ENEMY LAW

RICHARD PENNELL PROVIDES A HISTORICAL PERSPECTIVE ON WHAT HAPPENS WHEN PEOPLE FACE TRIAL IN FOREIGN COUNTRIES

In December 2006, the Melbourne Age asked six personalities what should be done about David Hicks. They agreed that he should return to Australia, but each gave different reasons. Some thought he had not been given a fair hearing, others that Australians should not be punished abroad. The poet Les Murray replied:

Generally it is taken poorly if a person enlists with an army that’s intending to attack his own country and perhaps he should have a hearing on that in his own country. I don’t think Australians should be left to rot in foreign prisons.

And Suzie Howie, a publicist, said that:

In an ideal world people would be brought back to their own country to be judged by their own country’s laws but that doesn’t happen, as we know with Schapelle Corby. One would hope in a humane world that people could be extradited to their own country.

Less than a week later, in the Australian, these apparently self-evident truths were contradicted by the family of an elderly lady in New Caledonia. She had been beaten to death, allegedly by a drunken Australian navy sailor. While they insisted
the killing of Lysiane Mille at the weekend would not tarnish their positive views of Australians, they said it was essential for the sailor to be tried under French justice in a New Caledonian court. ‘We have been nervous that because he is an Australian military person, he would be taken away and nothing would happen,’ said Lysiane’s eldest son, Jean-Marc Mille.

For Suzie Howie justice could only be done under the laws of the country of the accused; for Jean-Marc Mille it was possible only under the laws of the victim’s country. Justice depends on culture and place.

We are familiar enough with the problem. Since October 2004, when Schapelle Corby was arrested at Denpasar airport in Bali, the question has often been front-page news. Corby was not the first: Nguyen Van Tuong was arrested in Singapore in December 2002. Nor was her penalty the most severe: fifteen years’ imprisonment, compared to execution for Nguyen and six death sentences imposed on the Bali Nine. But she was the only one to publish a book about the experience.

Corby was very much the girl-next-door, one of us, in a way that the Bali Nine have not been. ‘She could be my daughter,’ one woman wrote to a newspaper. The photographs illustrating the media reports emphasised her vulnerability, a white girl lost among foreigners. This encouraged some virulent responses. A group called ‘The World for Schapelle Corby’ launched a web petition. It began portentously ‘We are Citizens of Planet Earth demanding the release of Schapelle Leigh Corby held presently in the Balinese jail awaiting trial,’ and ended even more dramatically: ‘Citizens of Earth will not sit & allow this to happen without us making this fight, and we are NOW BOYCOTTING INDONESIA UNTIL YOUR LAWS CHANGE AND MS. CORBY IS RELEASED. We will not forget about her!’ Not many signed it, but 100,000 did support a more sober petition to the Indonesian court declaring that she was innocent.

Some went even further and threatened Indonesian diplomats in Australia. Someone sent a letter to the Indonesian Foreign Affairs Ministry containing a white powder that resembled anthrax spores. Blanket emotionalism overlay some more pointed arguments: that the trial was unfair; that the investigation was incompetent (the failure to fingerprint the bag of cannabis); that the punishment was too severe in relation to the crime; that the Australian Government was doing nothing to help one of its citizens.

Many of these points were made during the Nguyen case, too. The death penalty was not just severe but barbarous. Phillip Adams called Singapore ‘a serial killer … When it comes to state murder, on a per capita basis, the sterile, clausrophobic Singapore exceeds the dubious records of China, Russia and governor
George W. Bush's Texas.' A prominent Melbourne lawyer, Robert Richter QC, told the Today show that the government could have done more to help Nguyen; Alexander Downer called Richter a 'creep'.

The three cases coming together held the public's interest—and the prominence of the Corby affair probably boosted coverage of Nguyen and the Bali Nine. But that cannot be the whole story. Similar cases over the past few years have excited similar levels of interest.

In late 1996 an Australian nurse, Yvonne Gilford, was murdered in Saudi Arabia. Two British colleagues (one a Scot, the other a Briton) were arrested, tried, and sentenced to death or flogging. They were reprieved when compensation was paid to the Gilford family (who gave it to a hospital). The press coverage resembled the Corby affair in both its intensity and its focus.

