Lawless order

Prison Law and the Rule of Law

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In recent times there have been challenges to the debate about rights and the rule of law. The rhetoric of the rights and the rule of law are under threat by terrorism and the so-called 'law and order' debate. I am now coming to the increasing realisation that the law and order debate is somewhat misnamed because it is essentially about removing the legal accountabilities, restraints and safeguards from those responsible for what is known as 'order' such as police officers, parole officers and prison guards. In this way, the powers given to the Executive and their employees by the Legislature, unfettered by the Judiciary, are transformed to a new kind of lawless order.

This change can be seen to serve a political purpose by taking certain 'threats' to our society seriously. Threats such as terrorism, threats such as dangerous criminals and even protestors have stepped forward and taken the place of the threat of communists from days gone by.

In response to such threats we have extended police powers and decreased transparency, 'intervened' in the Northern Territory, removed basic rights and brought in preventative detention legislation in various jurisdictions. We are left to question what accountability mechanisms remain, particularly accountability resulting from the rule of law.

In societies that value the rule of law, the separation of powers between the Legislature, the Judiciary and the Executive are very important. Under a system of lawless order, the Legislature can be seen to be placing increasing amounts of power in the hands of the Executive, whilst removing the accountability of the Executive to the Judiciary.

However, these ideas of rights and the rule of law have proven to be controversial even within our profession. Many were shocked to hear of former High Court Justice Sir Gerard Brennan quoted last week as saying:

"*Incursions on the rule of law may be essential to combat the risk of terror*."

With the qualifying statement that lawyers should support the safeguards in the rule of law

"*unless it is tolerably clear that any proposed abrogation of the traditional laws, practices and procedures is necessary to protect the community, that the abrogation is proportionate to the apprehended harm and has a substantial prospect of achieving the desired protection*".[1]

This is reminiscent, but a substantially different cry from Brennan's earlier comments in the case of *Re Bolton: ex parte Beane* (1987):

"*many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statues which are so much part of the accepted constitutional framework that their*

[1] The Australian, 1 September 2007.

terms, if not their very existence may be overlooked until a case arises which evokes their undiminished force."

So when can these fundamental freedoms lose their force? Is it only limited, as Brennan now says, to 'terrorism'? Once the door is open and fundamental freedoms are allowed to be diminished, it is frightening to think what else may follow. The examples that we heard about this morning of privative clauses and extended powers in the Northern Territory intervention raise such questions.

The increased police powers in the APEC protests on the weekend also raised these questions. Here, powers were granted to police to search people, without the commonly used test of 'reasonableness.'

As a result all major protest actions took place outside 'declared' or 'restricted' areas where such laws were enforceable, perhaps representing the fear of people submitting to such lawless order campaigns, despite the fact that there was no legal reason why people could not enter these areas, assuming they were willing to submit to the unjustified searches.

Prison law has the unfortunate position of being one of the areas to bear brunt of the lawless order campaign. This is largely supported by populist politicians squeezing votes from the '*tough on crime'* approach. Prisoners have been found not to engender sympathy in the same way that free people do, making them particularly susceptible to this kind of campaign.

Prisoners live daily in an institutional environment of governmental control, where prison officers without expertise in matters such as mental health, social work or education dictate the minutiae of daily actions such as when to wake up, where to work, what to study and conditions such as strip searches, solitary confinement, access to activities including exercise and contact with family members.

It has been said that extreme power leads to extreme abuse and there are very few environs where the government can exercise its power in as an extreme environ as prison.

For these reasons, it is especially important that rights and the rule of law are maintained in the sphere of prison law. Looking back through the history of prison law, it can be seen to have tested some essential principles.

For example, did you know that the very first civil case in Australia concerned lost property during transportation and resulted in compensation for a prisoner?

Remissions and more recently parole cases have tested the question of relevant considerations and whether prison guards and officials considered the individual merits of a case rather than blindly applying a policy to a person.

It is significant that in the area of prison law, the courts have no power to examine the merits or the substantive issues in a particular case. Judicial Review only has the power to examine whether or not a decision was made legally. If there is an error of law discovered, this is referred back to the original decision maker to remake the decision legally. Limited internal review or complaints mechanisms are the only options for merit reviews.

I have noticed a number of specific recent developments that have threatened even this basic entitlement to be dealt with in a lawful manner, contributing to the further administration of lawless order.

The first of these, privative clauses, have already received academic attention and are beginning to receive legal attention through the courts. Privative clauses are brought in order to protect illegal decisions from review by the courts.

It is interesting to note that such privative clauses were examined over 20 years ago by Queensland's Fitzgerald inquiry and rejected. This enquiry questioned the inconsistency of Parliament passing a law, which the Executive is meant to comply with, while on the other hand enacting a clause to deny a remedy in the event of the Executive failing to comply.

A clear example of privative clauses in prison law can be found in the *Corrective Services Act* 2006 (Qld) which states that the *Judicial Review Act* 1992 (Qld) does not apply to decisions relating to transfer or classification, even where these decisions are infected with jurisdictional error and therefore illegal.

Some of the greatest injustices in prison are attached to decisions about classification and transfer. Our office has noted an increase in complaints from Aboriginal prisoners since this law, complaining specifically about being transported from one end of Queensland to another, without being consulted, funds provided for transport home upon release or assistance given to contact family members to advise them of the move.

A second prison law development that I have noticed is the increased use of procedural changes. In Queensland there have been 37 procedural changes so far this year. Some of these are no big deal, things like changes to rosters for staff. However, many of these changes have had a critical impact on the everyday lives of prisoners.

Since Judicial Review is only available for decisions under an enactment there are decreased legal remedies available for prisoners aggrieved by procedural changes. The arbitrary nature of these changes is also an issue. Unlike legislative changes, which require a certain amount of accountability through parliamentary debate, first, second reading speeches and questions, procedural changes are brought about through a simple internal process that does not require notice, explanation or consultation prior to introduction. The following are some examples of recent procedural changes in Queensland:

1. Reducing the access of sex offenders to best practice gradual release mechanisms came about through a procedural change stating that no sex offenders could be transferred to the prison farms.

2. Although the collection and use of identifying particulars is usually provided for and regulated by specific laws, Corrective Services have just instituted new, compulsory procedures requiring all visitors to provide fingerprints for biometric scanning.

3. There has recently been procedural change to remove the requirement that support be provided for the travel expenses for an Aboriginal or Torres Strait Islander prisoners wishing to return to their communities.

The third recent development that I have noticed has been legislative change that shifts power from the Judiciary to the Executive. For example, recent changes to the *Dangerous Prisoner*

(Sexual Offenders) Act 2003 (Qld) allow parole officers to electronically tag people under this act. Prior to these amendments last month, these conditions could only be imposed by the court.

It is significant to read the explanatory memorandum regarding the recent changes and to note that none of the parliamentary debate picked up on this vital point…

"There may be an argument that the amendments do not have sufficient regard to the rights and liberties of individuals as required by the Legislative Standards Act 1992."

I noted with approval the comments of Karen Mathis, former head of the American Bar Association's concerning the importance of overarching rights and the rule of law during a recent visit to Australia. She noted that if the government does not have judicial oversight, it will exceed its authority.

I am concerned that the abovementioned examples are only the tip of the iceberg when considering the unfettered power that government officers are increasingly gaining through both legislative and procedural changes. When such power is given one hand while limiting the accountability mechanisms of rights and the rule of law on the other, the abuse of power will take place both from individuals and systemically, resulting in lawless order.