

DEFINING THE NATIONAL INTEREST - A HISTORY LESSON

By David Dixon, UNSW Law, on Facebook 8 October 2018

The Timor spying case, in which 'Witness K' and his lawyer Bernard Collaery face prosecution, may be illuminated by noting similarities and contrasts with Clive Ponting's case. This was a product of Britain's conflict with Argentina over the Falkland Islands in 1981. Both the war and the case became defining moments of Margaret Thatcher's prime ministership.

Ponting, a Ministry of Defence civil servant, provided information to Parliament showing that it was being misled by the Government about the circumstances in which an Argentinian warship, The General Belgrano, had been sunk by the British Navy, killing 323 sailors. In both the Timor-Leste and the Belgrano cases, the protagonists were not whistleblowers who went to the media, but rather responsible public servants who sought to use proper channels to complain about wrongdoing by their superiors: Ponting sent material to a MP, while Witness K contacted the Inspector General of Intelligence and Security.

Both cases raise a fundamental constitutional question: does the executive government monopolize definition of the national interest? Ponting's defence raised this squarely: if the national interest is no more than what the government of the day says it is, then the unwritten British constitution would be radically altered.

In the Timor case, key questions are likely to be whether ISIS was performing statutorily authorized functions serving Australia's interests in bugging a weak, friendly country's government under cover of an aid operation and whether the Australian government alone can make such a determination. The context included potential criminal offences of conspiracy to defraud under the ACT Criminal Code by those who ordered the bugging operation and by all involved under Timor-Leste's law. A court informed by history may conclude that the Executive should not be allowed such defining power. Diverting security assets from investigating a terrorist bombing in Jakarta to bug Timor-Leste for commercial advantage is unlikely to meet ordinary people's understanding of the national interest.

If my argument is thought to rely on wishful thinking, let's return to the Belgrano case. Ponting's defence had apparent disadvantages - a jury vetted for political reliability and a judge whose bias towards conviction concerned even the prosecution. The jury is a much-criticized institution. But sometimes when it matters, jurors follow the example of their predecessors whose brave refusal to accept executive direction laid vital foundations of liberal society. The jury concluded that it was for the Law - for them - to define the national interest, and they acquitted Ponting.

One significant difference between the Belgrano and the Timor cases is that the latter will not be decided by a jury: incongruously, this serious alleged offence can only be tried

summarily. This places weighty responsibility on the magistrate - and potentially on future appeal judges. Given their integrity and quality, they are unlikely to genuflect to executive power in the manner of Ponting's judge.

A second difference concerns the role of the Parliamentary Opposition. The (pre-Blair) British Labour Party stood with legal organizations and civil society groups in condemning Ponting's prosecution. The inherently political nature of secrets trials was well-understood. The current prosecution could have been the opportunity for the ALP to make some redress for its shameful record on Timor-Leste, stretching back to Whitlam's role in the 1975 Indonesian invasion. Unfortunately, it appears that the ALP has too much to lose from publicity about its more recent dealings in Timor-Leste matters and so is keeping a silence which will not be forgotten.

Long ago, Winston Churchill warned that official secrets laws 'ought not to be used to shield Ministers who have strong personal interests in concealing the truth about matters from the country'. More recently, the High Court of Australia reported (in Lange) that 'each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia' and that such interests are protected by the implied constitutional freedom of communication on governmental and political matters. Like the Belgrano case, the Timor case is not about national security, but about public access to information and executive accountability.

The prosecution of Witness K and Bernard Collaery raises defining political and constitutional issues. Perhaps the Australian Government will have as much cause for regret that Margaret Thatcher's did in opening them for legal determination.