

THE IMPORTANCE OF HUMAN RIGHTS TALK IN ASYLUM SEEKER ADVOCACY: A RESPONSE TO CATHERINE DAUVERGNE

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I INTRODUCTION

Australia is a party to international treaties which oblige it, in certain circumstances, to refrain from returning non-citizens to their country of origin if their basic human rights are likely to be seriously violated in that country.¹ These obligations are known as *non-refoulement* or protection obligations. Persons seeking to invoke Australia's protection obligations are known as on-shore asylum seekers.

The Australian Government takes the position that most on-shore asylum seekers are, in reality, engaged in bad faith attempts to circumvent Australia's immigration controls. It has responded with draconian anti-abuse measures that violate the basic human rights of all on-shore asylum seekers. Some of these measures are directed at preventing on-shore asylum seekers from accessing the protection visa application process; others are directed at making the time spent in Australia awaiting a final decision on a protection visa application as unpleasant as possible.² Still others are directed at limiting the opportunities for

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1 In Catherine Dauvergne, 'The Dilemma of Rights Discourses for Refugees' (2000) 23(3) *University of New South Wales Journal* 56, Dauvergne refers only to Australia's obligations under the *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) and the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967). However, Australia also has protection obligations under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) and the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

2 For example, one employee of Australasian Correctional Management ('ACM') is quoted as saying of the Woomera Immigration Detention Centre run by ACM: 'It's a bloody horrible place, that's the bottom line, and there's an unwritten rule to make it as difficult for the detainees as possible': Terry Plane and Stuart Rintoul, 'Woomera manager is out of his depth', *The Australian* (Sydney) 30 November 2000, 4.

rejected asylum seekers to (allegedly) delay their removal by challenging their rejection.

In her recent article in this Journal, entitled 'The Dilemma of Rights Discourses for Refugees', Catherine Dauvergne argues that 'making rights-based claims on behalf of refugees is often an ineffective strategy' and that 'humanitarianism is a superior, if impoverished, strategic choice for refugees and their advocates'.³ In this brief response, I contend that Dauvergne focuses her attention on the wrong arena – that of the courts. I then explain why, in the correct arena – the political arena – it is imperative that asylum seeker advocates take on the project of persuading the Australian public to use human rights principles as the relevant frame of reference for thinking about the treatment of asylum seekers. Finally, I discuss possible strategies for pursuing this goal.

II THE POWER OF IDEAS

I agree absolutely with Dauvergne's proposition that rights claims made by asylum seekers in a court of law will be trumped by the claimed 'right' of the nation to exclude outsiders because '[t]he sovereignty of the nation is the fact which grounds the [domestic] legal system'.⁴ I do not dispute any of the evidence that she marshals in support of this proposition.⁵ However, Dauvergne dismisses too easily the possibility of asylum seeker advocates entering, and winning, the political fray in which the content of 'law' is determined, simply stating that:

Beyond the narrow confines of the court, in a place where public and political ethos are dominated by liberalism's ambiguity about opening borders, asserting rights claims on behalf of refugees meets intractable disagreements. Accordingly, humanitarianism is strategic.⁶

I disagree. 'Liberalism's ambiguity about opening borders' does not provide grounds for despair but rather grounds for hope that human rights can triumph, *and grounds for working to ensure that they do.*

What distinguishes 'liberal' from 'illiberal' democracies is the notion that citizens have some fundamental, pre-political moral rights that cannot be extinguished by laws passed by a political majority. The notion of universal human rights was, in a real sense, born of liberalism. The democratic strand of our political tradition suggests, however, that, unlike minority members, *non-members* of the self-governing community should not be able to trump the will of the majority of members by invoking moral rights. The essence of democracy is, after all, a belief in the right of the members of a community to govern themselves.

Liberal democratic states, such as Australia, usually manage to minimise overt clashes between liberal values and democratic values by the simple expedient of assuming a situation in which the terms 'person' and 'citizen' (ie, 'member') can

3 Dauvergne, above n 1, 57-8.

4 *Ibid* 57.

5 *Ibid* 63-71.