The Daily Record, a Scottish tabloid, rolled the medieval and religious barbarism of Islamic law and savage Saudi practice together:

Until earlier this century, Saudi was populated by poor Bedouin tribes, whose way of life had changed little in thousands of years. They held on religiously to the traditions laid down by the Koran and by Sunni law, which provided terrible punishment for those who infringed it. Oil helped them swap their camels for Rolls Royces ...

Each Friday, Saudis gather in the square in front of the major mosque in their area to watch beheadings.

In Australia, lawyers acting for one of the accused argued that Saudi punishments were illegal under South Australian law. Frank Gilford, the victim's brother, was in the difficult position of having to decide between accepting monetary compensation when the convicted nurses would hardly be punished at all, or refusing it, so they would be executed. They argued that an Australian who 'demanded' the death penalty committed an offence under the Statutes Amendment (Capital Punishment Abolition) Act 1976 (SA), which made the death penalty unlawful in South Australia. That was never tested in court—there was only time for an interlocutory injunction to prevent Mr Gilford from expressing his opinion before the case was resolved.

The Saudi investigation was flawed, said the Advertiser in Adelaide. It consulted Dr Kenneth Brown, whom it called an internationally renowned forensic expert. (He is a forensic dentist.) He described his experience in Brunei as an expert witness in a murder case: 'Vital forensic evidence was disregarded for no apparent reason.' Dr Brown remarked that 'if this can happen in Brunei where there is an adversarial system—we can only imagine what may be happening in
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Saudi Arabia where the system is more fundamentalist. This was a generic sort of logic: Brunei is a Muslim country, which administers law unfairly; since Saudi Arabia is "more" Islamic than Brunei it must be more unjust, although the two legal systems are quite different.

It was the government's job to save the nurses, the British press said. Much was expected of the new prime minister, Tony Blair, in this as in so much else. 'Can Blair let this happen?' asked the Daily Mail over a front-page photograph of a Saudi policeman flogging a criminal. Another tabloid, the Daily Mirror, had the headline 'Stop this, Tony.' The Daily Express demanded: 'Don't let them behead Debbie.'

Back in 1993, Michael Fay, an American, and Shiu Chi-Ho, a Hong Kongese, were flogged in Singapore for vandalism. Fay attracted huge media attention, Shiu very little. President Clinton pleaded with the Singaporean authorities to moderate Fay's sentence. They reduced his lashes, but not Shiu's. The hyperbolic American media campaign led Asad Latif, an opinion-piece writer for the Straits Times (a paper famously subservient to the Singapore Government), to write a whole book alleging that Singapore was the bullied victim, not Fay. He titled it The Flogging of Singapore, Singapore-as-victim fitted into a broader expression of Singaporean feeling at the time—that the West was trying to impose its values on an Asian society. A decade later, others besides Phillip Adams were describing Singapore as a world outcast whose government did not share their notions of 'civilised values'.

There was nothing new about this antipathy between us, 'civilised Europeans', and them, 'barbarians'. In the mid-nineteenth century one such case reverberated through two parliaments (the British and the French) and caused diplomatic problems between Britain, France, Tunisia, the Netherlands and the United States and a handful of smaller European states.

Paolo Xuereb, a Maltese, and thus a British subject, was arrested in Tunisia in 1843 for murdering a local official and another Maltese. In 1844 the Tunisian authorities tried and executed him.

Tunisia was a tiny pawn in great-power rivalries. By mid-nineteenth-century Mediterranean standards it was quite prosperous and impoverished Maltese, Italians and Spaniards went there to seek their fortunes. Many lived by their wits on the edges of the law. Xuereb, a thug and smuggler, killed another Tunisian, the house manager of the British Consulate, and the Consulate's guard, factotum and go-between (the dragoman), who was a Tunisian, in a dispute over a rented farm.

