Making migration law

Courting our conscience

Dr Eve Lester

In May 1992, I was representing members of a group of about 30 Cambodian asylum seekers who sought their release from detention in the Federal Court of Australia. They were among a cohort of 389 so-called 'boat people' who had arrived in Australia over the preceding few years.[1] Two days before the hearing, and without notice to the applicants or to us as their representatives, Migration Amendment Bill 1992 (Cth) was introduced into Parliament. With bipartisan support, it passed both Houses that same evening. Specifically designed to stymie the case before the Federal Court, the legislation provided that 'boat people' *must* be detained and that a court was not to order their release from custody.[2] This mandatory detention framework was, the Act said, in 'the national interest'.[3]

The significance of this legislative framing was in the silence it created. Detention was by operation of law. There was no actual decision to detain. Because mandatory detention was decision-less, there was nothing for a court to review. The Bill suggested that detention was to last for a limited time — 273 days (or about nine months) (*not* counting the more than two years detention the Cambodians had already endured). However, the legislation distinguished between what was called 'application custody', which was limited to 273 days, and 'custody', which was not. According to the legislative formula, the clock stopped on 'application custody', but not custody, every time progressing a claim was out of the Immigration Department's hands (for example, if the detainee exercised appeal rights). Thus, detention could be much more prolonged, and possibly indefinite. Indeed, some of this cohort would be held in '*application* custody' for less than 273 days but would not be released from '*custody*' until 1995.

How could legislation with such ramifications pass so effortlessly onto the statute books? How could the High Court uphold the constitutional validity of legislation that is so manifestly oppressive? What is it about migration lawmaking that enables responses such as this to unsolicited migration seem thinkable? These are the questions that animate my book, *Making Migration Law: The Foreigner, Sovereignty and the Case of Australia* ('*Making Migration Law*').[4] In other words, I ask: How have we got into this mess? For, wherever one

stands on the political spectrum, few would deny we are in a mess. And, if we do not understand how we got into it, we stand little chance of being able to navigate our way out of it, legally or politically.

This article provides an overview of the approach I take in the book and offers some of my key findings and conclusions. First, it explores how we have inherited the (highly contestable) claim that there is an absolute sovereign right to exclude and condition the entry and stay of aliens, which I term 'absolute sovereignty'.[5] Second, it uses the example of mandatory detention, one of two case studies analysed in the book,[6] to show how we use that inheritance in contemporary practice. This pairing enables us to think about the past in order to illuminate what contemporary lawmakers do and why they do it. It makes visible how deeply ingrained 'absolute sovereignty' has become as a system of thought and practice. What we see is that the emergence of an international human rights framework and the end of the White Australia immigration policy were not harbingers of a new dawn in migration lawmaking, despite having been events of great historical moment.

I Early international law and the foreigner

From its earliest conceptions (European) international legal theory contemplated the foreigner's mobility in rights terms; rights to set forth and travel, to sojourn, to hospitality, to trade, and to share in common property. Free movement rights all found voice in the work of early international jurists, including rights of passage, the right to leave one's country, the right of asylum, and (perhaps most striking for the modern international lawyer) the right to enter and reside in the territory of *another* state. Likewise, the right of necessity played a significant and evolving role in shaping how international law framed and conditioned the foreigner's stay. By any measure, it is a dazzling array of rights. But who *was* the foreigner in this early international legal paradigm? And why did he (a pronoun I use advisedly) enjoy such rights?

In Chapter 2 of the book I examine the seminal international legal texts of Francisco de Vitoria, Hugo Grotius, Samuel Pufendorf and Emmerich de Vattel between the sixteenth and eighteenth centuries, which makes visible that the foreigner in early international law was a figure of privilege and power — a European insider, aligned with the sovereign and sovereign interests.[7] Above all, he was either an imperialist, conquering and claiming the coastlines of the New World, or an intra-European foreigner, whose mobility was enabled and authorised by international law, whether as trader or exile. That is why he had rights. And that is why these early texts disclose no references to the idea of 'absolute sovereignty'. Instead, the foreigner's treatment in early international law was informed by considerations such as necessity, humanity, hospitality and tolerance. In contrast to the 'foreigner', it was the 'barbarian' of early international law who was the outsider, a non-European made subject to the law yet unworthy of its protection; subjugated rather than outlawed.

