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Justitia in the shadow of Australia's immigration detention centres

di

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Abstract: La legge e la politica vanno di pari passo. Dopo tutto, la legge sostiene le politiche pubbliche, i politici sono eletti sulla base dei loro programmi e molti di loro sono giuristi. Inoltre, i politici scrivono le leggi che stabiliscono ciò che è giusto o sbagliato e i giudici interpretano queste leggi nelle aule dei tribunali. Ma cosa accade quando i politici prendono il sopravvento e piegano la legge ai propri obiettivi? Le poltiche sull'immigrazione in Australia hanno creato una situazione tale per cui i bambini subiscono violenze e abusi a causa delle politiche governative e sette giudici di grado elevato hanno dichiarato che la legge non è in grado di proteggere questi bambini. Nessuno ha parlato di perseguire i colpevoli. La polizia non ha fatto indagini. Sulla base della teoria di Jürgen Habermas, questo saggio mette in luce come l'ossessione del governo Howard di chiudere i confini agli "uninvited refugees" abbia ispirato un sistema di leggi volto a far prevalere i diritti dello stato sui diritti dei bambini. Attraverso un processo che conserva l'apparenza della razionalità giuridica, l'applicazione della legge sull'immigrazione ha distrutto i principi giuridici che la maggior parte delle società considerano inalienabili. L'autrice inoltre sostiene che la razionalità giuridica è diventata razionalismo giuridico, il regno dell'ideologia politica senza restrizioni che opera con la parvenza della razionalità giuridica.

The statue of the Roman goddess Justitia, blindfolded, with the scales of justice in her left hand and a sword in the right, demands obedience to the rules and procedures of the law. Justitia's blindfold symbolises a disregard for wealth and status, as she weighs evidence and facts according to law. Ready to strike with her sword, she has the power to end disputes by delivering definitive justice. Justitia demands obedience to social norms, either by co-operation or by force. Her ability to exercise these powers have long been directed and regulated by governments, as they wrote the very law that provided Justitia with the raw material against which she balanced the facts and pronounced judgement. For some refugees who arrived in Australia since 1999, the Howard government steered Justitia's sword until a vast chasm separated Australian refugee policy from previously accepted principles of national and international norms. In this new divide, child legislation would still exist but no longer be applied to protect refugee children inside immigration detention centres. At the beginning of the third millennium, Justitia heralded a new interpretation of individual rights and the duties of governments to uphold these rights.

This article explores the relationship between legal rationality and legal rationalism, with regard to refugee policy in Australia. But first, two definitions are in order. In this article, *legal rationality* is defined as the system of law, with its rules and procedures that operate within a framework of societal institutions. *Legal*

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rationalism, on the other hand, is counterfeit legal rationality. It is the ideologically driven application of these legal rules and procedures for the purpose of achieving goals that are located outside of legal rationality. This article argues, by drawing on the *colonisation thesis* of Jürgen Habermas, that legal rationality has become colonised by legal rationalism.

Who are refugees, and what are some of the policies that place them into a framework of national and international rights? As a consequence of the massive population displacement in Europe during and after the Second World War, nation states formalised their willingness to protect people from persecution in their homeland, when they signed the Refugee Convention[1]. Australia signed this agreement in 1954, and also its updated version, the Optional Protocol[2]. In practice, there was considerable variation of how states chose to apply the Refugee Convention within their jurisdictions[3], because this instrument was not legally enforceable but depended on the good will of state signatories[4].

In 1999, the United Nations assisted approximately seventeen million people world wide, who were "refugees and returnees"[5]. By comparison, a number of ten thousand[6] seemed minute. About ten thousand people arrived in Australia between 1999 and 2003 by boat and without valid travel documents for the purpose of claiming refugee protection under the terms of the Refugee Convention. Since 1989, Australian governments have pursued a policy of mandatory detention until the hearing of the refugee claims became finalised. For some, this meant detention

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[1] Office of the High Commissioner for Human Rights, *Convention Relating to the Status of Refugees* [Website, High Commissioner for Refugees] (1951 [cited 27 Jun 2004]); available from http://www.unhchr.ch/html/menu3/b/o_c_ref.htm.

[2] Office of the High Commissioner for Human Rights, *Protocol Relating to the Status of Refugees* [Website] (1967 [cited 28 Jun 2004]); available from http://www.unhchr.ch/html/menu3/b/o_p_ref.htm.

[3] Ann Vibeke Eggli, *Mass Refugee Influx and the Limits of Public International Law*, ed. Anne F Bayefsky, vol. 6, *Refugees and Human Rights*, Nijhoff Publishers, The Hague 2002, p.84.

[4] Geoffrey Stern, *The Structure of International Society. An Introduction to the Study of International Relations,* St. Martin's Press, London 1995, pp.127-8.