The treaties between Tunisia and Britain (and many European countries) gave

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consuls the job of judging legal cases between European nationals, but they specifically excluded murder of a local. Even so, for a long time the consuls had judged their own murderers. But in 1844 the British consul, Sir Thomas Reade, instructed by the foreign secretary, handed Xuereb over to the Tunisian ruler, the Bey, for trial. The Maltese community was furious, egged on by the French consul who loathed Reade because he had been Napoleon’s jailer on St Helena. The French consul persuaded the Bey to allow Xuereb a defence team headed by the local correspondent of a Maltese liberal-nationalist paper.

The defence team’s arguments seem very familiar: the trial was unjust, because it separated two murders (the Maltese manager’s and the Tunisian dragoman’s) that were interdependent; the investigative process was faulty; the trial process was faulty because the defence team could not bring the witnesses they wanted. Most of all, the trial was ‘contrary to the laws that govern Europe’. Applying non-European laws to a European was inherently wrong. In a letter thanking the French consul for his help, Xuereb’s defenders complained that his ‘natural protector’ (the British consul) had handed him over to ‘the rigours of an enemy law’. The British Government was not protecting its subjects. Reade was also roundly attacked as a ‘tyrant consul’ in flyers pasted on the street walls of Tunis. These vitriolic productions were the mid-nineteenth-century equivalent of the unrestrained blogs of today.

How might we understand these cases? Superficially, the rhetoric and the practice surrounding them are emblematic assertions of cultural superiority: ‘Western’ justice is better than ‘non-Western’ tyranny. It is tempting to fit them into the broad spectrum of orientalist stereotypes described by Edward Said, or Samuel Huntington’s clash of civilisations. ‘An enemy law’ fits both theories nicely.

A long tradition of European ‘legal orientalism’ goes back to at least the eighteenth century. European scholars, politicians, ghouls—and lawyers—portrayed non-European societies as unjust and cruel, in art, general literature and legal culture. A famous painting by Henri Regnault is a vivid example: an executioner cleans his sword on his robe while the headless victim lies at his feet. Its title is *Exécution sans jugement sous les rois maures*. The picture captures the violence of medieval Muslim rulers, the title their capriciousness.

Violence and caprice were the leitmotifs of European characterisations of Islamic justice. In 1933, Lord Lloyd, recently retired as British high commissioner in Egypt, was typical: he wrote that ‘under Turkish dispensation … justice, like cholera, was a visitation of a mysterious and very unpleasant kind’. Some Western accounts of Chinese law even claimed that China lacked an indigenous tradition of
'law' at all. All over the British and French empires, colonial legal specialists attempted to set things to rights. 'Indigenous' law was inferior or nonexistent, so Europeans should impose a 'better' system. Usually that meant preserving the laws and customs (making the distinction was hard) of the colonised provided they were not contrary to 'natural justice or morality'. Sati, burning widows beside their dead husbands, was frequently quoted as an Indian example of what failed the 'repugnancy test'. But repugnancy was a vague and shifting idea, easily adapted to the interests of colonial power. During the Algerian war of the 1950s, French soldiers forced Algerian women to take off their veils, in an attempt to enforce an ideological and secular obedience. There are echoes in modern French and Dutch laws.

Even if non-European legal systems were sanitised, there was no question that Europeans who became enmeshed in them should be subjected to the judgement of foreigners. In nineteenth- and early twentieth-century Egypt, European judges tried Europeans in Mixed Courts. In Morocco, the Ottoman Empire and China consular courts formalised a much older system that went back to the treaties of the sixteenth and seventeenth centuries.

IDEAS of 'orientalism' or a 'clash of civilisations' provide ideological symbols, but do they explain how people are tried in countries and cultures that are foreign to them? Are the cases of Corby, the Saudi nurses or Xuereb intrinsic products of a cultural stand-off? Things are more complicated.

