knowingly, intelligently and voluntarily. Hicks's pre-trial agreement was deemed favourable. He was granted concessions. But failure to resubmit "his appellate waiver within 10 days after the convening authority provide notice of action invalidated his appellate waiver."

"There is insufficient indication... that the appellant reiterated his desire to not appeal within 10 days." In other words, Hicks had not given sufficient grounds to show that he had waived his right of appeal. "Thus we hold the waiver is invalid and unenforceable." The result: "The findings of guilty are set aside and dismissed and the appellant's sentence is vacated."

The second point noted by the review commission, citing the Court of Appeals for the District of Columbia Circuit case of *Al Bahlul* (2014) was that "it was a plain ex post facto violation" to try a person for the offense of providing material support to terrorism after the fact. It was a "prejudicial error" that required a vacation of the conviction. While Al Bahlul's plea was different from Hicks, "those differences do not dictate a different result." Hicks, in other words, had been bludgeoned by unlawful retrospective punishment.

In a most conspicuous way, the treatment offered to Hicks did not merely violate every sacred canon of presumed innocence, it suggested a new legal order, one stacked with ghastly, Kafka-like qualifications. In the sinister legal purgatory of Guantánamo, Hicks could suffer Washington's own version of a disappearance, with connivance from a subservient Canberra.

Australia's political authorities continue that line, trumpeting a view that validates outsourcing torture, detention and confinement of its own citizens. (They can't even be patriotically indecent enough to inflict cruelties on their *own* people.) Showing a continuing tendency to ignore evidence placed before him, Australian Prime Minister Tony Abbott was resolute about the quashed sentence. "David Hicks was up to no good and I'm not in the business of apologising for the actions the Australian government takes to protect our country." (The statement would better read "inaction" in the name of Australian security.)

Others have preferred to ignore the procedure as a trifle. Commercial radio stations such as Sydney's 2UE suggested that the quashing of terrorism convictions did not imply he was a "saint".[3] "He may be legally innocent, but not absolved of the guilt he did [sic]." Guilt has many shades, and such arguments fittingly ignore the one critical issue in all of this: that of the law. In the realms of such debate, a sober middle ground is nigh impossible.

The opposition leader, Bill Shorten, proved surprisingly qualified in his statements. "There is no doubt on one hand David Hicks was probably foolish to get caught up in that Afghanistan conflict, but clearly there has been an injustice done to him" (*The Daily Telegraph*, Feb 19).

The troubling feature of the findings by the review commission is that, at its heart, little is made of the plea bargain system itself. Nor is the entire military commission process examined in its crude corrosion of judicial protections. The conviction was quashed because it violated a procedural requirement, and a judicial requirement. Invalidating a badly understood waiver is one thing; invalidating the entire process of how he was dealt with, quite another. We can at least take heart from the fact that the judges were aware of ex-post facto nastiness.

For that reason, the fate of Hicks remains the greatest affirmation of fiendish legal inventiveness, the sort of cleverness that threw the law book out in favour of gossip, arbitrariness and political judgment. It is one the US legal system has, and continues, to pay dearly for. The Australian citizen, on the other hand, can always rely on his or her own government to surrender liberties at the drop of the judicial hat, an anaemic form of patriotism if ever there was one. Washington, right or wrong, will have its day.

Dr. Binoy Kampmark was a Commonwealth Scholar at Selwyn College, Cambridge. He lectures at RMIT University, Melbourne. Email: bkampmark@gmail.com

Notes:

[1] http://ccrjustice.org/files/Hicksv.United%20States_13-004%20Decision_(2015.02.18).pdf

[2] http://www.supremecourt.gov/opinions/05pdf/05-184.pdf

[3] https://www.youtube.com/watch?v=n_Cjj5s6dOE&feature=youtu.be&a

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