United Nations set to rule on ICAC's injustice

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In France during the 1890s, Alfred Dreyfus was subjected to show trials based on flawed evidence that left the reputation of justice teetering at the edge of an abyss.

The conviction for treason of this Jewish army officer was eventually exposed as baseless nonsense infected by anti-Semitic bias. Dreyfus was freed from Devil's Island, pardoned, exonerated, restored to active duty and promoted.

The lesson is that great nations – those based on a true belief in individual liberty – remedy injustice when it is staring them in the face no matter how late and no matter how painful this might be to institutions and those in power. Lesser nations do not.

The question now is whether this country will step back from the same abyss that confronted the French republic. Or will it press on, blind to the evils inherent in rule by flawed institutions of state?

This brings us to the unjust treatment of Charif Kazal, which has been gnawing away at the standing of Australian justice for more than a decade and was mentioned at last week's parliamentary inquiry into the proposed National Anti-Corruption Commission.

Significantly, that reference was made by Dennis Cowdroy SC, who established the ACT Integrity Commission and was its first commissioner.

The injustice inflicted on Kazal is clear to those who care to look. They include Geoffrey Robertson KC, the human rights lawyer who has taken this man's cause to the United Nations.

Those on the other side of this argument have much in common with the "anti-Dreyfusards" of France, authoritarians who were prepared to sacrifice an individual in order to protect flawed institutions from reform.

Kazal, a Sydney businessman, was declared to be corrupt in 2011 not because a court found he had broken a law, but because a mere agency of the NSW government decided he "could" have broken a law.

This technique, known as the "could test", is a cancer that is set to infect the rest of the nation. It is one of core provisions of the definition of corrupt conduct in the proposed National Anti-Corruption Commission.

This descent into punishment based on speculation has a long history in NSW and is outlined by Robertson in a submission, or "communication", that has been before the UN Human Rights Committee since February 7.

It is Kazal's last hope of clearing his name.

Robertson's "communication" on Kazal's behalf outlines a system in NSW that would be right at home in an authoritarian hell hole.

Allegations against some people concerning conduct of a criminal nature are diverted from independent courts and processed by a special anti-corruption tribunal outside the justice system, where procedural and substantive rights are set aside.

Robertson writes: "The complainant (Kazal) has at all times maintained his innocence. He has never been convicted of any criminal offence and indeed the prosecutor rightly concluded that there was insufficient evidence to even charge the complainant.

"Despite this, the NSW anti-corruption commission published a report in which it concluded that the complainant 'could' have committed a criminal offence.

"Notwithstanding the fact that the complainant had never been charged with any offence, let alone convicted of that offence, Australian newspapers continue to refer to him as a 'Sydney businessman found to be corrupt' ..."

Robertson makes the point that conduct of a criminal nature should be dealt with by courts, not tribunals that deprive people of rights available in the justice system and guaranteed by the International Covenant on Civil and Political Rights.

He argues that the terms of the covenant mean these guarantees apply to the way countries deal with allegations concerning acts that are criminal in nature, regardless of how they are described by domestic law.

Those guarantees cannot be circumvented by establishing quasi-judicial mechanisms that make serious determinations outside the criminal justice system, Robertson writes.

That means the procedural rights under the covenant apply whenever courts and quasi-judicial tribunals deal with conduct that is criminal in nature – regardless of whether a formal criminal charge has been laid.

If Robertson is right, it means the practice in NSW of having some criminal conduct dealt with by that state's Independent Commission Against Corruption risks branding this country as an abuser of human rights.

The implications go beyond the way Kazal was treated by ICAC. It means the proposed National Anti-Corruption Commission, which would adopt many of the procedures of ICAC, would also be at risk of breaching the international covenant if it purported to deal with conduct of a criminal nature in ways that deprive people of rights guaranteed by this treaty.

That would mean the presumption of innocence, which is guaranteed by Article 14(2) of the covenant, would be breached if the NACC used the "could test" to deal with conduct of a criminal nature.

As Robertson writes: "This extraordinary provision in the ICAC Act not only fails to uphold the presumption of innocence but in fact does the very opposite: it presumes that the targets of its investigation are corrupt and makes findings in relation to serious crime without any application of a burden of proof whether to the criminal standard (beyond reasonable doubt) or even to the civil standard of balance of probability."

The NACC's architects have a problem. If Robertson is right, the NACC and ICAC are both flawed.

They should refer conduct of a criminal nature to the justice system as soon as it becomes clear that a crime might have been committed.

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