

Contentious Politics, Human Rights and Australian Immigration Detention

Abstract

Australian immigration detention has been a contentious political issue for over two decades. While Australia is signatory to all major human rights instruments, immigration detentions' status as administrative detention, the bipartisan political support it receives and the open hostility the government has expressed for human rights have ensured few avenues for political reform and progress toward the realisation of these rights. While this has challenged more traditional legal and institutional means of pursuing change, human rights can be (and have been) defended in other ways. In this article I will show how human rights shape and are shaped by contentious political action, offering a powerful means to pursue change where traditional political and legal structures have failed. I will first discuss grassroots action that has occurred in response to these policies, outlining action that has been relatively impactful. I will then consider how human rights could be understood as contentious. I argue that such an approach is particularly well positioned to explain how human rights have been used to challenge these policies and discuss the importance in of ongoing research and action in this area.

Human Rights and Australian Immigration Detention

Australian immigration detention was introduced over 25 years ago. While any non-citizen without a valid Australian visa can be detained for an indefinite amount of time, the most punitive elements of this policy have targeted refugees and asylum seekers who have travelled to Australia by boat. Onshore detention centres have been maintained since 1992, while offshore detention centres on Manus Island (Papua New Guinea) and Nauru were introduced in 2001, closed and then re-opened in 2012 (Phillips and Spinks 2013). The impact of detention on detainees has been well documented, with violence, sexual and physical abuse, self-harm and suicide all widely reported (Australian Parliamentary Select Committee 2015; The Guardian Australia 2016). Despite this however, the Australian government persists with this approach, explicitly as a deterrent to further boat arrivals (Rudd 2013; Dutton 2015; Morrison 2014a, 2014b; Abbott 2013). In other words, the Australian government detains men, women

and children seeking Australia's protection in environments where violence, sexual and physical abuse, self-harm and suicide is completely foreseeable as a means of deterring further people travelling to Australia. The suffering produced by these policies is deliberate and completely avoidable. This has led a number of authors to draw comparisons between these policies and torture (Essex 2016; Bouchani 2016; Sanggaran and Zion 2016; Berger 2016; Doherty and Hurst 2015; Perera and Pugliese 2015; Isaacs 2015a). Others have described these policies as "state-sanctioned... child abuse" (Owler 2016) and "a crime against humanity" (Doherty 2017).

As can be imagined from these descriptions Australian immigration detention violates or infringes upon almost all human rights and international legal instruments to which Australia is signatory (Creek 2014). This includes the International Covenant on Civil and Political Rights (ICCPR) (UN General Assembly, 1966), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (UN General Assembly, 1984), Convention on the Rights of the Child (CRC) (UN General Assembly, 1989), Convention relating to the Status of Refugees (UN General Assembly, 1951) and Protocol relating to the Status of Refugees (UN General Assembly, 1967).

Recent criticisms have included the Australian Human Rights Commission (AHRC) Forgotten Children Report (2014) which examined children's wellbeing and the impact of immigration detention. The report concluded that these policies "are in serious breach of the rights guaranteed by the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights" (p. 11) and that immigration detention was having "profound negative impacts on the mental and emotional health of children" (p. 29). In the same year, the United Nations (UN) Committee Against Torture (2014) raised concerns relating to non-refoulement, the detention of children offshore detention. In 2015 the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment found that Australia's policy of offshore processing had systemically violated the CAT (UN General Assembly 1984), more specifically violating the right "to be free from torture or cruel, inhuman or degrading treatment." (Mendez 2015, 8). More recently, the UN Human Rights Council, Working Group on Arbitrary Detention (2018) has been no less critical, finding that Australian immigration detention was arbitrary, again contravening the ICCPR and the Universal Declaration of Human Rights (1948).

These criticisms are far from exhaustive and sit amongst 25 years of more general condemnation and calls for reform. During Australia's second Universal Periodic Review by the UN Human Rights Council (2016), over 50 states raised widespread concern about Australia's policies. Mandatory indefinite detention, the detention of children, offshore processing and boat turn-backs were all singled out for condemnation. In 2016 the UN also called on Australia to end offshore processing after the Nauru files were released (UN 2016; The Guardian Australia 2016). The Nauru files were the largest collection of documents to be leaked in relation to Australian immigration detention. They detailed widespread reports of abuse, violence, and self-harm of both adults and children (The Guardian Australia 2016). In late 2014, the UN High Commissioner for Human Rights raised concerns about Australia's policies of offshore processing and boat turn-backs, noting that these were "leading to a chain of human rights violations, including arbitrary detention and possible torture following return to home countries" (Al Hussein 2014, , para. 48).