[5] United Nations, *More Information/Humanitarian Affairs. Humanitarian Action.* [Website, United Nations] (22 Apr 2004 Unknown [cited 9 Jun 2006]); available from http://www.un.org/ha/moreha.htm.

[6] Figures compiled from three sources.

(1) Department of Immigration and Multicultural Affairs, *Fact Sheet 70. Border Control.* (Department of Immigration and Multicultural and Indigenous Affairs, Canberra. Public Affairs. Section., 15 September 2003 2003 [cited 23 September 2003 2003]); available from http://www.dima.gov.au/facts/70border.htm.

(2) Department of Immigration and Multicultural Affairs, *Fact Sheet 74a. Boat Arrival Details* (12 Sep) [Website, Department of Immigration and Multicultural Affairs] (15 Sep 2003 2003 [cited 24 Sep 2003]); available from http://www.dima.gov.au/facts/74a_boatarrivals.htm.

(3) Department of Immigration and Multicultural Affairs, *Fact Sheet 75. Processing Unlawful Boat Arrivals.* (13 August 2003 2003 [cited 24 Sep 2003 2003]); available from http://www.dima.gov.au/facts/75processing.htm.

for several years. Mandatory detention under the Howard government, which came to power in 1996, did not occur smoothly, as evidence of human rights violation and harsh treatment kept mounting[7]. Another dimension was added in 1999, when the government passed legislation that prevented those who had arrived by boat, and who were subsequently recognised as refugees, from ever bringing their families to Australia. As the result of the scrapping of family reunion, whole families travelled together, and were subsequently detained together. Deprived of opportunities for social and intellectual development, children bore the brunt of the policy of mandatory detention. In 2004, the Human Rights Commissioner released a 925 page report on the effects of detention on children, with the finding that Australia had breached the *Convention on the Rights of the Child*[8], and had inflicted "inhuman and degrading treatment" on some children who had developed mental health problems" [9] inside detention centres.

Despite these effects on children, this policy was not illegal, but firmly grounded in national Australian legislation. Neither has the Australian government outlawed refugee rights, but has chosen to apply these rights in a particular way. The next section addresses the question of how, under the auspice of legal rationality, Justitia has been relegated an existence in the shadow of Australia's immigration detention centres.

Of rights and reason

Legal rationality, with its rules and procedures of the law and its grounding in the institutions of the state, guards against arbitrary use of powers. Within this system, governments have to obey the law, but they also write new legislation that underpins their public polices. Together, the legally rational based system of enforceable laws and court judgements set the standard for normativity in society. Philosopher and critical theorist Jürgen Habermas views rationality as an integral component of public life[10]. According to this argument, rationality is never entirely

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[7] Commonwealth Ombudsman, *Final Report to the Department of Immigration and Ethnic Affairs of Investigation of Complaints Concerning Onshore Refugee Processing*, 1997. Human Rights and Equal Employment Opportunity Commission, "Those Who've Come across the Seas. Detention of Unauthorized Arrivals", in *Canberra: Human Rights and Equal Opportunity Commission,* 1998. http://www.hreoc.gov.au/pdf/human_rights/asylum_seekers/h5_2_2.pdf. Philip Flood, *Report of Inquiry into Immigration Detention Procedures*, Commonwealth of Australia, 2001. Commonwealth Ombudsman, *Report of an Own Motion Investigation into the Department of Immigration and Multicultural Affairs' Immigration Detention Centres*, 2001.

[8] High Commissioner for Human Rights, *Convention on the Rights of the Child* (Adopted by United Nations General Assembly, 20 November 1989; Entry into Force September 1990); *Geneva: Office of the High Commissioner for Human Rights,* 1989. http://www.unicef.org/crc/fulltext.htm

[9] Human Rights and Equal Employment Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention*, Sydney: Human Rights and Equal Employment Opportunity Commission, 2004, p 849-55.

http://www.humanrights.gov.au/human_rights/children_detention_report/index.html

[10] Paul Connerton, ed. by, *Critical Sociology. Adorno, Habermas, Benjamin, Horkheimer, Marcuse, Neumann*, First ed., vol. Middlesex, England, *Penguin Modern Sociology Readings*, Penguin Books, Ltd., New York 1976, p.31.

cognitive, but also manifests itself as a social property. In his *colonisation thesis*[11], Habermas argues that the rationality of a social system can become so mechanised that it displaces the considerations that underpin normativity[12]. According to the theory, there comes a point where the rationality of a specialised system gains "more and more independence from normative contexts" of society, until this rationality becomes replaced with rationalism[13]. At this point, the rationality of "system imperatives" replaces these normative contexts with the logic of the system[14]. The problem arises, according to Habermas, when system logic overshadows the capacity for citizens to debate and contest what is normative in society, so that the "systemic mechanisms suppress forms of social integration"[15]. The problem here is not rationality, but that rationality takes on an existence for its own sake, devoid of normativity.

