

CRIMINAL JUSTICE AND HUMAN RIGHTS IN AUSTRALIA, ASIA AND THE PACIFIC

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Emergency Lockdowns in Australia: Averting Race Riots to Policing Dissent

Post-conflict Truth and Reconciliation in the Solomon Islands

Enforced Disappearance: the case of Dr Aafia Siddiqui

Children of the Incarcerated

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Front Cover Artwork

Lawrence Finn, *In defence of the indefensible*, mixed media, 200x140mm (approx), 2008. Created by the Artist for this edition of the HRD.

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No country has a perfect justice system. And no arm of government is more prone to imperilling an individual's rights than its criminal justice system. In this domain the right to a fair trial, to liberty, to freedom of speech and to be silent are in daily dispute.

Voicing Rights

Freedom of speech, the right to silence and the right to be heard are themes that resonate through three articles in this edition. Police feature in each of these as well. These officers of the state wield great power, often with inadequate transparency and accountability.

Wilcock's account of police, on horses, and with specially-invoked crisis powers is about challenges to freedom of speech and of political expression in a situation where there were no dire threats to the state, no 'war on terror', no threat of violence against innocents. The incidents occurred at a time and place not far from where the Federal Court of Australia reiterated Justice Brennan's observation that '[f]reedom of speech can hardly be an incidental casualty of an activity undertaken by the Executive Government to advance a nation which boasts of its freedom.'¹

The right to speak is important. So is the right to be silent. In *Precise Justice* Masashi Akita provides a compelling account of the immense cultural, legal and political challenges facing the exercise of this right in Japan. Akita analyses why Japan finds it difficult to act decisively and effectively against police coercing suspects to confess. He observes that there is a view widespread amongst Japanese police, prosecutors and judges that justice requires a detailed account of how and why a crime took place. Who better to get this from than a suspect? Kallun Willock shows the vulnerability of a defendant who exercises his right to speak, but cannot speak the language of the court. Willock illustrates the distortions this may create through the 2003 prosecution and conviction of Nick Baker in Japan of illicit drug importation.

Akita and Willock's focus is on justice miscarriage. Minogue's account is also about miscarriages of justice. He tells of an Indigenous Australian prisoner's futile and frustrating search for post-conviction justice through the assistance of the University of Melbourne Innocence Project – a project that according to Minogue should have taken responsibility for its hollow and unfulfilled promise to help.

Salahuddin Ahmed's chilling account of the 2008 enforced disappearance of Dr Aafia Siddiqui reveals the story of a suspect incarcerated without even a semblance of due process. Ahmed links the 'war on terror' in Afghanistan and Pakistan to this major erosion of human rights. Notably, in the absence of effective remedies through the rule of law it was left to the fourth estate to expose Dr Siddiqui's situation. Siddiqui awaits trial in the United States. No doubt this story is not over.

Lack of transparency in justice is presented in a starkly different perspective by Calvin Shaw, an observer of Australian common law criminal trials. Shaw is a man with a hearing disability. He can

observe public courtroom justice but has no access to its oral or written discourse - where it does not 'speak to the eye.' Gestures and physical objects such as exhibits speak to the eye. Their visibility accentuates their power in court where managerialism and efficiency have increased written communication and decreased the traditional public common law theatre of actors and actions.

Children

Three articles relate to the rights of children. Tony Krone in *Raets Blong Evriwan* presents a picture of guarded optimism with respect to Solomon Islands' justice. Its High Court has utilized the Convention on the Rights of the Child (CROC) to protect children from mandatory life sentences for murder. Further, the passing of the Solomon Islands' Truth and Reconciliation Act 2008 suggests a remarkable and optimistic progression towards healing ethnic rifts and defusing conflict in that country.

Finally, there is the child of the incarcerated prisoner. Ahmed reveals the plight of Siddiqui's children. They are denied justice because their mother is denied justice. Outside the extreme context of Siddiqui's situation, and instead within ordinary everyday Australian justice, Michael Levy shows that the child of an Australian prisoner is statistically susceptible to following their parents to gaol. Forty per cent of juvenile detainees in New South Wales have had a parent in gaol. These and other indicia of disadvantage and damage are known trends. Levy analyses these issues in the context of Articles 3, 9 and 12 of CROC. Unlike the crime victim who is often seen and heard by the sentencing court, these victims of their parent's criminality are given no place to be heard in the justice process.

Jill Hunter is a Professor of law at UNSW. She specialises in comparative criminal justice, criminal trials and human rights.

Endnotes

¹ Brennan J, *Davis v Commonwealth* (1988) 166 CLR 79, 116, quoted by French, Branson, Stone JJ in *Evans v State of New South Wales* [2008] FCAFC 130, at [77]. In *Evans* the Court ruled invalid cl 7(1)(b) World Youth Day Regulation (NSW) 2008, made under the New South Wales 'thou shall not offend' law.