The first sign of this is that neither side in these supposed cultural rifts was united. In Australia and Britain, the Gilford case took place against a background of heated debate. The South Australian lawyers believed the death penalty was illegal—but many South Australians thought that it should not be. An opinion poll in May 2001 showed approval for the death penalty at 55.7 per cent, higher than any other state and the national figure of 43.5 per cent. In Britain a reader wrote to the right-wing Daily Telegraph, contrasting Saudi Arabia's peaceful streets with disorderly Britain, and asked if he really lived in a 'civilised' country. Norman Tebbit, columnist of the right-wing Mail on Sunday, agreed. Tebbit, a prominent minister in Margaret Thatcher's cabinets in the 1980s, had trenchant views. Michael Foot, then the leader of the Labour Party, called him 'a semi-house-trained polecat', an insult he reviled in. Tebbit mocked the readers of the liberal Guardian (many of whom, according to him, lived in the trendy inner-London suburb of Islington) for their cultural insensitivity in attacking Saudi Arabia. In an article sarcastically headed 'Does Islington think we should send a gunboat?' he said that multiculturalism was a sham. Although, he went on, he was not about
to become a Muslim himself (something no-one had suspected), people who lived in Islamic countries should obey their rules, which did have some merit:

I do not argue that the Saudi system is right. But when I look at our own society, with its crime, its violence, its culture of drugs and sexual perversions, even its apparent record (according to the Guardian) of miscarriages of justice, I would not like to argue before a neutral audience that we are in a position to condemn the Saudis or Islamic law.

Australian opinion divided over Corby and Nguyen. Bloggers set up an anti-Corby petition ("we insist Schapelle Corby be prosecuted to the fullest extent of the law ..."), which very few people signed. Andrew Bolt in the Herald Sun wrote that:

Crimes must have consequences. And the clearer, often the better ... It's a message that is brutally simple and Singapore ensures not even brutal simpletons can doubt it. It doesn't want people from countries with fuzzy notions of punishment—such as ours—thinking the death penalty applies only to those who are brown, or can't find a good lawyer, a friendly journalist, a bribe or excuse.

Singaporean opinion divided too. Think Centre, a non-government organisation, campaigned against the execution of Nguyen, as part of a campaign against the death penalty. That campaign, which began in 2001, was supported by the veteran opposition politician J.B. Jeyaratnam, a lawyer and once the only opposition MP. The Nguyen case was part of the wider politics in Singapore.

In Tunis in 1844, not every Christian supported the French consul. The American consul, John Howard Payne (who wrote 'Home Sweet Home'), firmly backed his British counterpart, whom he found him very hard to like.

Arabian opponents of the Saudi regime, such as the Movement for Islamic Reform in Arabia, based in London, used the nurses' case in their internet campaign. There was nothing new about injustice in the Saudi courts, they said; the regime was using this case to show, falsely, that it adhered to shari'a law to legitimise itself inside the country. MIRA pointed out that Saudi Arabia's well-documented history of abusing human rights went beyond the two British nurses: most of the people executed in Saudi Arabia came from poor countries and no comment was made about them.

It was true the Western media generally made little comment on the fate of non-Europeans in Saudi Arabia, though Amnesty International campaigned doggedly for them, and a worldwide campaign saved Amina Lawal from death by stoning in Nigeria in 2002 after she was convicted of adultery. It was untrue that
no-one ever protested about the fate of citizens of developing countries executed in the Gulf. There were furious protests in the Philippines in 1995 when a Filipino maid, Sarah Balabagan, was sentenced to death in the United Arab Emirates for murdering her sexually abusive employer.

The Balabagan affair followed on from an even more celebrated case, that of Flor Contemplación, which did not take place across the great civilisational frontier of 'West' versus 'East', but (once again) in Singapore. A simplistic orientalist or clash of civilisations explanation of these cases really does not work.

In 1991 Flor Contemplación, a Filipino maid in Singapore, confessed to killing another Filipino maid and the child she was minding. She never renounced the confession, but just before she was hanged in 1995 there were claims the child's father had framed her. The Singaporean court rejected this story. When Philippines president Fidel Ramos appealed to the Singaporean Government not to execute her, he was ignored.

'Them' versus 'us' language was used on both sides. Internet lists were deluged with comments. Some Singaporeans took the Andrew Bolt line: 'Justice has been handed out in an open court in Singapore and defendant with full access to legal council [sic] was found guilty.' Some Filipinos took a less lofty position: 'It is high time for someone to teach this full-of-spittl-brats tiny island nation a lesson ... They are the modern day slave owners in today's Southeast Asia.' In another thread a Singaporean responded to criticism with this:

So what is the big deal if one wayward [Filipino] got hanged in the beautiful island of Singapore, as opposed to some pirate-infested, cannibalistic islets of the Philippines? I'm pretty sure Flor is glad to end it all, here.