Despite these criticisms, Australia's approach has, if anything, only become increasingly punitive. Thus the question of how to pursue reform has been an enduring one. Below, I will discuss some of the major factors that have limited "top down" reform, or reform through traditional political and legal structures. I will then discuss the action that has been taken in response to these policies, from the "bottom-up", that is, grassroots, collective action. I will show that this provides a powerful alternative means to pursue reform. I will discuss why human rights should also be seen as contentious, both shaping and being shaped by such action. I conclude by arguing that there is a need for greater engagement with this literature, as among other reasons, the intersections between human rights and contentious political action have the potential to inform future action and influence reform.

Government Power and Australian Immigration Detention

The Australian government wields substantial power in relation to Australian immigration detention. It is worthwhile considering why this is case, as it explains why human rights have and are likely to continue to be approached with contempt, why top-down reform appears

unlikely into the foreseeable future and why, because of this, many have taken increasingly adversarial action in response to these policies¹.

In Australia, while some human rights protections exist, human rights occupy an “anomalous place” in domestic law (Penovic and Sifris 2006, 31). Australia has no bill of rights and while it has agreed to be bound by a number of major international human rights treaties, very few of these obligations have been incorporated into law. While this is problematic in itself, and while it has historically led to the exclusion of many marginalised communities including refugees and asylum seekers, the Australian governments’ real power over Australian immigration detention arguably comes from the fact that it is administrative detention. Under Australian law immigration detention is a form of administrative detention, which is to say that its purpose is not judicial punishment but for administrative reasons. Administrative detention also differs from judicial detention as it is used without investigation and the judicial elements of a trial and sentencing. Because of this and as administrative detention is permitted under the Australian constitution (*Al-Kateb v Godwin* 2004) the Australian government retains substantial powers in the administration and management of immigration detention centres. In addition to this, there has been little political opposition to pursue reform. The core elements of these policies have received support from both major political parties, as outlined by Grewcock (2013, 11):

...both the ruling Labor party and the opposition Liberal-National party coalition share a mutual disdain for the arrival of any new boat bringing refugees into Australian waters, distinguishing themselves only by a willingness to blame the other for allowing such breaches of Australia’s forward defences or indulging in squabbles over the impact of government policy on refugee movements in the region. While this occasionally throws up superficial differences in emphasis about how best to ‘stop the boats’, there is, fundamentally, a high level of bipartisan agreement that unauthorised refugees should be deterred through measures such as the mandatory and indefinite detention of all unauthorised non-citizens; the use of offshore processing; extensive naval interdiction programmes; and a punitive anti-people-smuggling regime.

¹ While there are a number of historical, social and political factors that explain *why* Australia persists with its uniquely cruel approach to asylum seekers and refugees (Nethery 2010; Bashford and Strange 2002), it is beyond the scope of this article to discuss these in any detail.

Despite the power the government already holds and the little political opposition it faces, it has only sought to further consolidate its power and degrade the rights of those seeking protection. For over two decades, the Australian government has attacked critics, stoked division and promoted misinformation about those seeking protection, all while attempting to maintain a veil of secrecy. Journalists have had little to no access to detention centres (Jabour and Hurst 2014). The offices of contractors have been raided and their equipment seized in attempts to find whether they had disclosed information to journalists (Farrell 2015b, 2015c). The government has also referred former staffed who have spoken about the conditions within detention centres to the Australian Federal Police (Farrell 2015a, 2016) and passed legislation to criminalise such disclosures (see the discussion on the Border Force Act below; Newhouse 2015). This hostility has also been extended to international organisations. When questioned about these policies, former Prime Minister Tony Abbott attempted to deflect international criticism by suggesting that “Australians are sick of being lectured to by the United Nations” (Kozaki 2015).