Law and Terror

Enforced Disappearances

Article 2 of the International Convention for the Protection of all Persons from Enforced Disappearances defines enforced disappearances as

'the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.'

There is no ambiguity in international principles relating to enforced disappearances. As article 1 of the Convention makes absolutely clear, there are

'no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, [that] may be invoked as a justification for enforced disappearance.'

On 20 December 2006, the United Nations General Assembly adopted the International Convention for the Protection of all Persons from Enforced Disappearances. So far, 76 countries, including France, Germany, India and Japan, have signed the Convention. Australia, the United States, United Kingdom, Pakistan and Afghanistan are among those who have not.

On 7 July 2008, British journalist Yvonne Ridley told a press conference in Islamabad¹ that a Pakistani woman had been held in solitary confinement for years in the US-operated internment facility at Bagram, Afghanistan. She had been nicknamed 'the grey lady of Bagram'. Ridley speculated that the woman might be the US-educated neuroscientist Dr Aafia Siddiqui. Former captives held at the Bagram facility, including Moazzam Beg – who was later shifted to Guantanamo and then released without charge – also reported an unidentified female, referred to as Prisoner No.650, at Bagram who had seemingly lost her sanity and cried continuously.²

Dr Aafia Siddiqui was born in 1972 in Pakistan. She attended university in the United States ultimately emerging with a Ph.D. degree in neuroscience from Brandeis University. She was married with three children and had settled in Boston. After that, her story gets murky. According to U.S. authorities, she was suspected of being a facilitator for Al-Qaeda. In early 2003, the F.B.I. issued an alert seeking information about her, stating that "although the FBI has no information indicating this individual is connected to specific terrorist activities, the FBI would like to locate and question this individual".³

Soon afterwards, around 28 March 2003, Siddiqui went missing along with her three minor children (then aged 6 years, 5 years and 6 months respectively) while traveling from Karachi to Rawalpindi. Her family claims that they were initially 'arrested' by Pakistani intelligence operatives and later rendered to U.S. authorities in Bagram. This was confirmed by a spokesman for Pakistan's Interior Ministry on 28 May 2004.⁴ No formal arrest, charge or extradition proceedings ever took place and U.S. authorities continued to deny knowledge of the whereabouts of Siddiqui and her children. Nevertheless, in 2007, both Amnesty International and New York-based Human Rights Watch listed Siddiqui as one of the 'secret detainees' held by the United States in connection with the 'war on terror'.⁵ Shortly after Yvonne Ridley's dramatic press conference in July 2008, a Pakistani lawyer – Iqbal Jafri – filed a petition before the Islamabad High Court seeking to ascertain Siddiqui's whereabouts and the legality of her alleged detention.

Before the court proceedings could go any further, on 4 August 2008 the U.S. Department of Justice issued a press release claiming that Aafia Siddiqui had been arrested by the Afghanistan National Police on 17 July 2008 in Ghazni. The press release claimed that Siddiqui was observed by the Afghan police outside the house of the governor of Ghazni who considered her suspicious and searched her handbag. In it, they allegedly found numerous documents describing the creation of explosives, as well as excerpts from the Anarchist's Arsenal and the descriptions of various landmarks in the United States.⁶ Apparently, Siddiqui's handbag also contained unidentified substances that were sealed in bottles and glass jars. According to the press release, on 18 July 2008 a party of U.S. personnel including two FBI agents and two military officers along with military interpreters arrived at the Afghan facility where Siddiqui was being held. The U.S. personnel entered a meeting room - apparently unaware that Siddiqui was being held. She was hiding behind a curtain, unsecured. A Warrant Officer placed his rifle down and the 36-year old mother of three

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allegedly snatched it, shouted and fired two shots, hitting no one. The Warrant Officer returned fire with his pistol, hitting her in the torso. The Department of Justice press release was silent about the fate of her three children.

Siddiqui was airlifted to the United States where she currently awaits trial. She has been charged in the Southern District of New York with one count of attempting to kill U.S. officers and employees and one count of assaulting U.S. officers and employees with a maximum sentence – if convicted – of 20 years on each charge.

Siddiqui’s case received extensive coverage in the Pakistani and U.S. media. Undoubtedly, the fact that it involved a mother and three minor children was significant in arousing public interest. In nearly all the major cities of Pakistan there have been rallies in support of Siddiqui and her children. Amnesty International, Human Rights Watch, the Asian Human Rights Commission and the Human Rights Commission of Pakistan issued strong statements demanding a full disclosure of the events surrounding the detention of Siddiqui and the whereabouts of her children.⁷ After the U.S. Department of Justice press release, the Pakistani parliament passed a resolution demanding the repatriation of Dr Aafia Siddiqui to Pakistan and disclosure of her children’s whereabouts.⁸

While many of the factual details are still unclear, it seems likely that the media furore created in Aafia Siddiqui’s case was crucial in forcing the three governments involved – the U.S., the Afghan and the Pakistani – to formalize and finally disclose her detention. As far as her children are concerned, the Afghan government later admitted that her 11-year old son, Ahmed, was being held in the custody of an Afghan intelligence agency, the National Security Directorate.⁹ He was eventually released into the custody of his maternal aunt, Dr. Fauzia Ahmed, on 15 September 2008.¹⁰ The whereabouts of Ahmed’s younger two siblings are still unknown.

