WHO WOULD WANT TO BE A REFUGEE?

A comparative analysis of Australian and Canadian Refugee Policy and Law

by

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CERTIFICATE

I certify that the substance of this thesis has not already been submitted for any degree and is not currently being submitted for any other degree or qualification.

I certify that any help received in preparing this thesis, and all sources used, have been acknowledged in his thesis.

CHARLES E. SINCLAIR

'Like the refugees themselves, the cry of their need crosses all borders. May they be heard by those persons, societies and countries which feel free, powerful and secure in their homes and riches.'

Rivera y Damas,
Archbishop of San Salvador,
1985.

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ABSTRACT

If I were a refugee where could I turn for support? Whilst the 1951 United Nations Convention relating to the Status of Refugees provides that if I can prove a well-founded fear of persecution I must not be returned to my country of origin, it does not provide I must be granted refugee status in the country to which I have fled. Furthermore, I must prove to the satisfaction of the authorities in the country to which I have fled that my fear of being persecuted is for reasons of race, religion, nationality, membership of a particular social group or political opinion. The Convention gives no guidance as to its interpretation.

Being returned to one's country is known as refoulement. A considerable body of international law has been built up on this subject. Refoulement provisions are also contained in other treaties and declarations. It is probably the most important feature of the 1951 Convention.

International law does not guarantee my obtaining asylum. Can I, then, invoke Human Rights Law? At the international level people are guaranteed certain fundamental rights provided the country in which the people are is a signatory to the appropriate instrument. Human Rights Law in Australia is haphazard. It gives no real guarantees. In Canada, the Charter of Rights and Freedoms gives everyone, even asylum-seekers, equal rights under the law. However, in neither country is there a right to asylum. Nor is there a statement on the needs of a refugee.

Australia and Canada both seem to follow Europe in the development of refugee policy and law. Europe has developed a series of conventions and agreements making it more difficult for a refugee to obtain asylum. In this regard, there is the Schengen Agreement, Dublin Convention (safe third country) and carrier sanctions. These instruments may be termed as control.

This thesis proves control as the principal feature of refugee law and refugee policy in Australia and Canada. Policy is clearly defined in Canada. No such clear statement

exists in Australian policy. Refugee policy in Australia seems to stand in isolation. Unlike Canada, it is not integrated with foreign policy and human rights policy.

Law is the application of policy and law feeds back into policy determination. Because Australian policy is not defined there is a most complex Act and Regulations. In Canada the Act is much clearer. If I arrive in Australia to seek asylum I must be detained. Whilst there is a provision for detention in Canada it is not used. Seeking asylum in Australia is an onerous task. It is made more complex by frequent changes to the rules. Canada has a simpler and more stable procedure. However, it must be emphasised, both countries control who is granted asylum and both countries rigorously apply the Convention definition. The motives behind such control are complex and, in the case of Australia, paradoxical.

Who influences policy? In both countries domestic policy is controlled by the bureaucracy although in Canada there is more input from NGOs such as the Churches. UNHCR has some influence. In Australia it is a clear "divide-and-conquer" result. The NGOs are divided. There is no formal NGO-Government consultative process. In my attempt to find asylum I would find no-one outside the bureaucracy influences policy. I am stranded in a legal and humanitarian quagmire with no way out. The thesis argues there is a compelling need for the bureaucracies in both countries to receive sound unemotional advice from the NGOs which can be incorporated into refugee policy.

The answer to the refugee's problem lies in a more humanitarian approach to the interpretation of the Convention definition of a refugee. Both Australia and Canada strictly apply the Convention even though, at times, such an approach affects foreign relations. Neither country places trade above adhering to the principles of the Convention.

As countries strengthen their border controls the future is bleak for those seeking refugee status. Where then does refugee policy go? Is resettlement a partial answer or is temporary protection, repatriation or voluntary return the durable solutions? The thesis discusses some changes in policies and argues a new convention definition of refugee would not solve the refugee problem.

Whatever the answer, one thing is sure - involuntary mass movements of people across borders will continue. No-one deliberately sets out to become a refugee.

