Book Review: Humanitarianism, Identity, and Nation: Migration Laws of Australia and Canada, by Catherine Dauvergne

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Book Review

HUMANITARIANISM, IDENTITY, AND NATION: MIGRATION LAWS OF AUSTRALIA AND CANADA BY CATHERINE DAUVERGNE (VANCOUVER: UBC PRESS, 2005) 256 pages.[1]

BY SASHA BAGLAY[2]

In the popular discourse of refugee protection, many are likely to agree with Michael Walzer that "perhaps every victim of authoritarianism and bigotry is the moral comrade of a liberal citizen."[3] In practice, however, being a moral comrade is not sufficient to gain admission to, and membership in, a liberal state. In her insightful and innovative book, Catherine Dauvergne skilfully exposes the ambivalent nature of humanitarianism and its instrumental role in the creation of a positive self-image for host nations. Her argument draws on an analysis of migration laws in Australia and Canada with a specific focus on refugee and other humanitarian admissions. While the subject is not new, the author's approach to it is refreshingly untraditional. The book explores the nature of migration laws using three analytical tools: law and identity scholarship; liberal discourse as the predominant framework for discussion of migration; and an understanding of the nation as an imaginary entity rooted in myth and symbolism.[4] In merging the three, Dauvergne enriches legal method by weaving in perspectives from other disciplines such as political science, sociology, and social psychology. The book successfully builds on Dauvergne's previous scholarship[5] and represents a well-rounded and developed discussion of the themes found in her journal publications. However, for all the strengths, it lacks the dynamism of her admirable shorter pieces.

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[3] Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (Oxford: Basil Blackwell, 1989) at 49.

[4] *Supra* note 1 at 56.

[5] Those familiar with Dauvergne's writing will find themes discussed in her previous articles. See *e.g.* "The Dilemma of Rights Discourse for Refugees (2000) 23 U.N.S.W.L.J. 56; "Beyond Justice: The Consequences of Liberalism for Immigration Law" (1997) 10 Can. J.L. & Jur. 323.

The book's two-part structure separates the more general, theoretical debate about identity, Nation, and migration from the examination of the peculiarities of humanitarian admission in Australia and Canada. Due to this combination of a theoretical analysis and a practical discussion of substantive law, the book will appeal not only to those interested in new approaches to theory, but also to students seeking to learn the details of refugee determination in Australia and Canada. Those looking for a highly sophisticated analysis of national identity and its sociological construction will not, however, find it in the book. Rather, correspondent to the purposes of the discussion, the chapters of Part One provide an overview of the main approaches and authorities on the issue, becoming a good starting point for further reading.

While the insights of the book are numerous, I will focus only on the two most salient: the discussion of humanitarianism in Part One and the analysis of rights discourse in the jurisprudence of the High Court of Australia and the Supreme Court of Canada in Part Two of the book. Dauvergne's examination of humanitarianism is one of the most remarkable aspects of this work. She manages to capture the essence of this phenomenon that is so familiar in ordinary meaning of everyday interpersonal relations, yet so tricky to define with regard to state practice. Further, the author's attention to court jurisprudence highlights the markedly different natures of rights discourse and discourse on humanitarianism. The awareness of this distinction can enrich our understanding of migration law and strategies to change it.

Part One sets the stage for analysis by describing the essence of identity, Nation, and migration. It reviews various aspects of identity and Nation as well as Nation's symbiotic relation with migration law and explores liberalism and its limitations in evaluating migration decisions.

In this discussion, identity analysis is assigned a central role for a number of reasons. In the author's opinion, identity is particularly well suited for understanding migration law as it exposes the hierarchies, categories, and gradations of community membership that lie at the core of migration law and the rights available to individuals in a given community. In an apt analogy, Dauvergne depicts rights as concentric circles with citizenship at the centre: "[t]he closer one is to belonging to

the nation, the more rights one has in the migration realm."[6] This pattern leaves non-citizens at the periphery where admission is granted not as a matter of right, but as a matter of compassion (for refugees) or economic expediency (for immigrants). By delineating the borders and criteria of membership, migration law helps to constitute a community and to inscribe its identity. As the author notes, migration law performs the seemingly contradictory function of creating an impression of stability while reflecting the perpetual changes in a nation's understanding of itself.[7] In this process, the concept of the "other" is an implicit but inalienable element as the identity of members is relational. Put simply, it is defined in contrast with non-members. Thus, migration law often resembles a "photographic negative" that highlights the features which distinguish outsiders from insiders. The process of "othering" fits squarely into the dominant liberal discourse of migration and finds no challenge within it.

