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THE CRUELTY OF OUR LAW

AILEEN CROWE

FOREWORD

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This is an uplifting book. It tells the story of human endeavour to help people tackle the challenges of the Australian legal system, as it applies to non-citizens arriving by planes with valid entry visas but who thereafter claim protection under the *Migration Act* 1958, on grounds expressed in the *Refugees Convention* 1951.

The special animosity that many Australians feel towards those who arrive on boats, making claims for refugee status without benefit of appropriate entry visas is told in other books and in countless administrative, tribunal and court decisions. This book is about a different cohort. But many of the obstacles and legal complexities recounted in these pages will remind the reader of the special animosity reserved for “boat people” who arrived by sea. Against their arrival, the Australian Parliament, and politicians of otherwise different persuasions, united to erect specially high barriers because of the spectre raised of little boats drifting towards their continental country presenting an apparition of the modern “yellow hordes” who terrified us in earlier centuries.

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Those who arrive on planes present different challenges. Of necessity, they will arrive with visas. Those visas would have been checked by airline staff, both for validity and duration, because an airline carrying entrants who were not in possession of valid visas to enter Australia incur obligations themselves: ordinarily to take the arrivals away, sometimes with severe penalties for their mistake. Nonetheless, the enormous queues of new arrivals at Australia's international airports present different but acute problems in their cases. The arrivals have to be processed quickly. Very soon, they are, for the most part, merged in the Australian community. Without internal passports or identity inspections, many who arrive could be absorbed and disappear from official scrutiny until something extraneous brings them to notice.

When, after their initial arrival, the immigrant carried by an airline claims refugee status, many of the same obstacles of the boat people are confronted. They are denounced as "queue jumpers". They are condemned as "economic immigrants", not refugees. They are queue jumpers. They are accused of having falsely obtained their short-term entry visas, generally as tourists. They should be expelled. But before expulsion, if they contest that result and persist with the assertion that they are 'refugees', they face very similar challenges to the "boat people". Those challenges, and the legal hurdles they have to jump, are described in this book. The description conjures up a special part of Hades, as portrayed in Dante Alighieri's *Inferno Devine Comedy*. Most of this book represents a description of the *Inferno*, as witnessed by the author when helping desperate applicants to escape the fire.

Her thesis is that, in order to deter and repel most of the applicants who seek refugee status (and thereby to discourage other foolhardy souls who might be tempted to follow in their footsteps) complex and often harsh legal procedures have been put in place. As she describes them, the procedures produce “a toxic immigration culture sanctioned by parliament, a culture that allows systemic cruelty to operate.”

Initially, the author had no particular knowledge of, or experience in, Australia’s legal system for the protection of those who seek to establish refugee status. She was a nun of the Catholic Church. Her work was substantially in other fields of need. All this changed when a community social worker telephoned her office in the late 1990s seeking help for a family in a desperate situation. Their rent was due. They were living on cheap noodles. They were at risk. Drawing on her experience as a teacher and pastoral assistant in Papua New Guinea, the author responded intuitively. One thing led to another. Soon she was in the thick of seeking to help those claiming protection as refugees.

This experience brought her directly into contact with the mechanics of the bureaucratic and legal system put in place to decide, in each individual case, the merits or demerits of the application. The new desperation also brought her into close contact with the operation of Australia’s independent tribunals and courts, the latter including the High Court of Australia, established under the Constitution. Because, at the time of which the author is writing, I was serving as a Justice of the High Court of Australia, I was also coming into contact with cases of the kind she describes, likewise at first, without a great

deal of experience in that area of the law. In my case, the experience was presented at the peak of the pyramid of bureaucratic, tribunal and judicial responses to refugee applicants. But Sister Aileen, the author of this book, was down in the engine room. She was dealing up close and personally with real people. Cases, for her, were not mediated through learned counsel and distinguished judges and Ministers of the Crown. Cases came to her as people looking for urgent help with shelter, food and advice. Their predicaments quickly turned into a rapid understanding of the vital necessity of pursuing the complex game of bureaucratic Snakes and Ladders, put in place by law to decide the merits of the applications that she attempted to support.

Fortunately, Sister Aileen's experience "as a woman in the Catholic Church" had exposed her to an experience, as she puts it, of "powerlessness in many ways and on many occasions". Those who were seeking recognition of their claim to refugee status commonly suffered "diminished power, especially when confronting immigration officials and others in positions of authority". But what the clients lacked in confidence and determination, Sister Aileen could endeavour to supply. She did so, "unashamedly us[ing] my dominant, white woman, Catholic nun power when accompanying people seeking protection in their interactions with the immigration department".

Sister Aileen thus takes the reader through the often baffling, frequently discouraging and commonly frightening world of officialdom that Australia has in place to process their claims that they are "refugees". The book is full of seemingly irrational requirements. Such as the imposition of obligations to pay significant fees for government services whilst at the same time being

forbidden to engage in work to earn the money vital for that purpose, not to say for bare survival. Sister Aileen pulls no punches in describing in what she sees as the injustices, irrationality, illogicality and plain error of the system she came to know and sometimes to operate. I cannot judge the justice of her complaints in individual cases. But I can empathise with her despair at many aspects of the system created, in the name of the Australian people, to impose a kind of litigious torture on these desperate people.

