Recent developments

Staring into the abyss — confronting the absence of decency in Australian refugee law and policy development[+]

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If you're looking for refugees in need, I know where you find them and you don't find them coming to Australia unlawfully by boat.

Philip Ruddock (ABC 2001)

Introduction

Asylum seekers[1] who arrive in Australia without authorisation inhabit more than the Immigration Detention Centres[2] — the idea of them has begun to step beyond the limits of detention to assault Australians' collective conscience.

The starting point for this article is Australia's 12 year old policy of mandatory detention of asylum seekers who arrive here informally — the so-called 'illegals' and 'queue jumpers' — and the support which that policy currently enjoys among the

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1 Asylum seekers are people who claim refugee status but whose status has not yet been formally determined be either the UNHCR or a state. A refugee is a person whose claim to refugee status has been recognised. Under the Convention on the Status of Refugees (1951) and its 1967 Protocol (Refugee Convention), both asylum seekers and refugees are afforded the protections and rights without distinction. We will refer throughout this article to asylum seekers and refugees as the context requires.

2 Currently there are six operational Immigration Detention Centres (IDC) or Immigration Reception and Processing Centres (IRPC) operating in Australia: Villawood IDC (Sydney), Maribyrnong IDC (Melbourne), Perth IDC (Western Australia), Port Hedland IRPC (Western Australia), Curtin IRPC (Derby, Western Australia), and Woomera IRPC (South Australia). A facility is being set up on Christmas Island as well as a facility in South Australia. There are also plans to build a facility in Brisbane. Curtin IRPC is being decommissioned.

main political parties and the general population (Grattan, McDonald, Clennell 2001: 1). Of late some sections of the community and the popular press have begun to express dissent and sometimes outrage with the policy. Rather than rehearse those arguments and points of view, we want to reflect on questions of power and ethics at play around the issue of asylum seekers and refugees in our political and legal institutions. How has the executive chosen to use and (arguably) misuse its power and how has this manifested itself? What does it say about the nation we are and the nature of institutionalised power in this society? What kind of ethics are currently being deployed to legitimise the existing policy and how might an alternative ethical lens refocus the policy?

The discursive site of asylum seekers and refugees has been much explored since August 2001 when the *MV Tampa* rescued over 430 asylum seekers from their sinking vessel en route from Indonesia. The now infamous 'children overboard affair' and the ironically entitled 'Pacific solution' have spurred even the somnolent Labor Opposition into some kind of action.

To some extent, maintaining asylum seekers and refugees within this discursive space suits the Government, because it allows the Government to abstract the notion of the asylum seeker, place particular emphasis upon the potential millions waiting to move to our country and present those who come here by boat as merely seeking 'migration outcomes'. This kind of language does not engage with the reality of the individuals seeking asylum on our shores from Iraq and Afghanistan and other places,[3] the vast majority of whom are successful in their claims for asylum.

Truth overboard? The political use of asylum seekers

> We cannot allow a situation to arise where people choose, and not Australians choose, who comes to this country.
>
> John Howard (2001)

Minister for Immigration Ruddock and Prime Minister Howard, as the chief

3 Over the 11 years from 1989 to January 2001, 10,224 people have arrived in Australia without permission. Of these, 4991 were granted entry, that is 49 per cent. More particularly, in the years since 1998, over 90 per cent of applicants for refugee status have succeeded. Arrivals from particular countries have an even higher acceptance rate, even on Australia's criteria. For example, in the year ending 30 June 1999, 97 per cent of Iraqi and 92 per cent of Afghani asylum seekers were accepted as refugees.

government protagonists, have purveyed a false logic in pursuit of an overriding objective to ensure that 'Australians choose who comes to this country'. The premise of the official position is that 'boat' people are queue jumpers, illegal immigrants, economic migrants making a lifestyle choice. They are wealthy enough to pay people smugglers exorbitant amounts for passage to Australia. And, after the attack on the twin towers of the World Trade Centre on 11 September 2001, they are potentially terrorists. Accordingly, to provide the next step in the syllogism, they have marginal claims and are not the constituency of need which Australia's generous refugee policy is trying to address. The needy are those patiently waiting in refugee camps offshore. And worse, for every one of the illegals, a needy refugee will be turned away.

