The Australian Offshore Detention Regime: A Constitutional Reflection

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This essay reports on the Commonwealth of Australia's regime of offshore detention designed for unauthorised maritime arrivals (hereafter UMAs Migration Act 1958 n.131, 198 AA-AJ). The aim of the offshore detention policy is to deter future arrivals by preventing UMAs from settling in mainland Australia. It will be argued that such a regime is a manifestation of Australian constitutional arrangements that allocate a large spectrum of prerogative to the Parliament of the Commonwealth of Australia (hereafter the Federal Parliament) and of a missing human rights culture in the Australian jurisprudential tradition.

Since 2015, Australia's offshore immigration centres have allowed residents to move freely in and out of the residential facilities and so, at the time of writing this essay, the federal offshore immigration detention policy on those facilities has officially lapsed (Migration Act 1958 N.131). However, Australian security forces still have the option of detaining and transferring UMAs to a third country. The Supreme Court of P.N.G. continues to describe foreign residents in the Australian immigration centre as 'held against their will' (Namah v Pato). In particular, section 198AB of the Immigration Act 1958 gives the prerogative to the Minister for Immigration and Border Protection (hereafter the Minister) to relocate UMAs to offshore regional processing centres. The offshore processing centres are currently situated in the Republic of Nauru (hereafter Nauru) and the Independent State of Papua New Guinea (hereafter PNG). In April 2016, the two centres held 1313 asylum seekers. Fifty of these individuals were children (Convention Relating to the Status of Refugees 1951). The ministerial prerogative applies to all UMAs irrespective of the protection that asylum seekers might have in relation to the Refugee Convention and its protocols. PNG, Nauru and Australia are signatories of the Refugee Convention and its related protocols.

Before I explain the current policy, a series of issues has to be dealt with as preliminary debates. Herein, I will not discuss the series of United Nations' decisions against the policy that declare long-term detention illegitimate. In several instances, the UN Human Rights Committee has found Australia's policy of compulsory detention for asylum seekers disproportional and arbitrary (C. v. Australia; D and E, and their two children v. Australia, Communication No. 1050/2002, 2016; M.M.M. et al. v Australia 2016). I will also not speculate on the possibility that using offshore detention and processing centres for asylum seekers is a new emerging global paradigm of immigration policy. The so called EU–Turkey deal is the recent manifestation of this new paradigm (e.g. Ignatieff et al. 'The United States and the European Refugee Crisis: Standing with Allies'. Rochester, NY 2016). The inhuman conditions of the processing centres are discussed elsewhere and they do need to be replicated here, I simply want to point out that the widespread abuse against minors reported by the Australian Human Rights Commission should have, *per se*, been grounds enough for questioning the legitimacy of the current policy (Australian Human Rights Commission 2014, 186). It is also important to note that Australia immigration policies in other areas (e.g. skilled immigration visas) is well articulated (e.g. V. Breda, 'How to Reverse the Italian Brain Drain: A Master Class from Australia', International Migration, 2014, 64). Instead, the focus in this paper is on the Australian policy of offshore detention as a manifestation of the lack of a

human rights culture within the Australian constitutional system (Australian Human Rights Commission 2014).

To start with, the polemic over the substantive and formal status of the immigration centre in PNG will soon be purely theoretical. In August, the Minister confirmed that the PNG regional processing centre in which asylum seekers were detained will be closed. The decision to close the facility should be considered one of the effects of the Namah v Pato decision. In Namah v Pato, the Supreme Court of PNG considered, among other things, the status of its residents in the PNG regional immigration processing centre and the legitimacy of the statutory measures that allowed the establishment of such a facility. In relation to the status of its residents, the Supreme Court noted that Article 42 of the PNG Constitution guarantees personal liberty to all PNG residents and that the potential limitation to such freedom (e.g. related to criminal proceedings) does not apply to individuals who are unwillingly transported to PNG by an agency or foreign country. The Supreme Court's conclusion is both simple and cogently explained: 'Naturally, it follows that, the forceful bringing into and detention of the asylum seekers on MIPC [Papua New Guinea's Manus Island Processing Centre] is unconstitutional and is therefore illegal'. Thus, both the transport and the detention of asylum seekers were unconstitutional, but the Supreme Court went a step further and considered the statutory restriction on the basic freedoms of MIPC residents.