II The 19th century: a changing migratory landscape

A changing migratory landscape and political-economic conditions in the nineteenth century marked a shift in how the figure of the foreigner was conceptualised.[8] A new kind of foreigner — a (presumptively) hostile non-European 'barbarian' outsider — was now on the move. It was this shift and a desire, particularly in white settler societies, to regulate the mobility and labour of non-Europeans such as the Chinese that prompted the common law innovation of 'absolute sovereignty'. So, its emergence was neither historically accidental nor juridically inevitable.

What becomes clear is that 'absolute sovereignty' as a claim emerged because of a political and economic desire to regulate race and labour. And, no sooner had it appeared than the courts began treating it as a 'settled' common law doctrine that was 'not open to controversy'[9] even though, as we will see, it relied on selective and instrumentalist readings of early international legal theory.[10]

A judiciary in lockstep

In the second half of the nineteenth century, particular (instrumentalist) readings of early international law by the courts overlooked significant qualifications to the power of the sovereign. The Privy Council, the US Supreme Court and later the High Court of

Australia all relied on the following proposition attributed to Vattel:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[11]

Yet, none of the aforementioned courts saw fit to consider the implications of a tempering proviso in the same paragraph 'not [to] refuse human assistance to those whom tempest or necessity obliged to approach their frontiers'.[12] Elsewhere, Vattel qualified his position on the sovereign power to exclude with a rhetorical question: 'can it be necessary to add, that the owner of the territory ought, in this instance, to respect the duties of humanity?'[13]

These qualifications were overlooked by a judiciary in lockstep with the legislative and societal expectations of white settler societies, which were unapologetically doing all that they could to keep out non-Europeans. So, although we cannot forget that the foreigner in the work of Vattel and his predecessor publicists was a European, we can also see that the courts had hewn the doctrine of 'absolute sovereignty' out of a body of international law in a way that overlooked that dazzling array of rights that had been conferred on the (European) foreigner.

III The 20th century constitutional entrenchment

Upon the Federation of Australia in 1901, 'absolute sovereignty' was constitutionalised in what was described at the time as the 'freest Constitution in the world'.[14] Given expression through the inclusion of plenary powers in the *Commonwealth Constitution* — powers to make laws with respect to aliens and naturalisation, and immigration and emigration — it thus became even more deeply entrenched.

No debate and no due process right

So uncontroversial had these powers of exclusion been during the Constitutional Conventions that they engendered *no debate*. Indeed, the only debate on immigration arose when a proposal for a Fourteenth Amendment style due process right was defeated for fear that it may give such rights to people of 'undesirable races or of undesirable antecedents'.[15] Even a weaker proposal providing that people should not be deprived of life, liberty or property, without due process of law was rejected. As one delegate put it in defence of the doctrine of responsible governance, Australia was far too civilised to need to entrench a due process right in its constitution:

> Why should these words be inserted? They would be a reflection on our civilisation. Have any of the colonies of Australia ever attempted to deprive any person of life, liberty, or property without due process of law? I repeat that the insertion of these words would be a reflection of our civilisation. People would say — 'Pretty things these states of Australia; they have to be prevented by a provision in the Constitution from doing the grossest injustices.'[16]

In 1901, when debating the two Bills that were foundational to the White Australia policy (the Immigration Restriction Bill 1901 (Cth) and the Pacific Island Labourers Bill 1901 (Cth)), the new legislature embarked on the task with full confidence in the (absolute) scope of the aliens and immigration powers that had been described as a 'handsome new year's gift for a new nation'.[17] During that debate, Isaac Isaacs, MP (later Attorney-General, Chief Justice of the High Court and then Governor-General), proposed incorporating an 'instant power in any emergency to exclude any person whom this country thinks is undesirable'.[18] One MP admonished him for making a proposal that was 'despotic'.[19] The response of the future Chief Justice was candid and un-defensive: 'if we are going to offer a reproach to a measure because it is despotic, we must not forget that without a despotic provision we cannot do what we want at all'.[20]

