

OVERREACH OF EXECUTIVE AND MINISTERIAL DISCRETION: A THREAT TO AUSTRALIAN DEMOCRACY

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I acknowledge the traditional custodians of the land and respect their elders. I was delighted to be invited to give this oration to recognise and honour the work of the Hon. Michael Kirby. Michael has been a visionary and courageous lawyer on so many fronts: as a fine jurist on the High Court of Australia, his United Nations work on Cambodia, and his Report again for the UN, highlighting the human rights abuses of its own people by the North Korean regime, and his more recent advocacy on the right to equality before the law for all Australians, especially the right to marriage equality.

As a young international lawyer, my admiration for Michael was stimulated many decades ago when he referred in his judgements to the principles of international law as an interpretive guide to understanding the Australian Constitution. One of the most disappointing failures of Australian law and jurisprudence since the 1990s has been the reluctance of our courts to take account of Australia's international obligations, especially human rights treaties; agreements that Australia has negotiated and ratified since the Second World War.

You might all recall the strong leadership played by Australia's 'Doc' HV Evatt who was the President of the UN General Assembly when the *Universal Declaration of Human Rights* was passed without a single negative vote in 1948. His leadership inspired the continuing commitment of Australians to human rights over the following decades.

I salute Michael Kirby's clarity of vision and scholarship in applying the principles of international human rights when interpreting statutes and the Constitution, especially for understanding the need to set limits on executive powers. He has been crystal clear in recognising and resisting the growth of unrestrained ex-governmental power and discretions that deprive individuals of their liberty.

Tonight, I would like to discuss what I believe is the overreach of executive powers that goes largely unnoticed among most Australians, creating risks for a healthy democracy.

Over the last five years of my Presidency of the AHRC I have seen an expansion of the powers of government, typically granted by parliament; powers that are almost unremarked by the media or commentators; powers that typically have been unchecked by the judiciary.

What do I mean by the limits to executive power and what does this have to do with democracy?

Let me begin with some first principles. In our representative democracy, three branches of government have evolved: executive power is vested in the Queen and exercisable by the Governor General, who is in turn advised by the Federal Executive Council comprising the Cabinet Ministers; an elected Parliament comprising the House of Representatives and the Senate with the sovereign power to control the executive by passing laws; and finally, the independent judiciary and courts to interpret and apply the law. The separation of the respective powers of these three branches of government provides the checks and balances to ensure that, above all, the executive government acts according to the rule of law.

The idea of the 'rule of law' means many things. It is an overarching principle that all, including the Government, are subject and accountable to the law. The High Court calls this the 'principle of legality', meaning independence of the judiciary, the right to a fair trial, that punishment may be imposed by courts alone and is proportionate to the offence, that laws must be clear, known and enforced, that there should be access to justice for all, and finally, the rule of law prohibits arbitrary detention or the deprivation of property.

In short, no one is above the law, not even the elected government of the day.

My concern is that an imbalance has crept into our democracy so that increasingly the courts are marginalised by legislation. Compliant parliaments, including oppositions, over many years, have failed to exercise their historical restraint and pass laws that breach the rule of law. Executive cabinet government

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assumes ever more power. The result is that our democracy becomes weakened by the growing powers of the executive and by a corresponding diminution in the independence of the judiciary and a growing impotence of Parliament.

This is all very abstract. What are some examples?