ACKNOWLEDGMENTS

Over many years I have wondered how one would cope with having to leave one's homeland at short notice with few, if any, possessions, without one's family, ones friends. The trauma experienced is difficult to imagine. This thesis is, by examining the concept of refugee and comparing public policy and law in relation to refugees in Australia and Canada, my attempt to answer the question: "Who would want to be a refugee?"

I am beholden to my supervisors at the University of New England, Armidale, New South Wales, Dr John Atchison of the Department of History, Mr Myint Zan, School of Law and Dr Neil Marshall of the Department of Politics. My sincere thanks for their guidance and patience. Dr Atchison as my principal supervisor was a tower of strength in his guidance and in reading the many drafts. His criticisms and suggestions were always appropriate, valuable and timely. Sylvia Ransom of the Dixson Library was a great help with literature searches and locating references.

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ABBREVIATIONS AND ACRONYMS

AAT	Administrative Appeals Tribunal
ACTU	Australian Council of Trade Unions
ADJR Act	Administrative Decisions (Judicial Review) Act 1977
ALP	Australian Labor Party
ARC	Administrative Review Council
ASA	Asylum-Seeker Assistance Scheme
BIA	Board of Immigration Appeals
CAAIP	Committee to Advise on Australia's Immigration Policies
CCCB	Catholic Conference of Canadian Bishops
CCI	Canada Citizenship and Immigration
CIDA	Canadian International Development Agency
COEC	Coalition of Ethnic Committees
CPA	Comprehensive Plan of Action
CRDD	Convention Refugee Determination Division
CSCE	Conference on Security and Co-operation in Europe
Cth	Commonwealth [of Australia]
DFAT	Department of Foreign Affairs and Trade
DIEA	Department of Immigration and Ethnic Affairs
DILGEA	Department of Immigration, Local Government and Ethnic Affairs
DORS	Determination of Refugee Status Committee
DP	Domestic protection
EC	European Community
ECHR	European Convention on Human Rights
ECRE	European Consultation for Refugees and Exiles
EIC	Employment and Immigration, Canada
EU	European Union
EXCOM	Executive Committee of UNHCR
FCIC	Federal Catholic Immigration Committee
FECCA	Federation of Ethnic Communities Council of Australia
Fed C of A	Federal Court of Australia

GA	General Assembly
HRC	Human Rights Commission
IAB	Immigration Appeal Board
IACM	Inter-American Commission on Human Rights
ICAO	International Civil Aviation Organisation
ICCPR	International Covenant on Civil and Political Rights
ICCR	Inter-Church Committee for Refugees
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICMC	International Catholic Migration Commission
ICR	Intergovernmental Committee on Refugees
ICVA	International Council of Voluntary Agencies
INS	Immigration and Naturalization Service
IOC	International Olympic Committee
IOM	International Organisation for Migration
IRO	International Refugee Organisation
IRT	Immigration Review Tribunal
LNTS	League of Nations Treaty Series
MIEA	Minister for Immigration and Ethnic Affairs
NATO	North Atlantic Treaty Organisation
NCCA	National Council of Churches in Australia
NGO	Non-government organisation
NPC	National Population Council
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-operation and Development
PAM	Procedures Advice Manual
PARIVAC	Partnership in Action
PCI	Policy Control Instruction
PPEP	Protection Permanent Entry Permit
PRC	People's Republic of China
RACS	Refugee Advice and Casework Services
RCMP	Royal Canadian Mounted Police
RCOA	Refugee Council of Australia
RMS	Refugee and Migrant Service
RRT	Refugee Review Tribunal
RSAC	Refugee Status Advisory Committee

RSP	Refugee Studies Programme, University of Oxford
SAC	Special Assistance Category
SHP	Special Humanitarian Program
SMH	Sydney Morning Herald
TEP	Temporary Entry Permit
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNESC	United Nations Economic and Social Council
UNHCR	United Nations High Commissioner for Refugees
UNRRA	United Nations Relief and Rehabilitation Administration
UNRWA	United Nations Relief and Workers' Agency for Palestine Refugees in the Near East
UNTS	United Nations Treaty Series
US	United States
USCR	United States Committee for Refugees

PREFACE

The country of my habitual residence erupts in civil war. I must flee without preparation. I cross a border. I am too frightened to return for fear of persecution - I belonged to an opposing faction. What is my situation?