IV Mid century: curtailing 'naked and uninhibited' powers

In 1958, migration law in Australia underwent a major overhaul. The notorious dictation test, whereby an 'undesirable' migrant could be excluded if they failed a dictation test of 50 words in a European language of the immi-

gration officer's choice, was abolished.[21] However, the reform agenda was broader, covering deportation and detention powers.

In his Second Reading Speech,[22] then Minister for Immigration Alexander Downer Sr did something that seems astonishing now, given current authoritarian approaches to unsolicited migration: he resolved to place legislative limits on his own powers by subjecting them to judicial scrutiny. In doing so, he highlighted the Minister's 'solemn responsibility' to 'wield' powers he recognised to be 'arbitrary' in a manner that preserved national security but was also 'humane and just to the individuals concerned' — powers that he recognised were 'capable of the gravest abuse'.[23] With this in mind, he foreshadowed the imposition on the Minister's broad deportation powers of 'important checks on his authority'. Underscoring that his department dealt 'first and last' with human beings and their future welfare, he opined: 'as human values change, so the law must change'.[24]

As to the arrest and detention of 'suspected prohibited immigrants', Downer stated in the same speech that:

> [T]he present act empowers an officer without warrant to arrest any person reasonably supposed to be a prohibited immigrant offending against this act. *A moment's thought will show the latent dangers here*. Accordingly … the Bill provides for a person so arrested to be brought within 48 hours, or as soon as practicable afterwards, before a prescribed authority, who must inquire into whether there are reasonable grounds for supposing the person to be a prohibited immigrant. If the authority finds such grounds, he will order continued detention for a maximum period of seven days pending the Minister's decision as to deportation.[25]

Downer added further that 'naked and uninhibited' powers of arrest (and detention) provided for in existing legislation had the capacity to 'cause great injustice'.[26] Having declared a maximum period of seven days detention pending a decision to deport, he then detailed 'elaborate safeguards' against such injustice, including retention of the 'overriding power of [the courts to order] a person's release from custody if the court finds that the deportation order is invalid.' In addition to the right to apply for a writ of habeas corpus or injunctive relief, he added, the Bill would '[go] further', also providing for 'reasonable facilities for obtaining legal advice and taking legal proceedings'.[27]

Perhaps the most striking example of the reforms that the Minister outlined was the establishment of detention centres, which he characterised as a 'humanistic innovation'.[28] Describing as 'undesirable' what we now call co-mingling (that is, detaining immigration detainees in prisons together with convicted criminals), particularly because deportees 'very often' had a 'blameless record', he declared that there was 'a compelling case' for reform in the treatment of people he called 'statutory offenders'. In making these reforms, Downer described his own experience as a prisoner of war of the Japanese for three years as a 'comparable situation'. Gaols, he said, were 'depressing places, especially when you are not in any true sense an offender'. It was on this basis that he hailed the introduction of detention centres as a welcome innovation out of which he was 'sure' that 'nothing but good will come'; an innovation that, along with other ameliorating effects of the legislation, he believed would 'place Australia in advance of any other country in the world.'

