The people are not instruments or Peter Dutton is not Immanuel Kant

This is a transcript of an unwritten speech delivered by Bret Walker SC at the NSW Council for Civil Liberties 2017 Annual Dinner.

Why would I want to link Kant, to whose work reference is vital if you wish to discuss, in normative terms, the ethics of political science – ethical politics if you like – and a current minister of our current government (to whose activities no such reference will ever be appropriate)?

And I want to start in Germany. I have two stories, both, as it happens, about aeroplanes… At least they weren't boats. The first happened forty years ago. 1977 in the then Federal Republic that we called West Germany was a very bad time indeed. Emergencies, violence, and the politics of terrorism affecting society in a way that no Australian Government in peace time has ever faced to any comparable degree.

The Red Army Faction, the Baader-Meinhof Gang, specialised in the practice of politics by violence and killing of a kind which, in Germany, one might have hoped would have been eliminated after 1945.

There had been, in about 1975, some kidnappings of officials, people in civil society, which had produced, by way of the hostage and threat of violence, the release of convicted terrorists. They were flown, with some money, to the then Republic of Yemen. One of them later came back and, in 1977, kidnapped the president of what I'll call in English 'the German Business Forum', Hanns-Martin Schleyer. It was a very large event, widely publicised, no media blackout. And the demands included not only the release of yet more convicted terrorists but other matters of a kind which showed that there had been a magnification of effect and an appreciation of the leverage available by that kind of violence. The government, Helmut Schmidt's government, decided to stand firm.

In that ghastly web of international terrorism that existed then - it's not new today – the Popular Front for the liberation

of Palestine took on, as it were, a referral job and hi-jacked a passenger aircraft carrying German holidaymakers home from Majorca. They killed the pilot; the captain. And they too publicised their usual kind of demands for the German Government to release the German terrorists and, for good measure, some Palestinian prisoners as well. And the government stood firm.

Herr Schleyer's son realised his father was going to be killed in a ghastly kind of reality show. He tried secretly to pay the ransom in money that might have been sufficient to free his father, to save his father. Inadvertent publicity scotched that possibility. The government, in any event, did not want to deal with terrorists. And so he sued. He sued in a court which is only superficially similar to our High Court, only superficially similar to the United States Supreme Court, the *Bundesverfassungsgericht*, that sits in Karlsruhe. It's not frightened of political questions (although certain commentators have thought that it has tended to be sometimes excessively deferential to the Executive). There are a number of provisions of what the Germans modestly call the *Grundgesetz*: the basic law. The *Grundgesetz* is said, in its terms, to be provisional but it is probably now cemented by way of it being acceded to upon reunification by all of the states of the former East Germany.

The son of the hostage said to the court that there are various provisions of the *Grundgesetz*, in particular Article 1.1, that speaks of the inviolable nature of human dignity, that mean you, the government, must do more than you are doing and preferably you should do something so as to strike a deal with these wretched criminals to free my father to save his life.

The court received the formal complaint about one o'clock on Saturday afternoon; convened a hearing at 9.30pm that day; delivered a judgment at quarter to six in the morning on the Sunday. And they said no, for reasons I'll come to in a moment, the government does not have to do what you, the grieving son, seeks for the father.

And I think it was the very next day that a number of the Baader-Meinhof prisoners including Andreas Baader himself suicided, or at least that is the inquest's finding. And the day after that, on the basis that that constituted something in the nature of murder, in the warped view of the terrorists, Hanns-Martin Schleyer was shot in the head including by one of the terrorists who'd been freed two years before when a bargain had been reached with hostage takers.

Now what's that got to do, you ask, about the inviolable nature of human dignity. Well, I am coming to the categorical imperative. One aspect of the categorical imperative, of course, is that it is a starting point of ethical thinking about social relations that none of us use any of the rest of us as instruments or means to an end. And, of course, the hostage takers are doing just that. To be taken hostage is to be taken as an instrument or means for ends. And that is one of the philosophical explanations of why hostage taking is a monstrous crime.