Yet the lines were not solid. Norman Tebbit-like, a Filipino resident of Singapore assured his compatriots:

everything here is normal. Here we can take a bus without fear of being mugged. We can stay out after midnight and not fear for our safety. We can take taxis without fear of being cheated. We can leave our shoes outside our apartments at night and still find them there in the morning.

Majority Filipino opinion was different: there were street demonstrations and a communist terrorist group threatened both Singaporean and Filipino officials. Flor Contemplación had been abandoned by her government. The embassy in Singapore was widely considered to have abandoned her: in the four years she was in jail, consular officials visited her just nine times.
In 1995 Filipino politics was highly charged. Ramos was fighting senatorial and local elections and needed to play to the voters. When his appeal to the Singapore Government failed, he sacked his current and former ambassadors to Singapore, and provided a wreath for Flor Contemplación’s body when it returned. He recognised the importance of the execution to the collective feelings about the way in which Filipinos working overseas were abused. This was a far more important question than the justice of the particular case or the nastiness of Singaporeans. The case became emblematic, and Flor Contemplación became a martyr-hero.

These deep issues continued to trouble society in the Philippines. In 1996 the famous director Joel Lamangan made a feature film, The Flor Contemplación Story (Best Picture in the Cairo Film Festival, 1996), and followed it with The Sara Balabagan Story. Years later, in 2001, a Tagalog production of Jean Genet’s The Maids featured live footage of Flor Contemplación’s funeral in counterpoint to the funeral dirge sung by one the maids fantasising about her own imminent execution.

While all this was going on in Manila and Singapore, a similar case was developing in Egypt and Saudi Arabia. In late 1994 Mohammed Kamel Khalifa, an Egyptian medical doctor working in Saudi Arabia, accused a head teacher of sexually abusing his son. The Saudi authorities insisted that, having investigated the allegation, there was no evidence to support it. Dr Khalifa withdrew his allegation, but the teacher countercharged defamation. A court found in favour of the teacher, then sentenced Dr Khalifa to eighty lashes in front of the school students.

The affair ignited Egyptian opinion-makers. The Egyptian Organisation for Human Rights called on the foreign minister to get Khalifa released. The Al-Nadim Centre for the Psychological Rehabilitation of Victims of Torture examined his son and concluded he had suffered an ‘anal injury’. Very soon the official Saudi news agency was complaining that ‘Some Egyptian newspapers are leading an unprecedented campaign of denigration and false accusations against the Saudi authorities and people’.

The allegation strained diplomatic relations, because much of the Egyptian press is at best quasi-governmental. The press campaign seems to have reflected a nationalist official policy. One paper announced that ‘The flogging of the Egyptian doctor in Saudi Arabia is the flogging of every Egyptian ... and of Egypt because 1. It is barbarous 2. It contradicts the protection of his child who was harmed by the director of the Saudi school’. Al-‘Arabi called the flogging ‘the Barbarity of the kurbaj’ and in another headline referred to ‘The Saudi kurbaj—
80 lashes on the back of Egypt: The kurbaj was the traditional instrument of flogging in Egypt. It was the 'cat o' nine tails' of Egypt, made of twisted hippopotamus hide. Used in public, it was a hideous and degrading tool of punishment, imposed by the powerful on the peasantry.

Degradation was a key to Egyptian feelings about Saudi Arabia. There was widespread resentment in Egypt at how expatriate workers there were treated. Those feelings were expressed elsewhere in the Middle East: Saudis were often accused in Morocco of debauching Moroccan women. Al-Kifah al-'Arabi, a strongly Arab nationalist Lebanese weekly, joined the Khalifa furore with a bluntly juxtaposed headline: 'A Saudi rapes the child: Saudi lashes the father ... Because he told!' This was subtitled 'The complete story of a scene from the middle ages'. Not only the Daily Record thinks Saudi justice is medieval.