v The 1990s: mandatory detention

In 2019, the *Migration Act 1958* (Cth) that was introduced by Sir Alick Downer is still in force in Australia. However, it has been amended so many times that it is unrecognisable. Nevertheless, in 1992 the substance of the safeguards outlined in Downer's Second Reading Speech remained in place; that is that detention was to be for a limited period of seven days (or longer with the detainee's consent), and that detention was subject to review by an independent authority. However, for the Cambodian 'boat people', whose situation provided the setting for this piece, the Immigration Department had elected to detain them under a different provision.[29] Designed for stowaways, this other provision was intended to apply as a short-term measure.[30] Although its use was doubtful, and, the High Court would eventually conclude, unlawful,[31] its value to the Immigration Department was that it lacked the safeguards (and inconvenience) of periodic review and independent

scrutiny. Like the 'barbarians' of early international law, it enabled 'boat people' to be treated as subject to the law but unworthy of its protection; subjugated but, as the High Court would later remind us, not outlaws.[32]

As readers will recall, mandatory detention as it was originally formulated occurred by operation of law, and the legislation sought to place such detention beyond the scrutiny of the courts. My analysis in the book of the parliamentary debates around this first legislative framing of mandatory detention, as well as the transcript, court file and judgment in the constitutional challenge to it reveals the operation of parallel and mutually self-validating speech choices and techniques that are illuminating. On the one hand, a theme of (state) control and restraint relies on two claims: that there is an absolute sovereign right to control borders, and that the state can be trusted to exercise that right responsibly. On the other hand, a theme of (asylum seeker) deviance and opportunism ascribes to so-called 'boat people' illegality, lawlessness and impropriety, as well as volition. The speech choices and techniques that give effect to these themes reinforce the perception that complete control is valid and necessary and that the silence of decision-less detention is justified. Together they underpin political and jurisprudential pronouncements that regard the mandatory and non-reviewable detention of 'boat people' as an appropriate means of regulating entry into Australia.

No debate and no due process right

Bipartisan support for the Bill meant there were speeches but *no debate* in the House of Representatives, and though the lack of due process was raised by the Australian Democrats and Independent Senator Brian Harradine in the course of debate in the Senate, it did not hold sway.[33] Instead, parliamentarians offered a smorgasbord of immigration metaphors and other rhetorical flourishes, designed to drive home the enormity of the problem posed by 'boat people'.[34] The oppressive consequences of the Bill were pitched as tough but necessary; rational and restrained. In both Houses, 'boat people' were maligned as queue-jumpers engaging in illegal conduct; as people 'simply … expecting to be allowed into the community', not people who may need protection.[35]

In his Second Reading Speech, the Minister self-presented as the epitome of moral restraint, and his Government and his Department as models of good governance. He claimed 'no wish' on the part of the Government 'to keep people in custody indefinitely'. Indeed, he 'could not expect Parliament to support such a suggestion'. To this end, he asserted that custody would be for a 'limited period', being the 273 days (or about nine months) referred to earlier, and implied that processing of their claims would be completed much more quickly.

Additionally, the Minister positioned himself as entitled to and capable of adjudging the motives and behaviours of the 'boat people' and their lawyers. Indeed, he had described immigration lawyers in Cabinet as 'the worst kind of human beings' he had ever encountered.[36] He attributed delays in processing times to their 'calculated tactics',[37] thereby papering over governmental flaws and inefficiencies and the full implications of 'application custody' and the '273 day rule'. The clock stopping formula was, he said, designed as an 'incentive for the parties involved in the process not to embark on tactics calculated to delay the final processing of claims.'

Working up his moral identity as a reluctant jailer, the Minister re-emphasised that the Government had 'no desire to keep these people in custody longer than necessary',[38] thereby amplifying his repeated insistence that he was doing only what was necessary and that the detainees had only themselves (or their lawyers) to blame for their continuing detention.[39] This linguistic interplay, which juxtaposes institutional restraint with a projection of deviance, constructed the 'boat people' as responsible for their own detention; a technique that strategically inverted the foreigner to sovereign power relation by presenting the deprivation of liberty as entirely within the control of those who were subject to it.