The lexicon of this logic neatly bypasses any thought of international law and the obligations Australia willingly took upon itself by signing and ratifying the Refugee Convention, the International Covenant on Civil and Political Rights including the First Optional Protocol which provides individual rights of redress (ICCPR 1966), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT 1984) and the Convention on the Rights of the Child (CROC 1989). The combined force of these international instruments is manifold but includes a prohibition against returning people to a place where they fear persecution or torture; a prohibition against arbitrary detention; and the right of access to courts.

The Government by its action and public statements, has focused on something that Guy Rundle argues is one of Howard's 'obsessive themes': the unity of Australian society (Rundle 2001: 26). In this case, it is a question of what unites us is stronger than that which divides us, and Howard has sought to unite Australians against outsiders, who are 'not like us', whose 'kind I don't want here',[4] and who are 'illegals'. Rundle quotes Howard in another context saying:

> One of the greatest things about living in Australia is that we're essentially the same ... There is that continuity, that golden thread of unity that hasn't changed. It is imperative that we reach our conclusions in the context that we are one indivisible community of Australian people (Rundle 2001: 26 – 7).

Meanwhile in November 1999, Minister Ruddock announced that Australia faced 'a national emergency'. This was, he claimed, because in the Middle East 'whole villages are packing up and there is a pipeline'. Anthony Burke characterises

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4 Howard said words to these effect in a radio interview on 3LO with Jon Faine when confronted with allegations that asylum seekers en route to Australia threatened to, and did in fact, throw their children overboard when they were intercepted by the Royal Australian Navy.

Ruddock's description of the challenge to Australia as an urgent threat to Australia's integrity, rather than an administrative challenge, as 'alarmist' (Burke A 2001: xxii).

It has allowed the Government to begin to elide onshore asylum seekers who arrive informally with people smugglers and criminal activity and to portray them as a threat to Australia's sovereignty and territorial integrity. This opposition of those people inside and outside the Australian polity begs the question so poignantly put by Robert Manne, 'what if they were more like us?' (Manne in Crock & Saul 2002: 5).

Context of the Refugee Convention and other international law

> [T]he term 'refugee' shall apply to any person who ... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [sic] nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.
>
> Refugee Convention, art 1(A)(2)

> It's just a question of making sure these people don't land in Australia. Because ... at the heart of this is the protection of our territorial integrity.
>
> Alexander Downer (2001)

There are few people who would dispute the fact that the Refugee Convention is ill-equipped to cope with the current nature and scale of the world's refugee population. The Refugee Convention is a creature of the post World War II international political environment, developed to deal with the consequences of that conflict and with people fleeing a particular kind of state oppression. At the time that most states were signing that convention, the number of refugees worldwide was a fraction of what it is today and at least in the period immediately following the end of the war, many asylum seekers were often given refugee status after a fairly cursory screening (Joppke 1998: 111). The fact that refugees in the current world climate[5] are often fleeing situations of generalised violence and destruction rather than specific personal persecution is not taken into account by the Refugee Convention which delineates the bounds of refugee status through persecution on the grounds of their race, religion, nationality, membership of a particular social group or political opinion. The Refugee Convention does not assist those fleeing natural disasters,

5 The UNHCR estimates that there are 22 million refugees and persons of concern in the world: <www.unhcr.ch>.

those who are internally displaced, or those who are forced to leave their homes for economic reasons.

For many commentators and indeed for governments trying to develop a coherent response to the growing numbers of refugees arriving at their borders, the Refugee Convention is also seen as a free pass into the country — its provisions imply a potentially limitless obligation on states to take on refugees. According to some this represents an unreasonable and inappropriate obligation (Millbank 2001: 5) — a complaint that goes to the heart of the dilemma. How does the modern nation state properly strike a balance between the protection of state sovereignty and territorial integrity and the obligation to comply with its human rights obligations to the people seeking shelter within its borders?