The purpose of this simplified summary of Habermas' colonisation thesis is to illustrate a mechanism whereby the rationality of the laws, procedures and institutionalisation that underpinned refugee policy has become removed from the purpose of claiming protection based on the legal principles of fairness and due process. This illustration encapsulates the essence of legal rationalism, which then manifested itself as a political ideology that sought to exclude refugees under the guise of recourse to legal rationality. Cloaked by the ideology of legal rationalism, the delivery of refugee policy then became a matter of disregarding normative expectations of how refugees ought to be treated, because the policy was firmly grounded in statute law.

This example shows how obedience to the rules won at the expense of normativity, as the courts and the government contested the rules of legally rational treatment of refugee applicants within Australian jurisdiction. Already, there has been and ongoing practice where judges who delivered verdicts that the government disapproved of, at times faced "vilification" and "retaliative legislation"[16]. Eventually, the courts could see the matter from the government's perspective. In 2003, the courts made a landmark decision that illustrated how the rational application of the law had become instrumental in making child protection legislation inoperative within immigration detention centres. The courts accepted "that the children demonstrated the effects of abuse and neglect", and "identified the immigration centre environment as prima facie the source of the children's

[11] Jürgen Habermas, *The Theory of Communicative Action. Lifeworld and System: A Critique of Functionalist Reason*, trans. Thomas McCarthy, 2 vols., vol. 2, Polity Press, Cambridge, UK, 1987.

[12] Habermas, *op. cit.,* actually uses the metaphor of the lifeworld and the system, but this distinction will not be explored in this article.

[13] Ibidem, p.155.

[14] Ibidem.

[15] Ibidem, p.196.

[16] Mary Crock and Ben Saul, *Future Seekers, Refugees and the Law in Australia*, Federation Press., Annandale, N. S.W., 2002, p.62.

abuse and neglect"[17]. On this basis, the court ruled that the children should be released from detention. However, the High Court later overturned this decision[18]. The new decision was based on an argument by the government that in areas where migration law operated, migration law prevailed over child protection law. Judge Callinan declared that the Migration Act "was designed to deal with all matters, without exception, relating to unlawful citizens"[19]. The new ruling was that the case did not come under the jurisdiction of the Family Law Court, which had earlier ordered that the children be released.

Whilst the final decision of the High Court turned on considerations of jurisdiction, rather than on considerations of child abuse, the case illustrated how legal rationality had removed itself from its normative imperative to safeguard children. This decision effectively declared that inside detention centres, migration law prevails over matters of child protection. Whilst this decision did not prevent child protection legislation from operating inside detention centres, it conferred to the government discretion over whether this should be the case, and what form it should take.

Whose rights?

A unique brand of legal rationality for the protection of children inside immigration detention centres already operated before the 2003 court judgement. This development came about through the conditions inside detention centres during the preceding three years. As detained children continued to witness riots, hunger strikes, and self harm of adults, the government came under pressure to release women and children. In response to his critics, the Immigration Minister maintained that he was not prepared to split families by releasing the children, unless child experts advised him to do this[20]. This argument was the justification for the detention of children under these conditions.

The child experts were employed by the child protection division of the Department of Human Services in the state of South Australia. An unpublished document, a *Memorandum of Understanding*, was a legal agreement on how they would conduct their duties inside detention centres. This document also gave insight into how the logic of the legal rationality of child protection may become uncoupled from the legislative purpose designed to protect children, and from the normative expectation that children ought to be protected. Effectively, this Memorandum protected the government from adverse political consequences.

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[17] Richard Chisholm, *Children in Immigration Detention: The Exclusion of the Family Court and Implications for the Future*, paper presented at the 11th Biennial National Family Law Conference, Gold Coast, September 2004.

[18] High Court of Australia, "Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam [2003] Hca 6, 12 February 2003," High Court of Australia, 2003.

[19] Adiva Sifris and Tania Penovic, *Children in Immigration Detention. The Bhaktiari Family in the High Court and Beyond,* in *"Alternative Law Journal",* 29, n.5, 2004, p.217.

[20] Tony Jones, *Labor Rethinks Detention Stance*, in *Lateline*, 2002.

Under this agreement, the child experts could practice only in very restricted manner, on invitation and with permission from the Department of Immigration and Multicultural and Indigenous Affairs; the government department responsible for carrying out refugee policy. It stands to reason that any evidence that child abuse had occurred as the result of conditions inside detention centres would reflect badly on the government. Two years after the *Memorandum of Understanding* had taken effect, the child protection agency declared its untenable position. Above all, its workers were obliged to avoid a clash with migration law and there were restrictions on recommending the release of children, "even if such release were mandatory to the protection of the child[21]. Not surprisingly, the publication also stated that the "limited choice between inappropriate options" of the *Memorandum of Understanding* may have placed the agency at risk of criticism and litigation[22].