Chu Kheng Lim: the High Court proceedings

The ascription of responsibility and control on the part of 'boat people' for any encounter with Australia's unscalable wall of 'absolute sovereignty' would prove central to the constitutional case that came before the High Court in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ('*Lim*').[40] As the transcript shows, in the course of

Refugees waiting inside a hospital at Lorengau on Manus Island (Jonas Gratzer)

proceedings the Solicitor-General deployed with alacrity the rhetorical force of repetition to impress upon the Court that mandatory detention was the detainees' choice.[41] They were, he said, engaging in a voluntary activity, were voluntarily detained, had come voluntarily to Australia and were free voluntarily to depart at any time. A number of judges seemed unimpressed by this discursive strategy during the proceedings. But the Solicitor-General pressed on. Indeed, he cautioned the Court against being tempted to look behind the facelessness of the legislative scheme at the people affected *as people*:

> The problem is, Your Honour, when one gets close enough to these people as people who have committed no offence, who have a sincere desire to enter Australia, who have been detained for lengthy periods, one can obscure the basic issue of … legislative power in respect of aliens that we are dealing with here.[42]

In other words, the Solicitor-General argued that the humanity of the detainees should not be permitted to obscure the 'basic issue'; the basic issue being power — an absolute sovereign power of exclusion. Conversely, it would seem, 'absolute sovereignty' trumps respect for those duties of humanity that Vattel viewed as so self-evident that he scarcely thought them necessary to mention.

Lim: the High Court's judgment

In its judgment and relying on the instrumentalist readings of Vattel by the nineteenth century Anglo-American courts that erased the duties of humanity, the majority in *Lim* concluded that mandatory detention was a lawful exercise of the sovereign right to exclude embodied in the aliens power. The Court also concluded that the judiciary had no role in overseeing the detention because the detention was not punitive. It was not punitive because the detainees could always leave. To stay in detention was, therefore, their choice. Furthermore, the Court concluded that the measure of mandatory detention was one that was reasonably capable of being seen as a necessary *and appropriate* means of regulating entry; a measure that was found to be well within the same power — the same 'despotic' power — that had been innovated in the nineteenth century and was handsomely gifted to the nation in 1901. In other words, the uninvited migrant engages in an encounter with absolute sovereignty at their peril.

IV The 21st century: mandatory detention

In his Second Reading Speech when introducing the mandatory detention Bill in 1992, Minister Hand acknowledged the '*extraordinary nature* of the measures', but reassured Parliament that the legislation was '*only intended* to be an *interim* measure'.[43] As we know, more than 25 years later, mandatory detention is still government policy and to date has survived every challenge to its constitutional validity. Even as it seems to be overshadowed by the stridency of more recent responses to unsolicited migration, it remains a keystone policy, underpinning, for example, offshore processing of 'boat people' on remote Pacific islands and detention and turnaround policies implemented on the high seas.

Since August 2012, 4,177 people have been sent to and detained on Nauru or Manus Island, Papua New Guinea, as part of Australia's offshore processing arrangements.[44] As of 26 March 2019, there were 359 people left on Nauru and 547 left on Manus Island (915 people in total), with a further 953 of 1,246 medical transferees to Australia remaining here.[45] In addition to this, of the 1,285 people in immigration detention as at 31 December 2018, 380 were 'boat people' mandatorily detained in Australia, with a further 15,674 having spent often long periods in immigration detention but now, pursuant to the exercise of a non-compellable ministerial discretion, living in the community on short-term Bridging Visas.[46] Of these, 60.3 per cent (774 people) had been detained for 183 days (six months) or more, and 22.2 per cent (285 people) had been detained for in excess of 730 days (or two years).[47] Thus we see that the policy of mandatory detention still enjoys bipartisan support and continues to exact a grave human toll. And, to date, it remains firmly embedded in contemporary jurisprudence.