I can no longer avail myself of the protection of my country. To whom do I turn? A familiar story? Yes, the number of refugees is increasing annually. Over twenty years ago in 1972, the current wave of refugee movement began with Uganda's expulsion of descendants of South Asians. According to the records of the United Nations High Commissioner for Refugees, there were then about 2.5 million refugees worldwide. There are currently some 15 million refugees. To these should be added some 28 million internally displaced persons. As countries close their borders, how do I acquire refugee status? This is one of the questions addressed in this thesis.

The study of refugees is a relatively new discipline. There is no pre-existing body of literature. Much of the material used in the preparation of this thesis is not available in Australia. It was acquired during a period at the Refugee Studies Programme at the University of Oxford. No one discipline has a monopoly in refugee studies. Depending on the view one wants to express, anthropologists, demographers, sociologists, economists, historians, political scientists, geographers and lawyers have a role to play in examining the problems of mass movements of displaced people. Accordingly, this is an interdisciplinary thesis.

Refugees have existed since historical records began. Who precisely is a refugee is complex as international law tends to define refugees narrowly. Unfortunately, few displaced people have the opportunity to study the learned dissertations of experts in the field of refugee studies. So the procedures for gaining refugee status are relatively unknown to an asylum-seeker. The bureaucrats whom a traumatised asylum-seeker encounters are generally great sticklers to procedures.

What then protects a refugee? The 1951 Convention relating to the Status of Refugees and its 1967 Protocol evolved as the result of the large number of displaced

persons in Europe following World War II and the creation of the Eastern Bloc. As we approach the 50th anniversary of the signing of this Convention it is opportune to examine its relevance in the world today. The Convention is based principally on the doctrine of *non-refoulement*. *Refoulement* is an administrative act whereby a person is not admitted to a particular territory and the person is returned to the country from which the person came. There exists no viable alternative to the Convention.

The 1951 Convention and its 1967 Protocol defined a refugee as "any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, unwilling to return to it". The definition does not solve root causes. Refugee status is not the answer to violations of human rights.

The definition of "refugee", as formed in 1951, was derived in part from the constitution of the International Refugee Organisation. This had listed as valid objections to returning to a country of nationality "persecution, or fear, based on reasonable grounds of persecution, because of race, nationality or political opinions". The reference to persecution based on "membership of a particular social group" was directed at so-called "capitalists" who, it was considered, would not necessarily be bound by a voluntary associational relationship.

The 1951 Convention provides for some exceptions. If, for example, claimants had committed atrocities, engaged in criminal conduct or were persecutors, they did not deserve protection and could therefore be deported. If they had received protection in another country, then, for example, Australian or Canadian protection was not required.

The Convention, other than the definition of refugee, has not been passed into Australian domestic law. It has in Canada. As a result, Australian and Canadian Courts interpret the meaning of the Convention definition differently. Law evolves and so too has the meaning of "refugee". With reference to case law I show how the interpretation of the components of the definition of "refugee" have changed. The most important feature of this Convention and others is the principle of *non-refoulement*. This principle is considered in some detail in the context of other instruments and case law.

Refugee law provides little comfort to refugees in the quest for permanent protection other than if they can prove their case they will not be sent back. Does an answer lie with human rights law? The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are examined. However, the International Covenant on Civil and Political Rights is silent on asylum.

What is the situation with Human Rights Law in Australia and Canada? I do not propose to enter the debate on the need or otherwise for a Bill of Rights in Australia. I will, however, show that Human Rights Law in Australia is haphazard. On the other hand, the Canadian Charter of Rights and Freedoms is a link between domestic law and international law. The Charter reflects a direct or indirect effort to implement Canadian obligations under specific international instruments by which Canada is bound, or under general principles of international human rights law to which Canada would not wish to stand in opposition.

Where do Australia and Canada take the lead from in formulating new policies and laws effecting refugees? In my view, Europe is the trend-setter. Both Australia and Canada are derivative, rather than original in their approach to refugee issues. I will detail the development of various Agreements, the most important of which is the Dublin Convention. The effect is, we tend to have a "Fortress Europe" mentality. It is becoming more and more difficult for a refugee to enter Europe including the United Kingdom. This approach is being followed in both Australia and Canada although divergences are now appearing. The European Union is looking to go back and make the definition more restrictive, for example, by ruling out persecution by non-State agents.