Even in the small area of the refugee litigation that was viewed by a High Court Justice, there were features difficult to comprehend and almost impossible to explain, let alone justify. At the time of which Sister Aileen is writing, part of the burden of refugee applications was shifted into the High Court of Australia. This happened because other remedies were excluded by Acts of the Australian Parliament. However, the High Court unanimously determined that the Parliament could not exclude the supervisory role of the courts to ensure that officials stayed within power and exercised their jurisdiction according to law.

The consequence usually obliged the unfortunate applicants seeking redress to demonstrate a peculiar qualification for relief, namely “jurisdictional error”. This was a highly technical expression, not always understood by judges and lawyers themselves. To explain to a self-represented applicant, struggling in a special leave application before the High Court the meaning of “jurisdictional error” was an exquisite burden to place on the judge, let alone the litigant. When it had to be attempted, usually through the fog of linguistic limitations, it sometimes approached the farcical. Little wonder, therefore, that eventually the High Court of Australia shifted the great bulk of such

applications to be determined “on the papers”, without the pain and embarrassment of oral exchanges with the applicants. However, this meant, in many cases, that the court did not enjoy the benefit of an effective contradictor to the experienced and talented advocates who would contest and seek to repel the arguments of the applicants. The factual merits of the predicaments of the applicants all too often disappeared as the judges and lawyers tackled their special task. If they were heard at all, they were heard quarrelling over the elusive and mysterious concept of “jurisdictional at error” that meant nothing to the applicants though absolutely critical to the outcome of their dreams to stay in Australia, their chosen land of refuge.

In every generation in the history of Australia, wrongs have occurred and many of them have been carried into effect by the law. At the outset of the penal settlement at Port Jackson in 1788, there were elements in the law that were admirable. But also elements that we can now see as discriminatory and unjust. Thus Governor Phillip brought with him the King’s commission forbidding slavery in the great south land. Formally, Aboriginals were treated equally to “white” people when charged with criminal offences. However, Indigenous Australians were denied recognition of their land rights, with consequences disastrous for their economic interests. That inequality was not finally addressed until the 1992 decision of the High Court in *Mabo v Queensland [No.2]*. Women also suffered great inequality in Australia’s law. They enjoyed equal suffrage in federal elections after 1902, in some states later. However, until 1983 a married woman’s application for an Australian passport had to be authorised by her husband. Many injustices remained for women until more recent times. Similarly, the White Australia Policy was not finally abolished until 1973.

Sister Aileen suggests that some of the deep anxieties that explain hostility in Australia towards those who claim protection as refugees can be traced to the same racial attitudes as earlier gave rise to White Australia. A fear of difference and of the other, especially if they look different or have a darker skin colour. Likewise, the hostility toward sexual minorities (LGBTIQ) existed for more than two centuries in Australia. Effectively, they have remained until very recent times. Each of the foregoing sources of inequality and injustice would justify a book as detailed, and as bitter, as the present book on refugee applicants. Every such book would identify heroes like the author of this book. But also opponents who took a long time seeing what later generations regarded as obvious.

Correctly, Sister Aileen suggests, in one of the final chapters, the special sensitivity exhibited by Pope Francis in his message for the celebration of the World Day of Peace. He wrote:

“While it is true that migrations often reveal failures and shortcomings on the part of states and the international community, they also point to the aspiration of humanity to enjoy a unity marked by respect for differences, by attitudes of acceptance and hospitality... and by the protection and advancement of the dignity and centrality of each human being.”

Long before these Papal words were written, it is clear that Sister Aileen has been searching for the same path of kindness that would unlock the doors of

legal technicalities that sometimes bar the way of those who seek protection in Australia on the ground of refugee status.

As she is quick to point out, she is not a lawyer. Nor is she a governmental official. She perhaps does not fully understand the meaning and suggested constitutional reasons for “jurisdictional error”. I myself, when a judge, was sometimes uncertain about that phrase and its elusive nuances.

However, Sister Aileen has never forgotten the central message of the religion that had nurtured her, and indeed of all global faiths, confronted with the claims of the vulnerable stranger who needs protection and a new life where that claim can be justified. She certainly knows the human urgency of shelter, food and advice about access to essential rights. She knows the rational necessity of financial help, especially for those themselves forbidden to work. She knows the frustration of Australia’s many legal obstacles when the human merits seem to cry out for relief in the name of simple justice.

Just as today, we look back on the way our legal system dealt with Aboriginals, non-white immigrants, women, gays and others, so in the future, I suspect, we will look back at the present time with disappointment at the way our generations have dealt with refugees and those who claim the protection promised for that status. When that time comes, and in a new enlightenment, people like Sister Aileen Crowe will be celebrated. They will be honoured among the righteous of the Australian nation.

Sydney

Wendell

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