According to Christian Joppke, the post world war period, with the rise of the international legal system and in particular human rights law, has posed a challenge to state sovereignty. However, far from putting sovereignty at risk, Joppke argues that the development of human rights and the international community has highlighted the fact that sovereignty cannot be absolute, that it must always compete with other imperatives not the least of which are the domestic pressures within states themselves. Joppke cites the examples of the US and Germany as states in which the policy in relation to refugees has been liberalised due to the rights enshrined in the domestic law of those countries and contrasts these with Britain where weak domestic human rights constraints have led to a far greater emphasis being placed on national sovereignty than upon the rights of the individual asylum seeker (Joppke 1998: 141). This observation can certainly be logically extrapolated to the Australian context, where there is no bill of rights which can be invoked to challenge the ongoing ill treatment of and community opposition to asylum seekers and where the incumbent government has a clear and emphatic preference for the protection of sovereignty over the recognition of individual rights. Australia's attitude to the domestic implementation of human rights has variously been described by commentators such as Hilary Charlesworth as one of 'reluctance' and more recently by Di Otto as 'exceptionalism' (Charlesworth 1993: 195; Otto 2001: 219).

Otto argues that Australia's justification for this stance is in an insistence that human rights are already enjoyed in Australia and are adequately protected by Australia's political process (Otto 2001: 220). She points to the Government's announcement that our future co-operation with UN treaty reporting bodies would be 'strategic' and contingent on reform of the treaty reporting system. She further highlights the Australian Government's outrage in response to various UN Committee investigations into mandatory detention and the detaining of asylum seekers (Otto 2001: 221). The Attorney General, Daryl Williams, said in relation to the Committee

on the Elimination of Racial Discrimination's (CERD) comments about mandatory sentencing and its disproportionate impact on indigenous Australians, '[t]he Committee has apparently failed to grapple with our unique and complex history' (Williams 2000).

The Prime Minister revealed the true agenda when he objected to Australia being unfairly 'told what to do by outsiders' (Howard 2000). This exceptionalism extends beyond our public rhetoric and our lack of attention to specific obligations under international law, to actual examples of attempts to exclude ourselves from specific international obligations.

For all its failings and anachronisms, the Refugee Convention enshrines the recognition and protection of individual rights and as such is a valuable instrument worth retaining. Calls for the revision of the Refugee Convention, particularly those who would argue for group based systems for assessment (Millbank 2001: 4), should be viewed with some suspicion if not alarm. They may assist Australia to reduce the number of people who are defined as refugees, but such an approach also allows individuals to fall through the definitional cracks. The view that the Refugee Convention somehow encourages people to arrive in countries illegally rather than waiting in camps for their claims to be determined by the UNHCR is also a disturbing one (Millbank 2001 : 4). It would, of course, be far more convenient and administratively more manageable for people to assemble co-operatively and passively in the camps run by the UNHCR to which Australia commits considerable funds. Nevertheless, this is an option that is unavailable to many and which others find that they cannot endure. The suggestion that those who bypass this system and arrive in the country have less valid claims or are less deserving of refugee status is empirically false. The fact that refugees can and do wait for longer than 10 years in some UNHCR camps to be resettled may provide some clue as to why the process preferred by the current government is not one favoured by some asylum seekers. The system which Australia and the UK would put in place of the Refugee Convention does not provide a better solution for refugees. Rather it allows for a focus upon offshore refugees: that is, it favours the treatment of the problem elsewhere before it becomes a domestic one. There is, of course nothing inherently wrong with trying to avoid the root causes of refugee flows, however using this effort to absolve oneself of any other responsibility towards asylum seekers is of concern. It's a kind of 'I gave at the office' attitude which does not become the modern international citizen.

Ultimately, the issue is not about the relative need or merit of particular categories of refugees but rather about the maintenance of control and power in an inherently chaotic policy field. The resolve of the Government in relation to this issue has been

made clear in its policy decisions and administrative procedures, but it has also played itself out rather dramatically in ongoing clashes between the institutions of state, the executive, the legislature and the judiciary.