Much more recently, 2006, the Constitutional Court in Karlsruhe received another complaint, from a number of different

The Manus Regional Processing Centre on Los Negros Island Manus Province Papua New Guinea on Friday 11 September 2015. Photo: Andrew Meares

groups. They included the associations of the flight crew staff, the cockpit crew staff and a number of other groups who are affected by the conduct of safe aviation. There was an Act which I think, without any intended irony, was called The Aviation Security Act. Now by 2006, as you know, the Twin Towers had been destroyed by the use of two passenger airliners as weapons. In a rather gruesome image during argument in the *Bundesverfassungsgericht* the hapless passengers, innocents as they're called in the jargon, had been turned into weapons. They had been weaponised, not only physically but for propaganda as well. And the German *Bundestag*, by huge majority, bipartisan or multi-partisan, had enacted laws, which had a very carefully graded set of lawful response by the military in liaison with the police. It concerned situations where, in German airspace, something like the hi-jacking of an aeroplane threatened to become a weapon, which threatened the German public and the security of people in German territory. It was an ascending familiar proportionate response notion which had, at its apex, the possibility of the Air Force shooting the passenger airliner down.

There are, I think, no commentators at the time who thought that being able to shoot an airliner down meant anything really than the virtually certain death of everybody on the aeroplane.

The government put a nuanced argument which I will, no doubt, unintentionally travesty by summary, but it included a familiar utilitarian notion that the several hundred, perhaps two hundred, on the airliner were doomed anyhow, their lifespans were to be measured in hours, whereas the lifespans of perhaps the thousands in the populated areas which might have been the targets of the aeroplane under the control of the terrorist could look forward to much more. And you'll see an unpleasant quantitation involved. But being unpleasant doesn't make it unlawful because part of the art or challenge of government will obviously be dealing with the so-called 'wicked problems' to which there are no happy answers, but to which there must be an answer.

That you would never ever use fellow inhabitants of the earth (let alone your fellow citizens) as instruments for some governmental or personal project.

The court preferred the argument of the plaintiffs, the various claimants. And they did it in terms which the sage of Königsberg would have recognised. Because the categorical imperative, in two senses that I'll come to in a moment, can be seen virtually explicitly on the pages of the reasons. The state has no right to render these people, who are victims of crime, objects for the state purpose. They are not to be regarded as instruments for the end of preventing whatever mayhem is intended by the terrorist on the ground. And of course one thing you will have noticed about the situation that the plaintiffs had brought to the court in Karlsruhe was that the death of the passengers was certain if the lawfully authorised military force was engaged. Whereas the death of anybody on the ground was by no means certain. As the tremendous act of self-sacrificing, I stress self-sacrificing, heroism of the passengers of the third aeroplane that crashed in Pennsylvania in 2001 will remind us.

The categorical imperative comes in a primary form that we should act in our relations with others on the basis of a rule or maxim, a principle, that we can think should be universally applied. Some people have thought, I think too glibly, that the English translation is 'do as you would be done by'. I think we need to understand, particularly with governments that don't always have decisions made by people who do identify with the plurality of the population, that it's not 'do as you would be done by' it's 'do as you would have you and everyone else done by'.

Now a slightly elaborated but much more immediate form of the categorical imperative is an obvious one and I've already mentioned it. And it follows from the principle that you

should act only in accordance with the rule, that you can universalise; that you would never ever use fellow inhabitants of the earth (let alone your fellow citizens) as instruments for some governmental or personal project. There are many ways in which the English can paraphrase the German. But the familiar English locution is that people are never a means, they can only ever be an end. Or perhaps slightly teased out, the welfare interests of people, in order that they have their dignity as people, is an end; you may not cause them to suffer as a means to produce some advantage for others.

Now, at this point, it seems to me that a philosopher whose work is still read, who is still tremendously important for not just Germanic and other continental but I think all civilised legal systems in their wrestling with the normative justifications of their rules, Immanuel Kant, teaches us to ask: how did we end up with enacted legislation, executive policy and daily administration of a system that has just – today – lent itself to such sad and terrible language as the facility at Manus having been 'cleaned up'? How did we get there? Well we got there by a policy that renders it a little unfair for my subtitle to have picked out Peter Dutton. Only a little unfair because he does render himself egregious in the relish with which he justifies what decency would expect to be always uttered regretfully even if you are a partisan in favour of it. It's a little unfair because it's not just his colleagues in government, (and I don't mean those bound by Cabinet solidarity), I mean those who vote on the backbenches for the government. And it is also the Opposition, at least with a capital O. Indeed the Opposition with a capital O, when they were in government, can probably be credited as the true authors of the policy. But by now such enthusiasm has been given to the project that however numerous our ministers and their parliamentary supporters who may be attributed as the authors, what matters is that we as members of the polity – as members of the society of which the Commonwealth is the polity – need to reflect in terms which do go back to what Immanuel Kant had to say about such matters.