Contentious Political Action and Australian Immigration Detention

In the absence of political will and recognising the governments’ hostility toward reform, many have taken to the streets, taking grassroots collective action to protest these policies. Before expanding on this point however, it is first necessary to explain what is meant by contentious political action. Contentious politics has been defined as “episodic, public, collective interaction among makers of claims and their objects when: (a) at least one government is a claimant, an object of claims, or a party to the claims, and (b) the claims would, if realized, affect the interests of at least one of the claimants or objects of claims” (Tarrow 2013, 1). Contentious political action thus generally happens outside of traditional political structures and is generally, provocative, adversarial or confrontational. Much of the action that I will focus on in this article could also be labelled non-violent resistance (Sharp 1999). Practically, this includes action such as boycotts, protest, sit-ins and civil disobedience. Contentious politics needn’t be limited to such action however. As will be seen, action that would otherwise be seen as relatively uncontroversial under other circumstances, research, lobbying and investigative journalism for example, have all proven to be contentious when shining a light on these policies or calling for their reform.

Among its other applications, contentious political theory can be utilised to understand action that has been taken in response to these policies and how human rights have shaped and been shaped by such action. Below, I will consider a number of contentious actions that have occurred in response to Australian immigration detention. I will first discuss these more generally and then draw on specific examples, arguing that grassroots, collective action offers a powerful means to pursue change particularly when change through traditional political and legal structures have been restricted.

Australian immigration detention has been discussed, investigated and protested by academics, lawyers, doctors, artists, concerned citizens and those detained for over two decades. While change has been sought through more contained means such as advocacy, lobbying and research, others have utilised human rights for more contentious action. Marches, rallies, vigils and protests have been common (Doherty 2016a; Fiske 2016; Australian Associated Press 2016a). Others have become whistle-blowers after working within the system (Isaacs 2015b; Sanggaran, Haire, and Zion 2016; Marr and Laughland 2014; Doherty 2016c). Divestment in the companies that profit from detention has been encouraged (Farrell 2017) and a boycott of healthcare staff has been debated (Essex 2018). People have also engaged in various forms of civil disobedience. Deportations have been blocked (Australian Associated Press 2016b) and protesters have shut down parliament (Hutchens 2016). Greater international pressure has also been called for, with calls for the international community to boycott Australia (Loewenstein 2017). While the majority of protest has occurred on behalf of refugees and asylum seekers, or what Hall et al. (2018, 49) calls “belonging by proxy”, there has also been a growing number of detained asylum seekers and refugees protesting these policies, speaking about and broadcasting their experiences (Robertson 2017; Green et al. 2017; The Wheeler Centre 2017). There are a number of actions that are worth considering in more detail.

The Border Force Act was passed on 1 July 2015 with bi-partisan support. Part 6 of the Act, entitled “Secrecy”, set out provisions related to disclosure of “protected information”. Under the act all staff (past and present) who work with or within immigration detention were considered “entrusted persons”. Any information obtained during their time working in immigration detention was deemed to be “protected information” and any “record or disclosure” of this information was punishable by up to two years imprisonment. The potential impact of this legislation was immediately recognised. Those who worked in detention and in

particular the healthcare community responded with defiance and protest. Some people broke the law² (Isaacs 2015b) and challenged the government to prosecute them (The Guardian Australia 2015). Despite being given every opportunity to do so however, the government didn't lay charges. This lack of action stood in contrast to the government's previous attacks on individuals and organisations (some which will be discussed below). It was not until 30 September 2016 that the government quietly and with little explanation amended the Border Force Act (2015) exempting health professionals from the legislation (Doherty 2016b). Further amendments were made in 2017, which watered down the secrecy provisions of the act to only include information that could compromise Australians security, defence or international relations (Hutchens, 2017). These changes occurred while this legislation was being challenged in the High Court; a challenge which the government appeared to want to head off.