Imbalance between executive and judiciary and the threat to the rule of law

> The executive arm of government believes it is appropriate for the government of the day to make decisions in relation to who shall settle permanently in Australia, and it is not incumbent upon the courts, by creative law-making to take that power away from the Parliament. And this has gone on for some time.
>
> Philip Ruddock (ABC 1998)

The question of where the appropriate bounds of executive and legislative power and judicial power lie is not peculiar to the refugee debate, and the extent to which the legislature can legitimately ride roughshod over the judiary and judicial opinion is a question which has arisen a number of times during the reign of the current government.

What is concerning about Minister Ruddock's words above regarding the judiciary's creative law making tendencies is that it seems to overlook or side step the legitimate and important role which the judiciary plays as one of the institutions of state. Of course, it is not the business of the judiciary to formulate policy or to legislate, or to otherwise usurp the proper functions of the democratically elected legislature. It is, however, entirely within the legitimate role of the judiciary to interpret and apply the laws as they exist and provide a check to executive power where ever it exceeds its legitimate boundaries.

Refugee policy has provided an emotionally and politically charged context for the playing out of what is in fact a broader, endemic struggle over power. There are those who have been very critical of the part which the judiciary has played in the development of refugee law and policy, viewing their involvement as an improper encroachment upon executive power (McMillan 1999). We think this criticism should be seen within an historical context in which access to the courts has been progressively restricted by the executive. Legal commentators such as McMillan complain that judges are making decisions upon grounds which are not open to them. But what of the fact that these grounds have steadily been taken from them? Where the Federal Court could once review decisions on the basis of an oversight of natural justice, or because of unreasonableness or where an irrelevant consideration

had been taken into account these grounds (among others) are now no longer open to Federal Court judges?[6] There are now time limits upon applications to the High Court in its original jurisdiction on migration matters (*Migration Legislation Amendment Act (No 1) 2001* (Cth)). Further, a privitive clause has now been introduced which excludes judicial review of administrative decisions on migration issues in the Federal Court in all but very limited circumstances (*Migration Legislation Amendment (Judicial Review) Act 2001* (Cth)). In short, the judiciary and the Federal Court in particular, now operates under a significantly restricted capacity to make decisions with respect to a particular group of people — asylum seekers — and the legislature is responsible for that restriction. It may be correct to say that the Federal Court has been engaging in decision making which has exceeded the limited jurisdiction granted to it by the legislature, but it is important to look at the broader context to see that there is a more fundamental jurisprudential issue at stake here than the administrative law point with which McMillan is preoccupied. We believe that the balance of power between these core institutions of state is not being struck in a responsible or appropriate manner and that this has serious ongoing consequences for the principles of the rule of law.

Legal academics argue about the precise parameters of the rule of law, what it includes and what it does not (Hart 1979; Raz 1979). However there is broad agreement that there should be equality before the law. Our concern is that, by reducing the space for judicial review in respect of a specific group of individuals, Australia puts this principle at risk.

Not only has the legislature limited the space in which the judiciary can act, it has intervened on a number of occasions to change or to protect its policy agenda in the wake of judicial decisionis which it sees as unfavourable. An example of this is the 1992 case of *Chu Kheng Lim*.

In *Chu Kheng Lim's* case the Commonwealth legislature intervened by amending the *Migration Act* to retrospectively legitimise the detention of a group of Cambodian boat people when an application was made for their release pending the outcome of a review of their claims. The group had been detained for four years before having their claims rejected. An appeal against this determination was made and DIMIA agreed to reassess the case. Before the Court had time to hear the application for release, emergency amendments to the *Migration Act* had been passed by the legislature which, in effect, retrospectively legitimised the detention of the

6 See the *Migration Act 1958* (Cth) s 485 which excludes the grounds for review provided within the *Administrative Decisions (Judicial Review) Act 1977* (Cth) from application in migration decisions.

Cambodian asylum seekers. A challenge to this legislation was made to the High Court on the grounds that the legislature had usurped judicial power under Ch III of the Constitution by passing the amendments which legitimised the detention. The application was ultimately unsuccessful, however the High Court did concede that detention prior to the legislation being passed had been unlawful at which point further legislation was introduced to ensure that any compensation awarded in respect of the unlawful detention was capped at $1 per day in detention.