6 *Ibid* 73.

be used synonymously. In other words, although liberal democratic states freely use the universalist language of human rights, they do so on the assumption of a closed society.⁷ It is when one examines the treatment of the 'person' who is not also a 'member', that it becomes clear that the present moral basis of liberal democratic states, including Australia, is not universalism but rather diluted particularism.⁸ Most liberals agree that it is difficult to justify border controls in terms of the universalist morality that liberalism purports to embrace. The rationalisation of border control that presently holds sway in liberal democratic states is that 'liberal institutions are not only scarce, but hard won and fragile'. It follows from these circumstances that

a liberal may properly compromise liberal principles in practice, in the non-ideal world, when this appears necessary in order to preserve or strengthen them where they have a foothold ... In this spirit a liberal might, as things stand in the world today, not only uphold the traditional (and admittedly non-liberal) sovereign power over borders and admission to citizenship, but might also support restrictive policies on these matters, insofar as there were good reasons to believe that uncontrolled cross-border movement of people – in particular the influx of non-liberal people into liberal states – would pose a threat to the survival or perhaps simply to the flourishing and strengthening of liberal commitments and institutions where they exist.⁹

It is indisputable that all sides of Australian politics are *presently* agreed that it is in the 'national interest' to give paramount importance to the goal of ensuring that Australia's immigration controls cannot be bypassed by non-citizens. My starting point, however, is that the 'national interest' that politicians take into account in adopting policy positions is not a physical object. It exists as a concept, with a content dependent on social agreement reached through a political process.¹⁰ The problem is that common understandings of concepts such as the 'national interest' can become so deeply embedded in the institutional structures of a society that they are regarded as objective 'facts' by most individuals within that society.¹¹ Successfully challenging such 'facts' is difficult, particularly in a democracy such as Australia, where not only the politicians but also the general public need to be persuaded before they interpret a previously accepted 'fact' in the light of a new idea. However, there is a world of difference between 'difficult' and 'impossible'. The history of both liberal democratic societies, and other societies, already provides us with many examples of deep and enduring social transformations effected by those with the vision and courage to work for the acceptance and institutionalisation of new

7 See, eg, Seyla Benhabib, 'Citizens, Residents, and Aliens in a Changing World: Political Membership in the Global Era' (1999) 66(3) *Social Research* 709; Christian Joppke, 'Asylum and State Sovereignty: a Comparison of the United States, Germany, and Britain' (1997) 30(3) *Comparative Political Studies* 259; Daniel Warner, 'The Refugee State and State Protection' in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 253, 255-6.

8 Particularism is a moral perspective which treats group membership (being, in this context, membership of the political community) as the only source of moral rights.

9 Frederick Whelan, 'Citizenship and Freedom of Movement: An Open Admission Policy?' in Mark Gibney (ed), *Open Borders? Closed Societies? The Ethical and Political Issues* (1988) 3, 17.

10 Emanuel Adler, 'Seizing the Middle Ground: Constructivism in World Politics' (1997) 3(3) *European Journal of International Relations* 319, 337.

11 *Ibid* 337-40.

sets of social assumptions.¹² In other words, the evidence already exists that it is not 'impossible' to persuade members of the public and holders of power in a society to change their perceptions, not only of what is 'right' but also of what is in the 'national interest'.

III FRAMES OF REFERENCE

A Prevailing Frames of Reference

Many commentators have noted that throughout the European history of Australia, Australians have lived in fear of being overrun by the human masses presently living in misery in other parts of the world.¹³ As Dauvergne has insightfully pointed out in an earlier article, the purpose of Australian immigration policy (including on-shore asylum seeker policy) is, therefore, conceived in terms of imposing order where there would otherwise be chaos.¹⁴ The media, for example, uses language rife with metaphors of invasion and natural disaster in referring to the prospect of uncontrolled immigration. The belief that the exercise of tight immigration control is all that stands between us and 'chaos' explains why there is a pervasive tendency to describe asylum seekers arriving without authorisation as 'queue jumpers', and why the description encourages considerable public hostility. In the words of Glenn Nicholls:

The queue portrays a pool of people waiting outside Australia, before the eligible are let in. It reassures the domestic populace that there are few entry points and that they are not in danger of being overrun. It gives out that the entry process is equitable and orderly.¹⁵

Dauvergne has also pointed out that sympathetic framing of asylum seeker issues is not entirely lacking in Australia.¹⁶ As our response to the Kosovars demonstrated,¹⁷ it is very much part of the Australian self-image that outsiders are dealt with compassionately and generously. There is also the perspective (not mentioned by Dauvergne) that refugees, when given an opportunity to do so, are more motivated to establish themselves than ordinary migrants, and will therefore make an enormous positive contribution to our economy. However, humanitarian, charitable and economic perspectives are quite different from the human rights perspective.