The behaviour of all three governments involved – particularly as far as Siddiqui’s children are concerned – is chilling. It is ironic that all three are signatories to the United Nations Convention on the Rights of the Child, Article 2 of which states that children are to be protected from punishment on basis of the acts, status, opinions or beliefs of their parents. Even if the U.S. and Afghan governments’ version of Dr Siddiqui’s arrest and their denial of knowledge about the whereabouts of her younger two children are accepted, on what basis was 11-year old Ahmed held in custody by an Afghan intelligence agency for nearly 2 months after Siddiqui had been airlifted to the United States?



Tara Marynowsky, *Untitled*, Watercolour on paper, 2008. Courtesy of the Artist and Chalk Horse Gallery, Sydney, Australia.

A statement by the Asian Human Rights Commission is apposite in this regard: “(T)he ethical vacuum being created by the “war on terror” appears to have spread to the abduction and illegal detention of children... the conflict has lost its moral compass absolutely, on all sides.”¹¹

But Aafia Siddiqui’s story is just one example of the enforced disappearances that have become an international hallmark of the ‘war on terror’. In Pakistan alone, hundreds – if not thousands – of people have gone missing since 2001.¹² Usually, their families are informed – off the record – by intelligence officers that they have been detained in connection with terrorist activities and told they will be released once their questioning is completed. In Siddiqui’s case, for example, her family was repeatedly assured by Pakistani officials that she was safe and would be rejoining them soon. These empty assurances continued for more than 5 years until her whereabouts were finally confirmed by the U.S. Department of Justice press release. Rarely is there a formal charge or even a closed-door trial of the missing/detained persons. The above-mentioned Moazzam Beg was one of the luckier ones. After being arrested in Pakistan in 2002, he was detained in Afghanistan and Guantanamo Bay where he suffered long periods of torture and solitary confinement but was eventually released without charge after 3 years. Others continue to languish in a ‘twilight zone’; being shunted between safe-houses and detention facilities operated by intelligence agencies of several different countries.

The disregard for international law and their own domestic laws shown by many governments today when dealing with those

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suspected of involvement in terrorist activities is of considerable concern. In Pakistan, former President Pervez Musharraf disclosed - in his autobiography *In the Line of Fire*, published while he was still in office - that his government had arrested and eventually handed over scores of 'terrorists' to the United States thus earning millions of dollars in bounty for the national exchequer.¹³ He failed, however, to explain how many of them were formally arrested and charged with an offence and how they were handed over to U.S. authorities without formal extradition proceedings. Under Article 10 of the Constitution of Pakistan, no person can be detained without informing him of the grounds of arrest and allowing him access to a legal practitioner of his choice. Moreover, all arrested persons must be produced before a magistrate within 24 hours and cannot be detained further without the authority of the magistrate. Pakistani law also prescribes a formal extradition procedure in the absence of which a suspect cannot be handed over to a foreign country.¹⁴

However in 2006-2007, when the Supreme Court of Pakistan started regular hearings of petitions in respect of enforced disappearances and illegal detention and ordering the release of persons detained without charge, President Musharraf responded by suspending its Chief Justice. Thereafter, following the reinstatement of the Chief Justice by the Supreme Court, Musharraf declared a state of emergency and removed close to 60 Supreme Court and High Court judges, stating that

'some members of the judiciary [were] ... working at cross purposes with the executive and legislature in the fight against terrorism'.¹⁵

For his part, the deposed Chief Justice maintained that neither the Pakistani Constitution nor the international principles of jurisprudence allowed people to be detained indefinitely without any charge.

Regardless of the innocence or guilt of those suspected of terrorism, they are entitled to the protection of the due process of law. When constitutional democracies abandon the rule of law and civilized norms in their struggle to defeat the politics of terror, they usher in a dangerous climate of arbitrariness and anarchy. Simultaneously, they lose support and the moral high ground in regions and amongst people where they need to maintain it most. That is hardly a rational strategy.

Salahuddin Ahmed is a Pakistani barrister.

Endnotes

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The degree of civilization in a society can be judged by entering its prisons. - Fyodor Dostoyevsky



Marc Standing, *Utopian Child*, 2008, oil on linen, 170 x 170cm. Courtesy of the Artist and Brenda May Gallery, Sydney, Australia.

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