- Counter-terrorism laws that are out of proportion to the legitimate aim of protecting national security: billion dollar budgets are largely unchallenged by the Senate Estimates Committee; the creation without legislation of a super Ministry of Home Security; the adoption of meta data laws that grant access to private information to security agencies without a warrant or judicial supervision; the extension of control orders to 14-year-olds, despite advice from the Security and Intelligence Monitor that such orders should be abolished.
- Australia's immigration laws are among the most inhumane in the world, making it mandatory to detain unauthorised maritime arrivals in immigration detention centres for years and in many cases indefinitely, contrary to the right to claim asylum at international law and the Refugee Convention. The conditions in detention in Australia, Christmas Island, Manus Island and Nauru have been found by the UN's Special Rapporteur to breach the Convention against Torture. We still have about 800 men detained on Manus Island (minus 22 refugees recently accepted by the USA) and 40 or so children and their families on Nauru, a humane solution depending on America and no hope for those left behind.
- On the grounds of national security, the Minister for Immigration now has unprecedented ministerial discretions that are neither compellable nor, for practical purposes, reviewable by the courts. The Minister can cancel the citizenship of dual nationals, and cancel visas on 'character' grounds without any charge or trial to test the accuracy of allegations. The outcome has been rising numbers of men and women in immigration detention in centres throughout Australia and Christmas Island. I have met some who have been held without trial for between four and seven years.
- New laws are now being introduced to impose language and other conditions on Australian citizenship that appear likely to have a discriminatory impact on certain races and religions.
- The Minister for Immigration now has the power to overturn decisions of the Administrative Appeals Tribunal.
- State laws have been enacted to arrest and convict those alleged to associate with certain known 'bikies', or to detain sex offenders or violent criminals without trial.
- Add to this the adoption of state and federal laws that impose mandatory sentences, bypassing the role of the judge in assessing individual circumstances.
- Legislative processes are avoided by governments, most recently in the marriage equality debate, where there has been no parliamentary approval for a plebiscite, and funds have been diverted to pay the Australian Bureau of Statistics to conduct a postal vote, a process that has been approved unanimously by the High Court for reasons that have not yet been made public.
- The power to make war is an almost unconstrained executive function in which parliament has no formal role, a situation that is out of step with contemporary practice and good governance.
- The recent announcement by the Foreign Minister of military assistance to the Philippines Government in combatting the Muslim insurgency in Mindanao, has raised yet again, the wisdom of maintaining the almost unchecked power of Australia's Executive Government to authorise military engagements. The agreement to provide President Duterte with SAS units to advise and assist, along with two AP-3C Orion aircraft has been made in the absence of transparency or Federal parliamentary consultation. There has been almost no explanation by government as to why, after decades of separatist fighting in Mindanao, military assistance is now to be given to a President who has notoriously ordered extra-judicial executions of thousands of his own citizens in a war against drugs.

It may be true that any one of these laws can be justified in individual circumstances, that the law will affect very few people in practice, or that the law will be administered in a humane way. My concern is that these examples when viewed together become greater than the sum of their parts and a distortion of democracy.

But does any of this really matter? I was asked on an ABC radio program yesterday, 'Isn't any expansion of government power worth it if it stops a Muslim bomb exploding on a train?'

While I would take issue with certain aspects of this question, it is true that governments have a primary responsibility to protect their citizens and should adopt proportionate and reasonable laws to do so. Where I

draw the line is the adoption of laws that are not based on evidence, are disproportionate to a legitimate purpose, and breach fundamental freedoms and the rule of law. Sadly, governments over recent years have taken advantage of the fears of unregulated movements of peoples across boundaries in search of protection and a better life, the fear of global terrorism and, on occasion, fostered Islamophobia. On the pretext of fear, governments, often supported by the opposition, have extended their executive powers.

My question is, how can this happen in our contemporary democracy? How have we betrayed the legacy of Doc Evatt and the optimism of the 60s, 70s and 80s that international human rights principles would guide our democracy?

There are many underlying reasons, encapsulated by Geoffrey Blainey's phrase, *The Tyranny of Distance*, which remains true to this day.

- Australia is exceptional and isolated from the evolving laws of the nations with which we are rightly compared. We are the only common law country and only democracy in the world without a Charter or Bill of Rights.
- Our Constitution does not protect fundamental freedoms, with some exceptions, including section 116 that the Commonwealth may not make any law prohibiting the free exercise of any religion (a provision that is rarely mentioned in the current debate about marriage equality), the High Court has implied a right to political communication, but the Constitution does not protect freedom of speech as such.
- Australia has ratified the major human rights treaties, but has failed to implement by legislation the conventions on *International Covenant on Civil and Political Rights* ('ICCPR'), *Convention on the Rights of the Child* ('CROC'), and refugees, so they are not directly applicable by the courts.
- Those human rights that we have enacted by legislation, such as the *Racial Discrimination Act* ('RDA'), are constantly under attack, for example, the unsuccessful efforts to amend section 18C of the RDA. It also will be remembered that the RDA was suspended temporarily 10 years ago to allow the Federal Government to conduct the NT intervention, bringing with it much despair among the indigenous peoples of the region.

For all these reasons, in Australia we no longer speak the language of human rights and are increasingly out of step with comparable legal systems in the UK, Europe, Canada, the USA, even our cousins the New Zealanders.

It is of particular concern that the courts have ignored international law in favour of limited interpretations of the Constitution and domestic legislation. This has led to the relative isolation and exceptionalism of Australia with respect to human rights; a phenomenon that is reflected in the growing encroachment of the executive on ancient common law liberties.