VII Acknowledging an unedifying backstory

As I argue in *Making Migration Law*, if we are to find a way out of this mess, we need to understand how we got into it. Importantly, we need to understand contemporary migration

law as part of a longer, profoundly unedifying, and highly racialised jurisprudential tradition embedded within the broader context of a political economy of the movement of people. For it was in this context that the relationship between the 'sovereign' and the figure of the 'foreigner' was shaped into the claim of 'absolute sovereignty' and respect for the duties of humanity was erased. Thus, by locating contemporary Australian migration law within this longer trajectory, it becomes possible to track the way in which claims of 'absolute sovereignty' came together as practice, doctrine and authority. Popularised by Prime Minister John Howard's statement that 'we will decide who comes to this country and the circumstances in which they come',[48] it is this deeply entrenched 'absolute sovereignty' talk that today makes the policy of mandatory detention 'thinkable' and, for some, seem inevitable as an institutional response to unsolicited migration.

Understanding 'absolute sovereignty' as an idea or claim, not an unassailable or inevitable truth, enables us to notice and critically re-evaluate how power and law are understood and used to mediate the relationship between the foreigner and the sovereign. Making visible what we have inherited and how we use it impels ownership of the power relation that inheres in both 'absolute sovereignty's' past and its present. It obliges us to pay attention to what happens when contemporary migration lawmakers and policymakers rely on and perpetuate institutional practices that have, through the ostensible neutrality and restraint of law and legal process, enabled them to grow accustomed to having at their disposal absolute power over the movement and activities of foreigners. It enables us to see that even though many of us are exercised by the dehumanising effects of these policies, the claim of 'absolute sovereignty' has become such a deeply ingrained system of thought and practice that there is no political or juridical obligation to think about the people whose lives are (knowingly) being shattered by it. We struggle to find purchase in our opposition to it because where absolute power is at work there is nothing to push against.

VIII Where to from here?

I conclude the book with a provocation for a new conversation; one through which we *resist* 'absolute sovereignty' as an impenetrable claim; through which we *resist* the assumptions that have authorised, upheld and normalised the claim of 'absolute sovereignty'; and through which we *resist* the structural indifference to the duties of humanity towards 'boat people' — those 'barbarians' at our border — that is embedded in the claim of 'absolute sovereignty'.

What, then, are the possibilities? Can we think and do migration law in Australia without feeling impelled to make a claim on sovereignty in absolute terms? Can we turn 'absolute sovereignty' into a question — even a problem — rather than treating it as a given? Can we rethink the unregulated or under-regulated space in which the claim of sovereignty resides as an accountable space; open to meaningful scrutiny? If we could do this — even try — would the way in which we talk and think about both unsolicited migrants and ourselves assume a different quality?

As a first step, I suggest that we could engage more consciously with the dynamic potential of the relationship between the foreigner and the sovereign. We could court our conscience by eschewing the totalising claim of 'absolute sovereignty' as the unanswerable answer to unsolicited migration and repudiating the inevitability of the structural violence of the border. Instead, the relationship between the foreigner and the sovereign would be (re)imagined as one of vitality and exchange, one that recognises and respects the duties of humanity. Recalling the dazzling array of rights the foreigner enjoyed in early international law, it is a reimagining that is not as radical as it may seem. ⚖

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5 For a detailed explanation of how I use the term, see ibid 14–17.

6 See further Chapter 5, 'Mandatory Detention'. The second case study, discussed in Chapter 6, examines the policy of 'planned destitution', a policy of social and economic exclusion whereby many people seeking asylum are denied access to work rights and social assistance: see also Eve Lester, 'Planned Destitution of People Seeking Asylum: An "Act of Grace"?', R*ight Now* (Opinion, 20 August 2018) <http://rightnow.org.au/opinion-3/planned-destitution-people-seeking-asylum-act-grace/>.

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9 For a discussion of the 19th century jurisprudence, see Chapter 3, 94–107.

10 In this connection, two key sources of inspiration for this work are: Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005) and James AR Nafziger, 'The General Admission of Aliens under International Law' (1983) 77(4) *American Journal of International Law* 804.

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A navy dingy approaches a wooden refugee vessel that is sinking in waters off Christmas Island. Claims that asylum seekers were throwing their children over the sides of the boat were found to be false. Christmas Island, 17 February 2002 (Australian Defence Video/AAP Image)