12 See Thomas Risse *et al* (eds), *The Power of Human Rights: International Norms and Domestic Change* (1999), and Samantha Power and Graham Allison (eds), *Realizing Human Rights: Moving from Inspiration to Impact* (2000) for many convincing case studies.

13 Peter Mares, *Borderline: Australia's Treatment of Asylum Seekers and Refugees* (2001); Glenn Nicholls, 'Unsettling Admissions: Asylum Seekers in Australia' (1998) 11(1) *Journal of Refugee Studies* 61, 64.

14 Catherine Dauvergne, 'Confronting Chaos: Migration Law Responds to Images of Disorder' (1999) 5(1) *Res Publica* 23, 32-3.

15 Nicholls, above n 13, 76.

16 Dauvergne, above n 1, 72-4.

17 Dennis Shanahan, 'Anyone who had a heart', *The Weekend Australian* (Sydney) 10-11 April 1999, 27.

B The Human Rights Frame Of Reference

The moral premise underlying the notion of human rights – usually labelled universalism – is that all human beings are of inherent and equal worth. Human rights are those rights that must be accorded to each human being by all other human beings in order for the inherent and equal worth of the human person to be upheld. As David Feldman puts it, ‘there are certain kinds of treatment which are simply incompatible with the idea that one is dealing with a human being who, as such, is entitled to respect for his or her humanity and dignity’.¹⁸ In Australia, current treatment of asylum seekers which is incompatible with the premise of their inherent and equal human worth includes: arbitrary detention; withholding the means of achieving an adequate standard of living; and denial of basic procedural rights.¹⁹ If Australians adopted a human rights frame of reference for thinking about asylum seeker issues, they would necessarily reject such measures as inappropriate means of achieving the aim of preventing abuse of the protection visa system. However, the human rights frame of reference is largely absent from public discourse about asylum seeker issues. The strongest indication of this is the extensive use of dehumanising language by the media. For example, within the space of 10 days in November 1999, stories in *The Australian* newspaper likened asylum seekers to cargo, animals and garbage.²⁰

As Dauvergne accepts,²¹ by contrast with the human rights frame of reference, the underlying premise of even the sympathetic frames of reference presently employed for thinking about asylum seeker issues is one of inequality. For example, we try to treat animals humanely, but few of us accept animals as our moral equals; we feel free to give our interests much greater weight than theirs. And so it is, too, with our response to asylum seekers when it springs from humanitarian impulses alone. Likewise, charity is something that may be given or withheld depending upon the perceived worthiness of the supplicant and the perceived cost to the giver. Charitable treatment is not something asylum seekers

18 David Feldman, ‘Human Dignity as a Legal Value – Part I’ [1999] *Public Law* 682, 690-1.

19 See generally Savitri Taylor, ‘Do On-Shore Asylum Seekers Have Economic and Social Rights? Dealing with the Moral Contradiction of Liberal Democracy’ (2000) 1 *Melbourne Journal of International Law* 71; Savitri Taylor, ‘Protection or Prevention? A Close Look at the New Temporary Safe Haven Visa Class’ (2000) 23(3) *University of New South Wales Law Journal* 75; Savitri Taylor, ‘Protecting the Human Rights of Immigration Detainees in Australia: An Evaluation of the Effectiveness of Present Accountability Mechanisms’ (2000) 22(1) *Sydney Law Review* 50; Savitri Taylor, ‘Should Unauthorised Arrivals in Australia Have Free Access to Advice and Assistance?’ (2000) 6(1) *Australian Journal of Human Rights* 34; Savitri Taylor, ‘Rethinking Australia’s Practice of “Turning Around” Unauthorised Arrivals: The Case for Good Faith Implementation of Australia’s Protection Obligations’ (1999) 11(1) *Pacific Review: Peace, Security and Global Change* 43; Savitri Taylor, ‘Weaving the Chains of Tyranny: The Misrule of Law in the Administrative Detention of Unlawful Non-Citizens’ (1998) 16(2) *Law in Context* 1; Savitri Taylor, ‘Understanding the Changes to Australia’s On-shore Protection Program’ (2000) 22(1) *Migration Action* 4.