In February 2016, the #LetThemStay campaign was launched with protests in 12 major cities over 12 days, calling for the government to stop the deportation (to Nauru and Manus Island) of 267 asylum seekers, including 54 children and 37 infants (Hall et al. 2018). This action occurred at the same time of a High Court challenge to the legality of offshore detention and while an infant, who became known as Baby Asha was transferred to Australia and hospitalised (Essex and Isaacs 2018). Asha and her parents were flown to Brisbane after she was accidentally burnt. Doctors at Lady Cilento Hospital in Brisbane refused to discharge her to be returned to Nauru. The media promoted this case and a protest mobilised around the clock outside of the hospital for 10 days, placing the government under increasing pressure to honour the doctors' refusal to discharge her (Hall et al. 2018). After negotiations with the government, Asha was discharged to community detention about ten days later. Despite this compromise, the former immigration minister, Peter Dutton, maintained she would eventually be returned to Nauru (Wahlquist and Murray 2016, Doherty 2016a). The #LetThemStay campaign was labelled a success, over half of the 267 asylum seekers at the centre of the protests, including 37 babies and their parents, were released into onshore community detention (Hall et al. 2018). Unfortunately Baby Asha and her family were eventually returned to Nauru several months later (Hall et al., 2018).

In February 2019, the Australian government announced that children were no longer held on Nauru (Guardian staff with agencies 2019). This came after years of sustained protest and legal

² Not only broke the law, but publicised and promoted their breaking of the law through the media.

challenges. In fact, until the government made this announcement, all medical transfers had to be enforced by the Australian Federal Court (Vasefi & Davidson, 2018). Amid ongoing pressure and even more recently parliament passed the Migration Amendment (Urgent Medical Treatment) Bill (2018). This legislation strengthened doctors' position to recommend a transfer of an ill person to Australia for treatment from offshore detention centres on Manus Island and Nauru. The ongoing controversy surrounding these issues and pressure brought about by those who oppose these policies also had broader influence. Before the government announced all children were removed from offshore detention, there also appeared to be a shift in public opinion with close to 80% of Australians supporting the resettlement of children from Nauru (Australian Associated Press 2018).

Finally, contentious political action as it relates to Australian immigration detention as not just been limited to those taking to the streets or grassroots campaigners. In 2014, before the above events and the introduction of the Border Force Act, the AHRC released the Forgotten Children Report (2014), the finding of which were already summarised above. This report, while shocking, said little that was not already known. There was already longstanding evidence that the detention of children had a devastating impact on health and development. Despite this however, there was a vitriolic response from the Australian government. After the release of this reported the AHRC came under sustained attack with government calling for the resignation of the AHRC's President, Gillian Triggs (Borrello and Glenday 2015). The release of this report also fuelled renewed protest calling for the removal of children from detention. Children were eventually released from onshore detention in May 2015 (Australian Border Force 2015).

Some brief reflections are warranted before moving on. The progress discussed above shouldn't be taken for granted. While this article was being written the Australian government has signalled its intent to repeal the Migration Amendment (Urgent Medical Treatment) Legislation (2018). The above progress is also tempered by the fact that many people remain detained and the most punitive elements of these policies remain in place. The ongoing threat to this legislation not only calls for ongoing vigilance, but also highlights one of the key messages of this article, that legislative change alone is often not enough. In saying this, contentious political action also comes with caveats. There is a substantial literature that explores the potential pitfalls and trade-offs of such action. For example, while disruptive action may be effective in eliciting a response from the government and drawing attention to

these issues, it is often also most difficult to sustain and easily shut down. Furthermore and beyond just the type of action people engage in, whether action is impactful will depend on a range of contextual factors. It is beyond the scope of this article to discuss this in any detail. This aside however and regardless of the pros and cons that come with such action, it should be clear that contentious political action offers an alternative means to challenge the policies discussed above. Below, I will discuss where human rights fit in this picture and why they are important when shaped and shaping contentious politics.

Human Rights as Contentious Politics

How can we begin to understand contentious political action in response to Australian immigration detention through the lens of human rights? Below I will discuss how human rights from this perspective could be seen as being shaped from the “bottom-up” or by grassroots, collective action rather than from “top-down” or through traditional political and legal structures and as “battlefields” rather than settled concepts or exercises in legal reform. I want to show, that given the circumstances in Australia, conceptualising human rights in this way is particularly important because of the limited opportunities for broader structural and institutional reform. I also want to begin to show how such action can complement more traditional forms of action aimed at addressing rights abuses or restoring rights.