Drawing on works by Joseph Carens, Donald Galloway, and Michael Walzer, the author concludes that liberalism cannot provide a meaningful way of assessing fairness in migration policy and decision-making. Unlike other realms of social life, where justice can be used as a moral standard and an obligation to treat people in a particular way, relations between members and non-members cannot be evaluated in a similar fashion. Conceived to operate within the boundaries of a community, liberalism can only generate standards that apply within that community, thereby addressing issues of justice exclusively from the perspective of society's members. Consequently, migration law that regulates primarily outsiders and serves the interests of the host community will always be immune from the challenges of justice. The absence of a justice standard for immigration reinforces the importance of other pragmatic solutions to strict membership control, one of which is humanitarianism. The link between the latter and migration law is rooted in the so-called "humanitarian consensus" among various schools of liberal thought (advocates of open borders as well as supporters of closed communities). This consensus prescribes that, under certain circumstances, a nation should open its borders to people in need. The

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[6] *Supra* note 1 at 171.

[7] *Ibid.* at 161.

potential of humanitarianism to overcome the constraints on admission of non-members has several aspects.

First, it contributes to the depiction of a nation as generous and compassionate. Unlike the era post-World War II when refugees were welcomed to Australia and Canada primarily as a source of labour for growing economies, the current rationale for such admissions lies in the realm of image-making for host nations. "[T]he value is not of the refugees themselves, but of the nation for admitting them."[8]

Second, humanitarianism allows a nation to stay in control of admission and to preserve the member versus non-member distinction. Unlike justice, it is not an obligation, but rather a way to grant somebody something to which they have no rightful claim.[9] It is a largely non-compellable political choice of rich nations that highlights the inequality between the providers of humanitarianism and its beneficiaries. Humanitarianism does not specify the exact circumstances and number of people to be assisted, therefore allowing for fluctuations in humanitarian admissions concomitant with public sentiment and perceived national interests. Humanitarianism operates within the limits of sovereignty, yet by appealing to the goodness of a nation, it allows the manipulation of politics to respond to the plight of the needy. However, the very pragmatic value of humanitarianism precludes it from becoming a moral standard for refugee admission. The humanitarianism of migration law is ambivalent as it lies at the point of tension between the desire of a nation to be perceived as compassionate and a state's sovereign demand to control its borders and population. The two opposites are particularly difficult to reconcile given that migration law remains, as Dauvergne argued in her previous work, the "last bastion of state sovereignty."[10] Humanitarianism achieves a balance only by operating as the "exception to the rule." While respecting state sovereignty, this approach does not provide the certainty necessary for a moral standard. Instead, humanitarianism is doomed to be nothing more than "an impoverished stand-in for justice."[11]

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[8] *Ibid.* at 121.

[9] *Ibid.* at 72.

[10] See generally Catherine Dauvergne, "Sovereignty, Migration and the Rule of Law in Global Times" (2004) 67 Mod. L. Rev. 588.

[11] *Supra* note 1 at 7.

However, for all the criticisms, the absence of a justice standard for migration laws makes humanitarianism the only realistic challenge to population and border control.[12] It mitigates the self-centredness of migration law and injects into it an aspiration to be generous.[13] By appealing to national identity, it portrays more open admission as beneficial to state interests and makes it easier to advance such a policy. The author in this respect echoes Will Kymlicka's suggestion that one of the most effective ways to motivate people to act upon humanitarian obligations is to appeal to national identity.[14]

Having established the positioning of humanitarianism in relation to law, identity, and liberal discourse, Dauvergne proceeds to an examination of how it plays out in the specific contexts of the Australian and Canadian nations based on immigration mythology. The author creates images of respective national identities as a unity of three characteristics: the construction of the "other" in domestic refugee laws; the language of humanitarianism as applied to other admissions (refugee-like situations, compassionate consideration) in day-to-day administrative and judicial decision-making; and the analysis of rights and humanitarian discourses in the jurisprudence of the highest courts of the two countries.

The "othering" in refugee determination is one of the most vivid characteristics of national identity as it symbolizes the encounter of the nation with its "ultimate other"[15]—people who are the most unknown and the most markedly different from members of the community. Unlike economic and family migrants, who are admitted on the basis of things that we know about them and that they share with us, refugees are measured against the unknown, things that we cannot imagine.[16] This very construction, the emphasis on what refugees lack, triggers our humanitarianism and serves as the passport to admission for refugees.[17] In this process, however, the image of a nation maintains its centrality. Being a mirror of a nation's beneficence,[18] humanitarianism draws

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[12] *Ibid.* at 59.

[13] *Ibid.* at 74.

[14] Will Kymlicka, "Being Canadian" (2003) Gov't & Opposition 357 at 359.

[15] *Supra* note 1 at 81.

[16] *Ibid.* at 110.

[17] *Ibid.* at 126.