I ADMINISTRATIVE DETENTION

The question as to the proper limits on executive power is not, of course, a new one. Michael Kirby was a member of the minority in one of the most disappointing decisions of the High Court in the *Al-Kateb* case in 2004. This case concerned a stateless Palestinian young man – Mr Ahmed Ali Al-Kateb – who arrived in Australia without a visa and was detained under the *Migration Act*. When his application for a visa was rejected, Al-Kateb asked the government if he could be removed to another country, a request that also failed because no state would accept him. The outcome was indefinite detention, in fact, for over four years.

The *Migration Act* is unique in that it mandates administrative detention of so-called unlawful non-citizens, an exercise of the executive power to consider the application for a visa and to admit or deport the alien.

As one of three dissenting judges, Justice Kirby rejected the majority view that the indefinite detention was a valid exercise of executive power. Rather, he stressed that we should reject 'executive assertions of self-defining and self-full-filing powers' and order the release of the detainee as the purpose of the Act – assessment of refugee status or visa eligibility – could not be met in all the circumstances.

Justice Kirby stressed the interpretive principle upholding the international law of human rights on the ground that national courts are exercising a form of international jurisdiction saying:

‘...the complete isolation of constitutional law from the dynamic impact of international law is neither possible nor desirable today. That is why national courts... have a duty, so far as possible, to interpret their constitutional texts in a way that is generally harmonious with the basic principles of international law, including as that law states human rights and fundamental freedoms.’

The courts of many other countries adopt this interpretive principle and the US Supreme Court itself has accepted the relevance of the jurisprudence of other civilisations and has done so in the recent *Obergefell* case on marriage equality.

The end to this story is a relatively happy one. Mr Al-Kateb was finally released from detention and now lives in the Australian community. But the harsh reality is that the law remains on the books and affects the lives of thousands of people today. Attempts have been made to challenge it, but have, thus far, failed.

Indeed, the harshness of the law continues 13 years after the *Al-Kateb* decision.

II M68 CASE – 3 FEBRUARY 2016

A Bangladeshi woman, an asylum seeker, was intercepted at sea four years earlier and detained on Christmas Island as an unlawful non-citizen under the *Migration Act*. She was transferred to Nauru on 22 Jan 2014 and gave birth to a daughter in Brisbane (16 December 2014). She brought proceedings in the High Court to prevent her return to Nauru on the ground that her detention offshore by the Commonwealth was unlawful. She has claimed refugee status, but this claim had not yet been determined by the time of the court’s decision nearly two-and-a-half years after her arrival.

In legal terms, she challenged the constitutional validity of s198 AHA (2) *Migration Act* under which an officer is bound to take an unauthorised maritime arrival to a regional processing country.

The six-member majority found that s198 AHA is a valid law of the Commonwealth, thus there is no need to discuss the nature of executive power of the Commonwealth.

Justice Gordon was the sole dissident on the ground that s198 AHA is invalid because it attempts to vest that judicial penal power in the executive contrary to the doctrine of the separation of powers.

I would like to focus upon Justice Gageler’s separate decision which, I suggest, provides a scholarly discussion of the nature and limits of the administrative power of the executive to detain without trial.

He considered whether the detention of the Plaintiff by the Commonwealth was in excess of the Commonwealth’s power and observed that executive power is always subject to control by parliament.

Justice Gageler confirmed that the executive power conferred by s61 of the Constitution is to be understood by reference to common law principles relating to responsible government and said that ‘Detention by an officer of the Commonwealth executive can be justified only by a clear statutory mandate’.

In *Lim*’s case, the High Court declared that ‘an alien is not an outlaw... he cannot be detained except by some positive authority conferred by law.’

Justice Gageler approved the words of Justice Isaacs that certain fundamental principles not expressed in the written constitution, nonetheless, ‘form one united conception’, including the ‘inherent individual right to life, liberty, property and citizenship, subject to the general welfare at the will of the state’.

Justice Gageler summarised the law with the words, there is ‘no crown immunity from habeas corpus’.

Returning to the facts of the case, Justice Gageler found that the Australian Government procured the services of Transfield, and through it those of Wilson Security staff physically to detain the Plaintiff, a Bangladeshi asylum seeker, within the regional processing centre on Nauru. This, he concluded, was beyond the executive power of the Commonwealth as there was no law of federal parliament to permit this.

At this point of the judgement I was getting quite excited!

But, on 30 June 2015, Federal Parliament passed a law with retrospective effect to 18 August 2012 to provide the necessary legislative authority – an authority that nicely covered the period of the Plaintiff’s detention on Nauru. On this basis, Justice Gageler declared that the impediment had been repaired; the retrospective law now meant that the detention on Nauru by the Executive Government of the Commonwealth under the Transfield contract was within the scope of the statutory authority retrospectively conferred on the Government by a 198AHA (2).