The political impact of human rights has long been debated. Some have argued that human rights serve to re-enforce state power and existing hierarchies (Douzinas, 2007) and limit more radical reform (Moyn, 2018). In this respect many have been critical of the ability of rights to challenge power when conceptualised as “standards, rules or legally sanctioned values emerging from international law, practices or documents” (Blouin-Genest, Doran, and Paquerot 2019b). Kennedy (2002) argues that the human rights movement has too often overestimated the power and value of international law, stating that this view puts “too much faith in lawyers and procedures rather than challenging grossly unequal relations of power and voice through struggles to articulate more utopian visions”. Similarly, Chandler (2001) argues that rights are often established “independently of, or in inverse relationship to, the capacity of rights-holders”. In Australia, and as was discussed above, the government has shown little regard for and an open hostility to human rights, ignoring, dismissing or attacking suggestions that it is not complying with its international obligations.

Human rights needn't be reduced to this however. Others have argued that human rights have broader socio-political implications. They can empower those whose rights are under threat (Donnelly & Whelan, 2018) and act as a check on oppression and authoritarianism. They also provide a foundation for international activism, establishing political communities outside of traditional nation states (Gregg, 2016). From this perspective human rights are not limited to their institutionalised forms. Beyond international norms, human rights are contested with "struggles over their interpretation, redefinition, and application" (Georgi, 2019).

To understand this, it is first necessary to consider the malleability of human rights. Blouin-Genest, Doran and Paquerot (2019c) discuss what they see to be the "normalization, generalization and overall banalization of human rights", in their words:

Interestingly, it is the internationalization and flexibility of human rights that have made them contentious political objects: human rights are at the same time everywhere and nowhere, easily claimed and used to support contested practice, only to be repudiated the moment they no longer fit the main narrative of the actor(s) in question. They structure political conflicts, as rights are both the causes of and solutions for such encounters.

While for these reasons human rights could be criticised, their flexibility also presents opportunities to understand how they could be shaped and utilised beyond more traditional standards or rules (Blouin-Genest, Doran, and Paquerot 2019b). From this perspective human rights could be seen as, "a place for interaction between actors within different networks, a place/space where power struggles, societal relations and interactions are translated, creating meanings and understandings that can thus be invoked, contested or resisted" (Blouin-Genest, Doran, and Paquerot 2019b) or similarly, as "socio-political spaces of struggles for meaning, where activists mobilise by claiming a specific understanding and practice of these rights" (Georgi, 2019). In other words human rights are places for claims and contestations, they are "politically constructed objects and powerful political tools that are used for different purposes and that may disrupt and legitimise social institutions" (Georgi, 2019). As Blouin-Genest et al. 2019b put succinctly, human rights can be viewed as "battlefields".

Such an approach does not necessarily consider those making claims as victims, rather as political subjects challenging “the conditions of the social order in which these rights are either denied or limited” (Blouin-Genest, Doran, and Paquerot 2019a). Thus and in other words “[h]uman rights ... establish themselves not only as a formal limit imposed upon power, but as a space for claims and contestation against this same power, simultaneously structuring the vocabulary of, and means for, actions organized in their own name—that is, in the name of human rights” (Blouin-Genest and Paquerot 2016, p.137). In this view, human rights promote conflict and confrontation as opposed to consensus and compromise (Blouin-Genest, Doran, and Paquerot 2019b).

More practically and in line with this view of human rights, there has been a growing recognition that throughout the literature that there has been little discussion and analysis in relation to “actors involved in day-to-day contestation and implementation” of human rights (Blouin-Genest, Doran, and Paquerot 2019b). For Nash (2015, 1) if human rights are to address injustice “far more than law has to be changed”. Human rights are given real force when people “define human rights in ways that are appropriate to help them overcome the obstacles they face” (Nash 2015, 1). Social movements and contentious political action have an important role to play in this respect. Nash (2015, 11) goes on:

Rights are never effective simply because they are legal rights. Enjoying human rights in practice depends on how people use them—on what they claim, and how they make rights claims. This, in turn, depends on collective identity, on the pressure that people bring to bear because they have a “right to rights”—even where they do not have rights in law, or law is administered unjustly... Collective action is needed at every level if human rights are to make a real difference. Grassroots organizing is necessary if people are to be able to define human rights in ways that are appropriate to dealing with the injustices they face.