Just as equality before the law is an uncontroversial component of the rule of law, so too is the notion of prospectivity of the law as distinct from retrospectivity — the notion that the law be knowable and known by its subjects. There may be no constitutional rule to prevent a government's decision to legalise a situation which had until then been illegal and to ensure that its liability was minimised. However, this behaviour does not sit well with the jurisprudential principles that are valued in our society and it is difficult to see such actions as anything but fundamentally unjust.

This is but one seminal example in a series of examples where we believe the balance between executive and judiciary has not been justly struck. Other rights which have been curtailed include the right of asylum seekers to legal advice and a restrictions on human rights agencies, such as HREOC, to communicate with and provide advice to asylum seekers (Sceats 1999; Poynder 1995; Crock (unpublished): 21; Poynder 1997).

Almost every time the judiciary opens up or confirms a particular area of opportunity for an asylum seeker the Government has stepped in to 'batten down the hatches' and it has used its power to amend the *Migration Act* to do so. Rather than the judiciary acting to check executive power, it seems to have acted to test the impermeability of our *Migration Act* and where the *Migration Act* has sprung leaks which have let people with asylum applications through, the Government has been at the ready with its legislative 'plugs' in hand.

It is apparent to us that the executive, with the legislature in its control, has sought to craft a refugee regime which is entirely to its advantage and which has no regard for the basic demands of the rule of law. We say that this disregard is directly referable to the Australian Government's adherence to an unarticulated view that it does not owe obligations to those who are outside its borders. There is something deeply wrong with this perspective and we would like to propose the beginnings of an alternative.

Utilitarianism — serving the greater good?

> What if they were more like us?
>
> Robert Manne

> There exists a solidarity among men [and women] as human beings that makes each co-responsible for every wrong and every injustice in the world.
>
> Karl Jaspers

The current ethics guiding governmental policy is a utilitarian and majoritarian ethics. Governmental policy is currently guided by a principle of the greatest good for the greatest number with an eye to the barometer of public opinion, which in turn, is the measure of what is 'good' and the constituency for whom the good is sought. The ethics we propose is that of Emmanuel Levinas, and it challenges the current utilitarian and majoritarian approach, and refigures both what is 'good' and for whom the 'good' ought to be attained. Levinas proposes an 'ethics of responsibility' which cuts to the heart of how each of us understands ourselves individually and as a part of a collective, Australian society. An ethics of responsibility demands a policy that responds to the global issue of refugees and the refugees themselves, rather than cordoning off Australia's sphere of interest and cleverly creating policy and legislation that limits Australia's 'exposure' to refugees. Levinas' insight is that 'our'/Australia's interest is always already invested in the asylum seekers, and therefore our conception of what is good must necessarily involve an assessment of the best interests of the people the subject of Australia's refugee policy, the asylum seekers themselves.

If ethics is about being positioned by, and taking a position in relation to, others (Diprose 1994: 18; Grosz 1989: xvii), then Levinasian ethics offers a way of locating ourselves in relation to other people, strangers and friends alike, and in relation to the societies in which we live. The key to his ethics is a recognition of self's indebtedness to and responsibility for the other. The 'other' is your friend, a stranger, a refugee, or your enemy. Levinasian ethics explores each person's responsibility to one another, that is how must 'I' approach the 'other' person, the stranger, the refugee? Levinas calls this an 'ethics of alterity'.[7] It reflects Karl Jaspers' exhortation

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7 Elizabeth Grosz provides a useful definition of alterity as '[a] form of otherness irreducible to and unable to be modelled on any form of projection of or identification with the subject. [Alterity] refers to a notion of the other outside the binary opposition between self and other ... The other is outside of,

to which we alluded above, that:

> [t]here exists a solidarity among men [and women] as human beings that makes each co-responsible for every wrong and every injustice in the world, especially for crimes [or other wrongs] committed in his [or her] presence or with his [or her] knowledge. If I fail to do whatever I can to prevent them, I too am guilty (Jaspers 1978: 32).