From an interdisciplinary viewpoint the thesis traces the development of refugee policy and law in Australia and Canada and considers the interaction between policy and the courts. I do so because both countries have much in common. Both nations were settled by British colonists and have therefore inherited the Common law. Each is characterised by large land masses with relatively small populations. Each has, accordingly, devised a federal system of government to deal with the problems arising from such factors. Immigration has substantially remoulded both societies. Both countries have accepted large numbers of refugees. Both countries have maintained control of their borders. Australia, on the one hand, has developed a most complex system of refugee determination - a system under which successive Ministers for

Immigration and the Department of Immigration have often tried to put themselves outside Parliamentary control and scrutiny, beyond the Courts and tried to control the whole process. The frequency of retrospective legislation indicates an expectation by the Department that its legislation will be "rubber-stamped" by the Parliament. Many of the legislative amendments are counter productive. They have resulted in resources being poured into detention, repatriation agreements and so on. It would be more effective to address root causes. Canada, on the other hand, has developed a relatively straightforward process, subject to scrutiny by the Courts and reported on annually to Parliament.

The comparison is most appropriate as in 1995 Australia and Canada celebrate a century of Trade Relations. As joint sharers of the Pacific Rim and all its challenges, both countries confer regularly on refugee policy.

The thesis examines the Australian Migration Act 1958 in relation to refugees. In this respect it is difficult to identify the legislation as having a particular purpose because the real purpose has never been properly analysed and formulated. Is the Migration Act aimed at getting Australia the best quality migrants available, or is it aimed at keeping as many foreigners as possible out of the country, or is it aimed at giving some sort of a "fair-go" to the millions of people outside Australia who dream of migrating here?

It is, in my opinion, arguable that a lot of legislation that is difficult to administer, or whose operation is controversial, creates those kinds of problem because the underlying rationale has never been properly formulated. This in turn means that the guidance such formulation would provide about how the legislation ought to be structured and administered has not been available to policy-makers and legislators, often with unfortunate consequences.

The thesis argues that particularly in recent years legislation has been piecemeal and has resulted in successful litigation and constitutional challenge. It is demonstrated that over time the practice has developed of the Department trying to control the whole interactive process between Parliament, the Executive and the Courts. Law is the application of policy and law feeds back into policy determination. What we have is a loop. The Department has had long-standing problems in getting its approaches right - at least in the sense of satisfying the courts and review agencies.

It is clear that in Australia policy is sadly lacking. What is the point of a refugee definition that gets narrowed every time it looks as if there may be too many refugees? Such a policy must be free from political expediency. The question is whether people are refugees or not. If they are refugees, they are entitled to protection. If they are not, there has to be a system that gets rid of them, screens them out and gives them proper processing - and without delay. Indeed, refugee policy in Australia is not integrated with other relevant policy areas namely human rights policy and foreign policy. The opposite is the case in Canada.

In respect of Canada the situation is clearer. Policy is clearly defined in Canada. No such clear statement exists in Australian policy. The Canadian Parliament's intention in enacting the Immigration Act 1976 was to define Canada's immigration policy both to Canadians and to those who wish to come there from abroad. The purpose of the statute was to permit immigration, not prevent it. The Australian legislation (Migration Act 1958) is directed equally to limiting as well as facilitating permanent entry into Australia. Some provisions of the Act and Regulations are intended to facilitate entry into Australia having regard to Australia's legal obligations. Both regimes have resulted in complex regulations many of which appear to be restrictive in nature. This raises the question as to whether the policies are being interpreted in positive terms. The thesis examines the obligation of immigration officers to provide a thorough and fair assessment in accordance with the terms and spirit of the legislation.

No one arriving in Canada is a refugee until he or she is determined to be so by members of the Immigration and Refugee Board in accordance with Canadian law and an internationally agreed definition. Until then, he or she is simply someone claiming to be a refugee, who may or may not be telling the truth and who may or may not fit the definition.