What would he say? What would any of the prophets or divinities of the three great religions of the Book say about referring to the treatment of people who are either asylum seekers or, having been asylum seekers, are now accepted as refugees with Convention protection being held in places and under conditions designed – not accidentally produced – designed and executed for a declared purpose. That declared purpose being, as recently as yesterday you could hear it again from a minister, deterrence.

It is, I think, the most barefaced and revolting instrumentalism that I have heard from a non-authoritarian or non-totalitarian government while I've been alive.

I practise a bit of criminal law. I'm used to the idea of deterrence. But that's not instrumental in criminal law because it's an element in the sentencing of a person for his or her offending. And it is understood that a civilised view of sentencing, classically expounded in Veen v The Queen (No 2) by the High Court, necessarily involves consideration of deterrence. I personally happen to have lost faith in its social reality, but it is nonetheless appropriately part of the jurisprudence about sentencing. That's not instrumental. And it's not instrumental because it's understood the person must be punished, it will be done in public, there will be something in the nature of a lesson, maybe, for that person, maybe for others. At least that's the hope.

But the idea that you would select people who under the rule of law have not made themselves susceptible to punishment and visit upon them adversity in order to teach some lesson and mould other people's conduct is to use them as a means and to abrogate their human dignity as an end.

Why is it that it's thought proper for a civilised nation to use other people as mere instruments without respecting their individual human dignity?

And there should be no mistaking the deliberateness of this as a policy, revealing the intellectual and, I think, moral bankruptcy of those who advised, promoted, and reinforced the scheme. The responsibility is not just the parliamentarians'.

How can you seriously say that it is the right thing to make asylum seekers and acknowledged refugees suffer in order that others not undertake the same risks as that first group took on their way to being so scurvily received by Australia? If we really believed, if we as a society, really believed this was about preventing drownings – and of course the drownings have to be prevented, if at all possible, just as a matter of mercy and charity – then we wouldn't be stopping boats, we'd be sending boats. We'd be sending good boats, and good crews.

And better still we'd be doing something about the conditions which drive these people to have the well-founded fear of persecution which leads to them getting Convention protection in the first place.

And it wouldn't just be sneers at New Zealand to spend their money in Indonesia at peril of endangering the Anzac relation. What nonsense. What a juvenile and impolite threat. It would be us spending vastly greater sums of money than New Zealand was offering – at source. Stop obsessing about getting rid of the pull factor and start doing something – perhaps at the UN (reforming the Security Council and its monstrous veto system) – about the push factor.

But instead, what we have is a policy that says we will make this as miserable as possible for this group that has done no wrong (neither seeking asylum nor becoming recognised as a refugee with Convention protection is of course a wrong, except in a very distorted moral universe) and we will do so in order to make it an even more miserable calculation of fear of persecution and risk of the voyage ahead for those who are in like position. What an astonishing reversal from the near universal global acceptance of a duty to assist the afflicted and miserable that we saw in the aftermath of World War II.

Now I don't suggest that these are simple problems. They are wicked problems. And neither do I suggest that we need a court like the *Bundesverfassungsgericht* to practise pretty open politics in its decision making by reference to Article 1.1 of the *Grundgesetz*. As has been remarked before tonight, we don't have anything like that – either the court or the Constitution. And I don't think, with my cultural inflexibility, I would like to see that descend upon us, at least not suddenly. What we do have, however, is the vote.

Not all of us, at least for the Lower House, will be able to vote for any candidate who has any realistic prospect of doing anything about these matters. And, of course, no Commonwealth election should ever, I hope, at least in peace time, be a single-issue election. But with those whom we can influence by conversation, discussion and persuasion, serious thought should be given to asking the candidates, either directly or through joining united voices in public, why is it that it's thought proper for a civilised nation to use other people as mere instruments without respecting their individual human dignity, and what can be done to get Australia back on a track where (believe it or not) we acceded to a treaty that had in Article 34 a duty to facilitate the naturalisation and assimilation of refugees. When did you last hear discussion by any politician about Article 34? Correctly, I think, their calculation is that the tabloid overseers of public opinion would destroy the political fortunes of any party that seriously proposed that we comply with those almost-defunct obligations. And it may be that following the now (thank God) distant days of the 1940's and a shattered Asia and Europe it is appropriate for the world to revisit the Convention and to take a totally fresh view of the dignity of individuals miserably driven from their homes, perhaps differing from that idealistically conveyed by Article 34 of the Convention. But it won't happen – nothing will happen – unless we do something which is a native substitute for taking a case to Karlsruhe.

We can't take cases to Karlsruhe, literally or figuratively. But we can vote.

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