20 Don Greenlees, ‘Neighbour’s unwelcome toss over the back fence’, *The Weekend Australian* (Sydney) 20-21 November 1999, 4; Megan Saunders and Paul Toohey, ‘Human cargo, return to sender’ *The Australian* (Sydney) 12 November 1999, 1; Paul Toohey, ‘A roo shooter and his ute hold the line against illegals’, *The Weekend Australian* (Sydney) 13-14 November 1999, 1, 4.

21 Dauvergne, above n 1, 72.

can demand as their due. Even economic arguments do not serve the cause of asylum seekers well. As Jeremy Harding points out:

[T]o judge asylum seekers like migrants on the basis of their likely contribution to the economy is to impose another qualification on the right of asylum which many refugees, permanently damaged by experiences in their country of origin, may be unable to meet ... They need a more open defence, without proviso, which makes no appeal to the self-interest of host communities.²²

As long as the frames described above remain the only sympathetic frames of reference for thinking about asylum seeker issues, the inherent 'wrongness' of our present anti-abuse measures will not be apparent to the Australian public. How then should those seeking to effect policy reform – by procuring the abandonment by the public of existing frames of reference and the institutionalisation of new frames of reference – go about that task?

IV STRATEGIES FOR CHANGING THE FRAMES OF REFERENCE

A Challenging Language

In an article in *The Australian Financial Review Magazine*, Julie Macken made the point that Australians seem more oblivious to the extent to which their views are shaped by 'dominating ideology' than the members of comparable societies.²³ She quoted Elaine Thompson of the School of Politics and International Studies at the University of New South Wales as saying:

In the [United] States it's understood that 'law and order' is code for getting tough on blacks ... Their understanding of how language is used to legitimise certain forms of prejudice is very sophisticated compared with ours. In Australia, very few members of the media even understand how they help create hegemony. Which doesn't stop them from being powerful, but it does stop them from assuming responsibility for that power.²⁴

Far from being oblivious, asylum seeker advocates are acutely aware of the part language plays in reinforcing hegemonic ideas.

In taking the anti-abuse measures it has, the Australian Government has done no more than it believes voters would expect if they turned their minds to on-shore asylum seeker policy. It is aware, however, that the majority of voters are unlikely to turn their minds to the specifics of such policy unprompted. The Government has chosen, therefore, to engage in the common, vote-winning tactic of manufacturing a sense of crisis in order to receive credit for resolving it. The Department of Immigration and Multicultural Affairs ('DIMA') is extremely active in ensuring that the Government 'spin' is communicated to the public. Its official information, in the form of media releases, 'fact sheets' and the like, is available quickly and easily from its web site. It also briefs reporters on various matters, responds to the media's requests for information, and corrects

22 Jeremy Harding, *The Uninvited: Refugees at the Rich Man's Gate* (2000) 65.

23 Julie Macken, 'Power in Australia', *The Australian Financial Review Magazine*, 24 November 2000, 37.

24 *Ibid* 40.

'inaccurate' media reporting.²⁵ Both DIMA and independent commentators agree that the Government has experienced great success in getting the mass media to frame much of its discussions of issues relating to on-shore asylum seekers in immigration control terms.²⁶

Meanwhile, asylum seeker advocates prioritise the need to persuade the media that the use of terms such as 'queue jumpers' and 'illegals' should be avoided because they reinforce the immigration control frame of reference. They have achieved some success with individual journalists and newspaper sub-editors, although, clearly, they have a long way to go.

Asylum seeker advocates are also making a serious effort to introduce the language of human rights into public discourse about asylum seeker issues. For example, while the human rights frame of reference was not used by the journalists reporting allegations of ill-treatment relating to the Woomera Immigration Detention Centre, asylum seeker advocates used that frame of reference in opinion pieces, interviews and letters to the editor. It is unfortunate but true, however, that introducing an unfamiliar frame of reference puts the person or group introducing it at a disadvantage when attempting to achieve positive outcomes in the short-term. Understandably, asylum seeker advocates faced with people in real need of immediate assistance sometimes succumb to the temptation of distorting their own views in order to tap into the more recognisable language of the media's pre-existing frames of reference, for example, by using the language of humanitarianism, charity or economics when appealing for better treatment of on-shore asylum seekers. The problem with this approach is that it reinforces frames of reference that should be challenged, and thus actually jeopardises the possibility of achieving more significant and enduring change that would benefit all asylum seekers in the long-term.