If these cases are not clashes of civilisation, how can we explain them? A clue lies in two even earlier examples. The first comes from the early twelfth century. Usama ibn al-Munqidh, nephew of the lord of the castle of Shayzar, in what is now Syria, witnessed an extraordinary form of Crusader justice that he later recounted in his memoirs:

I once went in the company of al-Amir Mu'ın-al-Din (may Allah's mercy rest upon his soul!) to Jerusalem. We stopped at Nablus. There a blind man, a Moslem, who was still young and was well dressed, presented himself before al-Amir carrying fruits for him and asked permission to be admitted into his service in Damascus. The amir consented. I inquired about this man and was informed that his mother had been married to a Frank whom she had killed. Her son used to practise ruses against the Frankish pilgrims and cooperate with his mother in assassinating them. They finally brought charges against him and tried his case according to the Frankish way of procedure.

They installed a huge cask and filled it with water. Across it they set a board of wood. Then they bound the arms of the man charged with the act, tied a rope around his shoulders and dropped him into the cask, their idea being that in case he was innocent, he would sink in the water and they would then lift him up with a rope so that he might not die in the water; and in case he was guilty, he would not sink in the water. This man did his best to sink when they dropped him into the water, but he could not do it. So he had to submit to their sentence against him—may Allah's curse be upon them! They pierced his eyeballs with red-hot awls.

Later this same man arrived in Damascus. Al-Amir Mu'ın-al-Din (may Allah's mercy rest upon his soul!) assigned him a stipend large enough to meet all his needs
and said to a slave of his, 'Conduct him to Burhan-al-Din al-Balkhi (may Allah's mercy rest upon his soul) and ask him on my behalf to order somebody to teach this man the Koran and something of Moslem jurisprudence.

The second example comes from the French invasion of Egypt in 1798, as chronicled by 'Abd al-Rahman al-Jabarti. He described how the French behaved when their commander was assassinated. The French tortured and executed three men, one of whom they impaled alive. Yet al-Jabarti was greatly impressed by how the French conducted the trial:

They instituted a court procedure, summoned the assassin, and repeatedly questioned him orally, and under duress; they summoned those named by the assassin, interrogated them individually and collectively, and only then did they institute a court procedure in accordance with what the law prescribed ... This is quite different from what we saw later of the deeds of the riff-raff of soldiers claiming to be Muslims and fighters of the Holy War who killed people and destroyed human lives merely to satisfy their animal passions.

Usama and al-Jabarti used law as a cultural indicator to serve ideological purposes far beyond the case at hand. Usama wanted to show cultural superiority. Al-Jabarti wanted to comment on the abuse of power. Both writers focused on the process of legal enforcement, not the ideology that lay behind it, and then attached those processes to questions of cultural identity. But what they were both doing was emblematising justice.

We are still doing this. Arguments about Schapelle Corby or the Saudi nurses reflect deep concerns in our own societies, about how Australians should organise law and punishment and justice in Australia, Britons in the United Kingdom, Arabians in Saudi Arabia. The efforts of South Australian lawyers to prevent Frank Gilford from taking part in legal proceedings in Saudi Arabia are another reflection of this.

Those South Australian lawyers reflected something else too, which lies even deeper: they were binding Gilford to his Australianness. We are what our law makes us, and we belong to a particular place and a particular system of metropolitan law. When we move to another place we do not stop being us, so the legal system that has surrounded us until then becomes a badge. Yet the society into which we have moved defines the other people in it by their own common identity, which is also emblematised by the legal system that they have devised, even when how it functions is contested. MIRA attacks the Saudi Government for not sticking to shari'a law, not for a failure to follow Western law. The converse
is also true, as Michelle Leslie showed in another case. She changed her apparent religious identity and 'crossed over' to the other culture. She was no longer an outsider and the penalties imposed upon her were considerably reduced.

Turning legal cases into emblems can swamp guilt or innocence or, more important for the accused, conviction or acquittal. Schapelle Corby complained that her ramshackle team devoted 'so much more time to the court of public opinion than to the Bali Court of Law'. The emblematic quality of her case was more important than its outcome. She was still in the public eye but many of those accused in foreign courts have no voice raised in their defence at all.
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