Aside from the retrospective law passed by parliament to repair the defect, the more important question was whether detention under the *Migration Act* was in fact penal and, if so, was it a judicial power in breach of the doctrine of separation of powers?

Justice Gageler accepted the argument that any mandate for executive detention should be no longer than is necessary for the administrative processes required to carry the purpose into effect. Executive detention, he said, will become punitive and ‘transgress on the inherently judicial’ power unless the:

- Duration is reasonably necessary to meet the purpose and capable of objective determination by a court from time to time.
- The purpose is capable of fulfilment.

These conditions, Justice Gageler concluded, without reference to the facts, had been met. The consequence was, in his view, s198 AHA of the *Migration Act* did not contravene the doctrine of separation of powers.

How then does the M68 decision and Justice Gageler’s judgment contribute to our understanding of the executive power to detain?

- First, no judge refers at all to international legal obligations under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child or the Refugee Convention or the Torture Convention. I do not believe that it is acceptable for our courts to ignore the legal regime of obligations under international law.
- Justice Gageler’s analysis of the executive power confirmed that Parliament can confer on the Executive a statutory power to detain, so long as it does not violate the doctrine of separation of powers and exclusive judicial power to impose a punitive penalty. While I suggest that there was no adequate discussion of whether the detention of the plaintiff was a penalty, Justice Gageler has left the door open for future litigation challenging indefinite detention that has become penal.
- The question becomes, what is a reasonable period of time before the legislative purpose of assessing refugee status has not been, or is not likely to be, met? When does indefinite detention become penal? What if the detention is in practice indefinite, as is true for hundreds of people today?

The final decision in the M68 case was that the retrospective law gave the Government the powers it needed to return the woman to Nauru. This decision stands in stark contrast to the decision a few weeks later by a unanimous PNG court that the detention of refugees on Manus Island is contrary to its Constitutional provision protecting personal liberty.

What is the difference between the two decisions? One country has constitutional provisions protecting human rights, and the other does not.

III WAR POWERS: PHILIPPINES

Returning to the war powers of the Australian Government, there is, of course, nothing unusual about the unilateral decision by respective Australian governments to deploy armed forces in international conflicts. Over many decades our Prime Ministers have announced such engagements, only subsequently to inform Parliament: Vietnam, Afghanistan and Iraq. Australia has a long-standing military support for the Syrian bombing campaign and continued deployment of military personnel in Iraq, with little or no public discussion or parliamentary debate.

In stating my concerns about the extensive executive war powers, you might reasonably point out that the powers of the executive is always subject to the will of Parliament and, ultimately, to the ballot box. Under the Westminster system, if members of Parliament are unhappy with a unilateral decision of the Government of the day, the PM and Ministers are subject to scrutiny at question time, and the Government may be the subject to a motion of ‘no-confidence’. In short, one should not exaggerate the dangers to democracy of executive war powers because the checks and balances are in place.

I contest this sanguine view. Questions of national security, justified by a fear of terrorism, often conflated with a fear of unauthorised arrivals of immigrants, asylum seekers and refugees, even a fear of

Islam itself, have shielded government measures from political challenge as a taboo subject, creating a vacuum of silence in the absence of strong leadership.

In conclusion, and compounding my concerns about the overreach of executive power, is the phenomenon of ‘post truth’.

While it is a long-recognised cliché that the first casualty of war is the truth, the Oxford Dictionary only last year included the term ‘post truth’ as the ‘word of the year’. The idea that there are ‘alterative facts’, and that they too have credibility, has created an *Alice in Wonderland* world where words mean what we choose them to mean. Or as George Orwell put it in *1984* when the party oligarch reminded our hero: ‘Reality exists in the human mind and nowhere else. Whatever the Party holds to be truth, is truth.’

What are the solutions to the many concerns I have raised?

- Improve education in schools and universities with respect to our democracy, the Constitution and the rule of law, role of parliament and the separation of powers.
- Legislated Bill of Rights; there is little or no political will for such a reform, though the paradox might be noted that the very people who demand an end to ‘identity politics’, ‘political correctness’ and the anti-discrimination laws on race, sex and disability are the very same people who now demand new legislative protections for freedom of religion and freedom of speech.
- I also suggest we strengthen parliamentary processes through the committee system, to ensure that expert reports are read and inform debate, so we have evidence-based decision-making.

Thank you.