That is, being in the world as a person is an interdependent condition, and for Levinas, a condition made possible only *because* of my responsibility to the 'other' (Campbell and Dillon 1993: 169). We are interconnected and indebted to each other and it is precisely this indebtedness which constitutes us as subjects. This is not a process of acknowledging one's personal guilt, but rather realising that there are interconnections between all people, and that our existence is dependent upon the way others have been placed such that:

> [m]y being-in-the-world or my 'place in the sun', my being at home, have these not also been the usurpation of spaces belonging to the other man [sic] whom I have already oppressed or starved, or driven out into a third world; are they not acts of repulsing, excluding, exiling, stripping, killing? (Levinas 1989: 82 (footnotes excluded))

This is a radical movement from the ethics of Kant, Bentham or more recently, Rawls, each of which regards the individual as a self-directing agent, autonomous of, even while in relations or co-operation with, others (Schneewind 1991: 147 – 53, 155 – 6). In contrast to the traditional focus on autonomous freedom, Levinas' ethics redefines subjectivity as this heteronomous or interdependent responsibility.

How then does Levinasian ethics step beyond the self to teach us anything about society and politics? He achieves this extrapolation of ethics by introducing the critical theme of the third person, or the community (*le tiers*), who looks at me through the eyes of the other, so that my relation to the other is 'always already' a relation to humanity as a whole and therefore ensures that ethical relations are 'always already' political (Critchley 1992: 226). This has the further potential of imbuing politics with an element of responsibility not only to the immediate 'other' but to all the 'others' that make up the community. Levinas' ethics is constituted by an active *engagement* with other people. And because of Levinas' recognition that the 'I' can never fully comprehend the 'other' person or community, his is an ethics that

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unpredictable by and ontologically prior to the subject' (Grosz 1989: xiv). Alterity is a concept that allows our conceptualisations of others to escape the binary logic of a self-referential mode of 'thinking difference', and of equating (and devalorising) those 'others' as 'not me'.

is dynamic and contextual and cannot provide a fixed position that is true for all times and places.

And what about the 22 million refugees and people of concern to the UNHCR who might come to Australia if the opportunity was presented to them? What does Levinas have to say about them? And how can Levinas' teaching possibly respond to the argument that Rupert Murdoch recently put, that 'pursuit of a foreign policy based on moralism can lead to a massive loss of sovereignty' (Burke 2001: xxiii). Of course, Australia could not accept 22 million people. But to focus on the enormity of the problem and to allow its magnitude to defeat any possibility of accepting more than we currently do, is to miss the point and to discount the relevance of an ethics of responsibility. What if, as Manne poses, the refugees were a little more like us? It might be more easy to imagine Levinasian ethics at play then. But the power of Levinas' thought is that my responsibility and indebtedness, our responsibility and indebtedness, extends even to those we do not know and feel that we could not know or wish to know. We are answerable to them and it is no answer to close the door and turn them away or make their path any more difficult than it already is. Minister Ruddock unashamedly pursues a line of deterrence and of discrimination between 'good' and 'bad' refugees, all of whom are outsiders to the Australian polis, and only some of whom we Australians choose to recognise and allow within our borders. There is however no such valid distinction. To insist upon a sovereign right to control our borders depends upon understanding ourselves as independent beings in a society which defines itself in opposition to all those outside it. In our view, this is neither sustainable, ethical nor desirable. An ethical response would begin by shifting public discourse from a discourse which figures asylum seekers as 'outsiders' and 'others' to people in need to whom we owe legal and ethical obligations. It would progress by examining and addressing the root causes of refugee flows and considering policy alternatives that would make easier the road asylum seekers have to tread. The obvious starting point is a critical and ethical engagement with the current practice of mandatory detention of asylum seekers who arrive informally. Australia as a collective society has not only abrogated our collective responsibility to such people, but further, we have actively excluded them from our care and protection. We have constructed them as undeserving of our care and protection by refusing to define them as 'others' to whom we owe responsibilities. ●

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