The idea that human rights are shaped through collective action fits with Arendt’s (1958) view of human rights and political resistance. For Arendt, the most fundamental right and a precondition for other rights, was the right to have rights, or the right to membership of a political community. This membership meant having “a place in the world which makes opinions significant and actions effective” (Arendt, 1958, 296). Those excluded from this community were therefore not necessarily denied freedom or the right to think, but the right to

action and opinion. Arendt saw human rights as only being made real through human action and commitment. While human rights may exist in theory outside of any given political community, they are rarely protected. In this respect human rights are not inalienable, given through nature or even guaranteed by the state, but “politically constructed objects and powerful political tools” that can be used to “disrupt and legitimise social institutions” (Georgi, 2019). In other words, human rights are “created through human decision and determination” and “instantiated through our action” (Parekh, 2007, 759).

It follows that while norms and legal protections are important, they alone are not enough to guarantee the right to have rights. Arendt was also sceptical of traditional legal and political institutions. While on the one hand acknowledging that such institutions could promote freedom and protect people, they could also threaten freedoms and oppress the most vulnerable (Sokoloff, 2017). For Arendt (1972) “law can indeed stabilize and legalize change once it has occurred but the change itself is always the result of extra-legal action”. For this reason Arendt (1963) insisted that such political and legal institutions be permanently challenged in order to “continually establish and re-establish their authority and legitimacy” (Sokoloff, 2017).

Some outstanding issues are worth noting here. Arendt doesn’t dismiss political and legal institutions completely, in fact she saw the “value of both institutions and counterinstitutions in the same polity” (Sokoloff, 2017). This is not without tension, raising questions about the nature of rights and the place of legal and political institutions in re-enforcing and resisting oppression. A number of authors have been far more critical of human rights and their capability of securing change, most fundamentally noting that human rights always require political authority (Georgi, 2019). This raises a range of theoretical and practical questions which are beyond the scope of this article, but deserve further exploration in relation to Australia’s policies.

In saying this and while the above discussions are important, we shouldn’t lose sight of the value of approaching human rights from the bottom up or as “battlefields”. Practically, such an approach means that people can utilise and contest human rights even when they “do not have rights in law, or law is administered unjustly” (Nash 2015). Blouin-Genest et al. (2019a) see such an application of human rights as “as a genuine process of emancipation, allowing the redistribution of power and the inclusion of all in the decisions concerning the actions and orientations of the community...where individuals have a real capacity to choose and to act

politically”. Put another way contesting human rights in this way, “entail[s] a direct relation to liberal democracy’s most basic features: political representation and participation” (Blouin-Genest, Doran, and Paquerot 2019b).

Conclusions

Australian immigration detention has rightfully been labelled a human rights catastrophe (Davidson 2016). Rather than take steps to move toward an approach consistent with its international obligations, the Australian government has resisted reform that would ensure the protection of refugees and asylum seekers in Australia. Until such change is achieved, and the legal and institutional structures put in place to protect the rights of refugees and asylum seekers in Australia, demanding rights through contentious political action will remain an important site of resistance.

While there has been a growing interest in the intersection between human rights and contentious political action (Nash 2015; Blouin-Genest, Doran, and Paquerot 2019b; Ataç, Rygiel, and Stierl 2016), research in this area remains somewhat limited (Nash 2015). There are of course a number of good reasons as to why this should change, particularly as it relates to Australian immigration detention. First, as was discussed above, change driven through more traditional political and legal structures appears unlikely. The Australian government remains hostile toward human rights as international legal norms and has actively sought to shut down avenues for political reform or legal redress. Contentious political action challenges this position while also providing a complementary approach to those who seek to use more traditional means to challenges these policies. Importantly such action also allows those who have been denied the right to legal redress, detained refugees and asylum seekers, a voice in this resistance. Second, further research would provide a richer understanding of resistance to these policies. How have human rights motivated protest? How has protest framed human rights issues? How have those detained utilised human rights? These are only a few among a number of pressing questions. Finally and importantly, ongoing research has the potential to better inform future contentious action (e.g., Hagan 2010; Jackson 2018) exploring strengths, shortcomings and most importantly the most effective means of achieving reform and securing the rights of refugees and asylum seekers in Australia.

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