[18] *Ibid.* at 4, 63.

attention to a host nation, overshadowing the identity of those who benefit from it. Their identity is relevant only as long as it conforms to the idea that protection is conferred on deserving individuals—those who are destitute, but with the potential to become good members of a community.[19] The link between the exercise of compassion and control over membership becomes even more explicit in respect to non-refugee humanitarian admissions. Drawing on the body of Australian executive decisions and Canadian lower courts' jurisprudence of humanitarianism, Dauvergne concludes that not only need, but also values of nuclear family and economic success, are among the factors to be considered.[20] The combination of the need and establishment criteria does not accord well with common sense understanding of compassion and leads to the development of "counterintuitive" interpretation of humanitarianism that is particularly evident in the jurisprudence of Canadian lower courts. The contradictions in the potential interpretation of the term and its close connection to the interests of the nation-state once again highlight the malleability of humanitarianism and its inability to provide solid moral guidance for decision making.

Although, as established earlier, humanitarian claims are more frequently based on an appeal to a nation's mercy, they can also be framed as an assertion of rights. The link between humanitarianism and rights discourse exists primarily through the case law in which humanitarian claims are interpreted in rights-dominated settings. Theoretically, the two fall within different ambits: rights discourse by definition is rooted in justice and entitlement, while humanitarianism entails inequality and a compassionate grant of something a beneficiary has no right to. The core limitation to rights-based arguments is that a rights-based claim triggers a rights-based response. Given that rights exist in a hierarchical manner, a nation's prerogative to exclude outsiders will usually trump other rights.[21] On this basis, the author concludes that the differences in migration-rights discourses in Australia and Canada have little to do with the existence or absence of the *Charter of Rights*;[22] they are rooted in differing perceptions of national

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[19] *Ibid.* at 161.

[20] *Ibid.* at 141, 163.

[21] *Ibid.* at 212.

[22] *Ibid.* at 168.

identities.[23] Rather, the *Charter of Rights* creates an opportunity and space for discourse on human rights. It is then up to the courts whether to make use of this avenue or not.

Migration laws, and the place of humanitarianism within them, tell us different stories about the two nations. Australia emerges as a nation with vigilant territorial and population control and a strong hold by the executive on humanitarian admissions. In contrast, Canada seems to be less burdened with a culture of control. Humanitarian principles are embodied in the law and have been fairly extensively developed by the courts in a vast, and at times contradictory, jurisprudence. However, as Dauvergne mentions, this does not make the Canadian system better.[24] In the absence of a justice standard for migration laws, national rates and criteria of admission or institutional design of refugee determination do not allow us to determine whether one system is morally superior to the other. Instead, they allow us to infer conclusions about a nation's character. For example, in Dauvergne's opinion, Canadian culture emerges as accepting of refugees, more tolerant to higher rates of immigration, and more committed to multiculturalism.[25] Such statements make me uneasy.

While the author provides extensive evidence regarding judicial interpretation of the nation's identity, little is said about the broader societal and historical context that can allow reaching meaningful conclusions on the essence of Canadian culture. Dauvergne's "strategic sampling"[26] cannot create an adequate and objective portrait of Canada's treatment of refugees without mentioning the anti-refugee debate following arrival of the Sikh boat people in 1987; the mass detention of the Chinese boat people who arrived in British Columbia in the late 1990s; or the national electoral campaigns of the Reform Party. Furthermore, while generally acknowledging the link between geographic differences and cultures of control in the two jurisdictions,[27] Dauvergne does not pay much attention to the factors that historically contributed to the development of each nation's identity. Most notably,

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[23] *Ibid.*

[24] *Ibid.* at 123.

[25] *Ibid.* at 123-24.

[26] *Ibid.* at 9.

[27] *Ibid.* at 159.

the core question remains untouched: why have the similarly situated Australian and Canadian societies developed such different levels of tolerance towards asylum seekers? Perhaps this question will be a project for another book.

Ultimately, the book is a stimulating and informative read. It is also disturbing (and therein lies one of its strengths), as it challenges the pride of Canadians and Australians at being world-leaders in humanitarianism. It mercilessly exposes the narcissistic and self-serving nature of humanitarianism and the resilience of state sovereignty in the face of globalization. Dauvergne is even pessimistic in suggesting that in the future humanitarian admission will be increasingly singled out from general migration as an exception to the rule serving national interests.[28] Yet, the alarming content is a source of hope insofar as it can serve as a call to action. It is time to stop applauding ourselves and to recognize the true motivations behind state practices. Furthermore, the awareness of identity discourse and of the pragmatic values of humanitarianism can help pave the way to more open admission policies inscribed as inalienable features of host nations' identities.

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[28] *Ibid.* at 76.