These risks for the Department of Human Services became a considerable asset for the Howard government. By restricting the possibility of receiving a recommendation to release the children, the government engineered a situation where, regardless of community protests, it could plausibly argue that the child protection experts who practiced inside detention centres did not object to the detention of children. This argument was of political, not legal value. In reality, the government did not need child expert approval to release or detain the children. It had always had two options to release the children, without even altering the policy or the legislation. Firstly, the government could have moved the children elsewhere and then declared the new location "to be a place of detention", or secondly, to release the children outright by issuing a Bridging Visa[23]. Instead, it continued to deprive child refugee applicants of their liberty and then exploited the situation by implying that child experts tacitly approved of this. To its credit, by the end of 2004, the Howard government had released most refugee applicant children and their families from detention centres.

Since mid-2002, almost no refugee boat arrived in Australia. This changed in April 2006, with the arrival of one boat from West Papua, amid evidence of retaliation by the Indonesian military against those West Papuans who pushed for independence from Indonesia. Australian authorities gave refugee status to forty-two of the forty-three passengers. This decision caused a diplomatic incident, and Indonesia temporarily recalled its ambassador from Australia for eleven weeks. The Australian Prime Minster subsequently announced changes to his refugee policies that pleased the Indonesians. He indicated that future refugee assessment decisions would take into account "what's in this country's best interests and in the best interests of a longer-term relationship"[24] between both countries. In practice,

[21] Government of South Australia, "Review of Child Protection in South Australia," Department of Human Services, 2003, p.22.14.

[22] Ibidem.

[23] Flood, *Report of Inquiry into Immigration Detention Procedures*, paragraph 6.15, p 25.

[24] Louise Dodson, Mark Forbes, and Craig Skehan, *In the National Interest: Pm Takes Tougher Line on Asylum,* in *"Sydney Morning Herald"*, 8 Apr 2006.

this could mean a refugee assessment process that would in future "take into account the view of the countries applicants are fleeing"[25].

This change in direction, should it find its way into legislation, may well prove to become yet another example of legal rationalism. The problem does not lie in demanding that refugee policy benefits the host country; that merely states the obvious. Not only refugees benefit from a generous host country that respects human rights. The country also benefits because its policies engender a good international reputation and good standing with the United Nations. But benefits to the host state assume a different quality when the offer of refugee protection is weighed against approval, or disapproval, from the persecuting state. It would mean letting this type of rationality take its course through a system of legally rational rules and procedures, until the rationality of such system becomes uncoupled from the normative expectations of refugee protection. Justitia's blindfold then would tighten even further and may tip the balance of her scales to wield the sword of justice against those who seek protection from the injustice of persecution.

Conclusion

This exploration of how legal rationalism may have colonised legal rationality concludes that colonisation did occur in two steps. Firstly, there was the process of uncoupling. Several examples have shown that the logic of legal rationality inherent in refugee policy has become uncoupled from the normativity of the care and protection of children. The effects of this uncoupling were instances of child abuse and neglect as the inescapable and material consequences of government policy, with no legal remedy or legal requirement to provide a remedy to address this abuse and neglect. Once legal rationality became uncoupled from its normative base, the logic of legal rationality of refugee policy operated independently of normative requirements of how children ought to be treated. A second step was necessary to achieve colonisation. The uncoupled legal rationality then dominated the normative base with its own logic, and thereby removed normativity considerations from the process of legal decision-making. The result was the logical requirement to obey the rules for their own sake, and their interpretation within a narrow and concrete meaning, without weighing up normative purposes or consequences behind these rules. Colonising thus became evident through the establishment of "colonies" of legal rationality within the larger field of normativity that replaced, or at least dominated, sections of normativity and thereby removed normativity from the process.

If rationality always has a social component, as critical theorists would argue, then what was the social component behind legal rationality and its uncoupling from normativity? This paper concludes that the progression to colonisation was driven by political process. Political process manifested itself in several layers. There was the layer of parliament writing its legal statutes, the layer of interpreting

[25] Ibidem.

these statutes by the courts, the layer of policy implementation in clinical practice, and an additional layer of the material effects of this political process on children. Among these layers, it was the recourse to legal rationality, which effectively justified the mandatory detention of children.

How far can legal rationalism go? Its definition pivoted on the assumption that an extra-legal process was driving the legally rational application of rules and procedures, and their expressions within the institutions of the state. This research identified the extra-legal component as political process. But if political process has the power to steer legal rationality away from its normative base, then its powers reach beyond the narrow confines of refugee policy. The question then becomes when will legal rationality cease to protect the child in all of us, the child that is inquisitive, trusting, full of wondrous hopes and expectations, but always a potential target because of its inherent vulnerabilities that are so easily exploited? Will Justitia then remove her blindfold and exercise foresight?

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