Canada has what is recognised as one of the fairest and most generous refugee determination systems in the world. Due partly to the Charter of Rights and Freedoms which applies to everyone arriving on Canadian soil, there are layers of protection that ensure no genuine refugee is ever in danger of being returned to his or her country. Unfortunately, these guarantees of fairness, combined with the procedures of the Immigration and Refugee Board make it possible for unscrupulous, undeserving claimants to acquire refugee status.

Like Australia, Canada has the problem that refugee advocates claim that acceptance of refugee claimants should be increased. Refugee lawyers demand that the system be

more lenient. Claimants and their relatives want to stay in Canada. The government wants to satisfy voters that the law is being implemented.

In this thesis, the development of refugee policy and law in Canada is traced with emphasis on the period from 1976 when Canada's ad hoc refugee policy was given a more permanent basis by the Immigration Act 1976.

What is the position of detention in international law? Under Australian law an applicant for refugee status may be detained. While under Canadian law, there is a provision to detain such a person, there are no applicants for refugee status in detention in Canada.

Australia has a sorry record in relation to detention. Some persons were detained for a number of years. A considerable body of law has been built up on this subject. In its attempt to justify detention, many unfavourable results have been overturned by amending legislation rushed into Parliament in the early hours of the morning. The detention saga is an example of the Department's intransigence when it perceives a Court, or for that matter anyone else, is having an input into policy.

I show the law does little to help most refugees. Who influences policy? In both countries domestic policy is controlled by the bureaucracy although in Canada there is more input from the churches. The United Nations High Commissioner for Refugees has some influence. In Australia it is a clear "divide-and-conquer" environment. The non-government organisations are divided. There is some non-government organisations-Government consultative process but is it a partnership? In my attempt to find asylum I would find the influences on policy outside of government are minimal.

Does foreign policy have a role in the formulation of refugee policy or is humanitarianism the guiding principle? To what degree does humanitarianism influence foreign policy and refugee policy. Foreign policy is tied up with trade and geopolitical stability. Tied grants could be used to influence domestic policy in refugee generating countries. The thesis considers this question with reference to Australia and Canada but also draws upon the experiences of Japan and the United Kingdom. I have drawn on the Japanese and United Kingdom experiences because both countries have been completely "up-front" with their motives and stand in marked contrast to both Australia and Canada.

Where then does refugee policy go? There is no doubt the problem of refugees is a massive one. Does the West just walk away from it? What changes in policy are feasible? The problems, however, seem to be unending. Now, a new problem has arisen - trafficking in migrants. As countries strengthen their border controls the future is bleak for those seeking refugee status. Is resettlement a partial answer or is temporary protection, repatriation or voluntary return the durable solutions? The thesis considers some changes in policies. Whatever the answer is, one thing is sure - involuntary mass movements of people across borders will continue. However, one answer is clear - no-one would deliberately want to be a refugee especially if it entailed coming within Australian and/or Canadian jurisdiction.

This thesis is a significant contribution to the study of refugees in Australia. Although Australia has resettled many refugees, little research has been carried out in refugee studies. There is no equivalent in Australia to the Refugee Studies Programme of the University of Oxford or the Centre for Refugee Studies, York University, Canada. In 1992 the Bureau of Immigration Research, Centre for Refugee Studies and Employment and Immigration Canada, sponsored a conference on immigration and refugee policy in Australia and Canada. Edited proceedings were not published until 1994. Unfortunately, most of the papers discussed particular aspects of immigration policy but skimmed past refugee issues. This work concentrates on refugee policy and law in the two countries. The Australian Bureau of Immigration, Multicultural and Population Research has also scarcely touched the subject.

In the course of my employment as a Legislation Officer in various Departments of the New South Wales Public Service, I have been interested in drafting styles and how policy is translated into legislation. As a result, my attention has turned to the Migration Act 1958 (Cth) and its Regulations. I have built up some knowledge of this Act and International Treaties on which I have drawn in the preparation of this thesis. My Master's dissertation was entitled: "The Migration Legislation Amendment Act 1989: A Puzzle in Decision Making". During its preparation I became aware of the mess the Australian legislation is in. It will be apparent from reading chapter 7 of this thesis, that frequent change, inappropriate codification, unforeseen consequences of rushed legislation have created a legislative system so complex few can understand it. This thesis argues the case for Australia, like its Canadian counterpart, adopting a roots and branches approach to the current policy and law.