B Using Stories

Many asylum seeker advocates spend a great deal of time on projects designed to communicate the stories of individual asylum seekers to the Australian public. They do this because of the intuitive realisation that 'story telling' is a powerful way of eliciting a desired response from an audience. The ethical dilemmas raised by such projects are, of course, profound, and very present in the minds of asylum seeker advocates. The main ethical dilemma is obvious: telling real stories may endanger real lives. Bona fide asylum seekers are, by definition, persons who would face the risk of serious ill treatment if returned to their country of origin. If their stories are publicly told and they are then returned home (a real possibility), the risks they face at home are multiplied. Even if they are granted protection visas, the public documentation of their stories may cause problems for family or friends left behind. However willing asylum seekers are to tell their stories, and however carefully identifying details are expunged, the potential consequences of an error in judgment are horrifying to contemplate.

25 Department of Immigration and Multicultural Affairs, *Annual Report 1998-99* (1999) (also at http://www.immi.gov.au/annual_report/annrep99/html/contents.htm at 8 June 2001).

26 *Ibid*; see generally Mares, above n 13.

Given such stakes, it is especially important to make sure that every story told advances the long-term objective of changing public framing of asylum seeker issues. This is not the case at the moment. Asylum seeker stories are often told with the intent of tapping into humanitarian, economic and other existing frames of reference, instead of being used to introduce new ones. For example, stories along the lines of 'I was a stranger and you welcomed me' are really stories about our own compassion and generosity. While stories told of refugees who have succeeded (and have thereby made significant contributions to Australia)²⁷ appeal, in fact, to our economic self-interest. As pointed out earlier, invoking frames in which asylum seekers figure as unequals (a means to our ends) is an approach that is actually counterproductive in the long-term.

The only stories that are worth the cost of telling are therefore stories that enable the audience to see asylum seekers as 'the intelligible beneficiaries of someone's love'.²⁸ I am referring here to an insight of Raimond Gaita's. In *A Common Humanity*, Gaita says:

It is true and important, as Kant insisted, that we have obligations to those whom we do not love. We misconstrue its importance however, if we follow Kant in imagining that we should acknowledge obligations towards people we believed to be beyond the possible reach of the love of someone like ... Mother Teresa. We should not find it even intelligible ... that we have obligations to those whom we do not love unless we see them as being the intelligible beneficiaries of someone's love. Failing that, talk of rights and duties would begin to disengage from what gives it sense.²⁹

C Appealing to Reason

In a previous article,³⁰ I set out the intellectual case in favour of Australia honouring its international protection obligations. I argued that in the current era of globalisation, the gains to be made in the short-term by placing the 'national interest' (narrowly and traditionally conceived) ahead of the collective interests of the human species disappear in the long-term. I argued that in a world which is increasingly interconnected and interdependent, the interests of particular nations can rarely be divorced from the interests of the rest of the human species. I suggested that in this age of new realities, Australia's 'national interest' can, in fact, best be served by acting in a manner which seeks to advance the achievement of a world governed by an international rule of law founded on universal moral principles. I then attempted to demonstrate how all of this held true in the context of dealing with irregular, trans-border population movements. I shall not restate those arguments here. I simply wish to point out that arguments do exist which demonstrate that rational self-interest may actually allow for the human rights of asylum seekers to trump the 'right' of nations to control their

27 This is a strategy employed by, for example, the Refugee Council of Australia: see Melissa Phillips, 'Working with the media: notes for refugee advocates' (2000) 8 *Forced Migration Review* 33 (also at <<http://www.fmreview.org/fmr0813>> at 8 June 2001).

28 Raimond Gaita, *A Common Humanity: Thinking about Love and Truth and Justice* (1999) 26.

29 *Ibid.* Kant is, of course, one of the greatest proponents of the universalist morality underpinning the concept of human rights.

30 Taylor, 'Rethinking Australia's Practice', above n 19.

borders. What asylum seeker advocates have not yet done, but need to do, is assume the task of ensuring that those arguments become a central part of the public debate.

V CONCLUSION

It is too much to expect asylum seeker policy reform to be quick and easy if we choose to challenge the fundamental social assumptions on which existing policy is based. A more realistic expectation is that final success in obtaining significant reform will be achieved through a series of small successes that build on each other over a long period of time.³¹ It is tempting to let this endeavour fall by the wayside in the pursuit of more tangible and immediate 'wins', but it is a temptation to which we should not succumb. We should not accept the world as it is, while the possibility exists of re-making the world as we would like it to be.

31 See David Forsythe, *Human Rights in International Relations* (2000) 173-4.