Again, the Supreme Court decided that the PNG legal framework (which allowed the detention centres) including a constitutional reform that sought to distinguish between the rights allocated to all and those given to citizens was unconstitutional. The PNG Supreme Court found that statutory measures restricting the freedom of movement of the detainees were not '*reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind*' (para 109). This is perhaps one of the most interesting jurisprudential elements of the Namah v Pato decision because it shows a substantial gap in the jurisprudence of the High Court of Australia. The High Court had, on several occasions, the possibility of assessing the reasonableness of the offshore detention policy but failed to acknowledge the lack of proportionality between a policy goal (e.g. to deter illegal immigration and people smuggling) and the violation of human rights that such a policy engenders.

There are, indeed, several probable explanations for diverging decisions within the common law tradition, but I will suggest that the High Court of Australia is distinctly ill suited to balancing the aims of a policy with the protection of human dignity. Australia's constitutional system, as with most of the European constitutional systems, is based on the doctrine of constitutional sovereignty, which in turn entails a codified constitution and often a series of basic protected rights (V. Breda, Lingering with Intent: The UK Constitutional Review, in Constitutional Review and Democracy, in M. Jovanovich, The Hague, Eleven, 2015). Australia does have a codified constitution, but it does not include a bill of rights. In addition, over the past century, the High Court interpreted the Australian Constitution in a way that allowed a large margin of legislative discretion to the Federal Parliament.

This level of freedom in terms of setting policies and trumping rights is almost unheard of in common law jurisdictions, and Aroney and Allan described it in a succinct narrative: 'What is not to be expected in a federal system is that over time the most senior judges will decide such "penumbra of doubt" disputes in such a way that the central

legislature, in practice, ends up free to legislate on virtually *any matter it wishes or thinks will be of political benefit*' (N. Aroney, and J. Allan, 'An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism', Sydney Law Review, 2008, 293). So the High Court has, over time, trusted the Federal Parliament with extensive powers in setting the common good which (e.g. Amalgamated Society of Engineers Claimant; and Adelaide Steamship Company Limited 1920, New South Wales v Commonwealth 2006), in turn, allowed for instance, legislation that discriminated against individuals on the basis of their race (G. Sawer,. 'Australian Constitution and the Australian Aborigine', Federal Law Review, 1966, 17). It is important to note that the British constitutional system allocates large powers to the UK Parliament and its legislation is immune from constitutional review. However, one of the distinctive features of UK parliamentarism is its compliance with the criteria set out in what Mills called the 'political morality' of the constitution, and the applications of the European Convention on Human Rights (V. Breda, Lingering with Intent: The UK Constitutional Review, in Constitutional Review and Democracy, in M. Jovanovich, The Hague, Eleven, 2015). The Australian constitutional system has been impermeable to the culture of human rights and the idea of Mill's institutional morality is absent. The 2014 audit of Federal Legislation by Institute of Public Affair reported: 48 laws abrogating the presumption of criminal innocence, 92 eliminating natural justice, 108 removing the privilege against self-incrimination (M. Begg, and S. Breheny State of Fundamental Legal Rights in Australia: An Audit of Federal Law. Melbourne, Institute of Public Affairs, 2014, 3).

It was, therefore, not surprising that the High Court repeatedly confirmed the federal competence to legislate over the status of aliens (ex. Migration Act 1958) and the legitimacy of the executive orders by the Minister who transferred and held UMAs in a way that trumped rights, normally protected in a modern democracy, such as that of due process. For instance, in Plaintiff S156/2013, the High Court discussed the reasonableness of Section 198AD(2) of the Migration Act 1958 which limits the freedom of asylum seekers, but a test of reasonableness did not entail a balancing of the individual rights that were violated (e.g. access to legal support) with the aim of the policy (e.g. to deter illegal immigration). The justices focused instead on the appropriateness of the action carried out by civil servants and contractors in relation to the policy. This epistemic methodology, by way of comparison to the one adopted by the Supreme Court of PNG, reduces the level of accountability of public officials and it allows policy goals to trump rights. The line of authority of Plaintiff S156/2013 is defended in CPCF in which the High Court considered the principle of *due process* as not applicable to UMAs, and, in the recent Plaintiff M68-2015, the prerogative of Federal Government to financially support offshore centres was considered constitutionally legitimated.