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Legalising Cruelties: The Australian High Court and Indefinite Offshore Detention

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The High Court of Australia has done its occasional bit for refugees, though much of its legal reasoning has lead to inadvertent consequences. During the Gillard years, it sank what would have been a notorious exchange of refugees with Malaysia (the "Malaysian Solution") as one that was outside the scope of the Refugee Act and discretion of the minister of immigration.[1] On other occasions, its reasoning has bafflingly concluded that infinite detention of refugees for security grounds on a hypothetical basis is entirely legitimate.

The legal fraternity, and various NGOs were therefore curious on where the High Court would stand on the issue of Australia's own island gulag system, which received a considerable boost under the Abbott government from 2013. It involved a case brought by a Bangladeshi woman whose imprisonment, her legal representatives claimed, had been "funded, authorised, procured and effectively controlled" by the Australian authorities. This state of affairs, they contended, was beyond the government's constitutional powers. The legal team sought a declaration to that effect.

The majority of the Court held that s. 198AHA of the Migration Act 1958 (Cth) authorised the Commonwealth to detain the Bangladeshi plaintiff, who had been deemed "an unauthorised maritime arrival" as defined by the Act.[2] The Migration Act also permits the relocation of such arrivals to regional processing countries, of which Nauru is one. Such language conceals the essentially squalid nature of the process.

The wording of the Memorandum of Understanding (the so-called second MOU) is worth recounting. Entered into on August 3, 2013 between Canberra and the Nauru authorities, it is packed with euphemistic suggestion. "Administrative arrangements" were to be established to deal with "transferees" whose refugee claims were being processed.

The Nauru government would, in the words of three of the judges, appoint "an operational manager, to be in charge of the day-to-day management of the Centre". The Australian government, in turn, "would appoint an officer as a programme coordinator, to be responsible for managing all Commonwealth officers and service contracts in relation to the Centre, including the contracting of a service provider to provide services at the Centre for transferees and to provide for their security and safety." The Australian government, during that time, would provide "garrison and welfare" services in the true spirit of imprisonment.

What the MOU effectively created was a structure inimical to the interests of refugees and asylum seekers. Everything was done to sanitise what effectively were de facto prison arrangements far from the Australian mainland, a direct subversion of the UN Refugee Convention.

It would, however, be sold as a warranted approach to dealing with asylum seekers who dared use the sea as an option to arrive in Australia. There would be, for instance, a "Ministerial Forum" overseeing the implementation of the agreement; there would be a "Joint Working Group, chaired by the Nauru Minister," meeting weekly to discuss matters arising with the Centre.

Most sinister of all was the role given to Transfield Services, a private security company that is central to Australia's refugee policy. It is Transfield that received the primary responsibility for supplying "garrison and welfare services" to transferees, a role that the High Court seems to treat like a minor community centre. "Garrison services", we are told in rather mundane fashion, includes security, cleaning and catering services.

Just to make matters a touch murkier, we are told that Transfield had, in turn, subscontracted its services to Wilson Security Pty Ltd. Containing, and caging desperate human populations is a truly busy affair, and one that has involved a private sector eager to profit from it.

The Bangladeshi applicant's legal team were to be disappointed. The declaration was refused. The court refused to disturb the nature of the second MOU between Australia and Nauru. It had been authorised by s. 61 of the Australian Constitution. (The section simply enumerates that executive power in the Australian Commonwealth "is vested in the Queen and is exercisable by the Governor General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.")

Furthermore, the conduct of the Commonwealth pursuant to the second MOU was held by the majority to be entirely consistent with the provisions of the Migration Act. The wisdom of such executive power, one used to sanction the indefinite detention of asylum seekers and refugees offshore by other governments, was never questioned, shielded as it was by the law.

Having gotten what he wanted, Prime Minister Malcolm Turnbull resorted to the tinny humanitarianism that has masked a ruthless and questionable offshore detention program. Stopping boat arrivals and conveying their human cargo to prison-like centres was for their own good. Far better that than letting them meet a gruesome fate on the high seas.

The United Nations Children's Fund (UNICEF) claimed that the ruling did not affect "Australia's moral responsibility or its obligations to protect the rights of children in accordance with international human rights law." What had effectively taken place was a shift of responsibility "for this group of children and families to a developing state [Nauru] in the region."[3]

The decision on Wednesday means that 267 asylum-seekers, including 29 children and 33 babies born in Australia, can be deported to Nauru. A system of dysfunction and legalised rendition continues being perpetuated. The High Court has shown once again the enormous weaknesses within a legal system that lacks a higher enshrined law, one that fetters, rather than enhances, Parliamentary and executive discretion to harm others. Even more disturbing, it also suggests that such harm can be outsourced to foreign governments by accord.

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Notes:

[1] http://theconversation.com/malaysia-solution-high-court-ruling-explained-3154
[2] http://eresources.hcourt.gov.au/showCase/2016/HCA/1
[3] http://www.aljazeera.com/news/2016/02/australia-court-imprisoning-refugees-offshore-legal-160203033632383.html

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