

Volume One, Chapter 3

JUSTICE, IMMIGRATION AND REFUGEES

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July 12, 1992.

ABSTRACT

This paper proceeds in four parts. It 1) summarizes the philosophical debate about issues of justice applied to immigration and refugee policy; 2) proposes a category framework for making immigration and refugee policy; 3) relates the debate concerning justice to the debates on immigration and refugee policy; 4) applies the various concepts of justice to a few specific immigration and refugee issues to illustrate the applicability of the framework while clarifying how issues of justice can be applied to immigration and refugee policy.

I ON JUSTICE - A PHILOSOPHICAL FOREWORD

When someone knocks on the door of your country and asks to enter and become a member of your community, are you justified in saying no and turning him or her away? If so, on what grounds do you base your decision? And if you allow that individual to enter, on what grounds are you justified in accepting that person and not the many others seeking entry? Do you ask whether those grounds favour males rather than females, and, if they do, whether those grounds are fair? Is conditional admittance acceptable - conditional on good behaviour or obedience to laws or working in a particular area and/or in a particular field of endeavour for a specified period? Once admitted to membership in your community, however gradual that admission process may be, are you obligated to provide full formal membership? If temporary workers have contributed to society for a number of years, should they be allowed to become citizens? Further, are you obligated to go beyond formal membership and guarantee equal opportunity, not only between immigrants and the native-born, but between different types of newcomers, including men and women? If you are not obligated to do so, does this mean that newcomers will be disadvantaged by the inequality between them

and the native-born, or that female newcomers will be disadvantaged in comparison to male newcomers?

Justification. Obligation. Justice or injustice. The issue of justice is fundamental to policies on immigration and refugees. One of the most fundamental issues of a society is who we admit as members and on what grounds do we base those decisions. Formulators of immigration and refugee policy must consider the problem of justice because admission policies and decisions directly affects the conception of justice governing a society. As Michael Walzer (1983) noted, the decision to give membership in one's prosperous state is entirely the responsibility of the existing members.¹ It is one of the most important decisions members of a state make.

The canonical text for reintroducing the question of justice into modern political theory is John Rawls's contractarian vision, set forth in A Theory of Justice (1971), in which justice is rooted in individual consent based on individual self-interest. (Held, 1976) Actions, even collective acts, are initiated by the individual through the exercise of his/her will based on cognitive and moral reflection; those acts are presumed to be rational. That is, the individual has epistemic and moral responsibility and, given what s/he knows and believes, must make decisions based on

¹ "Individuals may be able to give good reasons why they should be selected, but no one on the outside has a right to be inside. The members decide freely on their future associates, and the decisions they make are authoritative and final." Walzer (1983) p. 41.

that knowledge and those beliefs and take moral responsibility for them. Collective decisions are a product of the negotiated compromises of individual rational agents. In making those decisions, the value of individuals transcend those of nations and states.

Questions of rights are at the heart of such decisions. Basic to those rights is the right of the individual to use his or her own knowledge and beliefs to make decisions. The individual has the right to engage in private reflection necessary to this decision making, the right to access and communicate information necessary to engage in this reflection and the right to try to influence the decisions of others.

Rawls also attempted to root justice in universal theory,² in the sense of providing abstract principles from which concrete issues could be adjudicated. However, if the theory claimed universality, it not only had to be abstract, it had to address questions about the fair allocation of goods worldwide, including the allocation of one of the scarcest goods of all, the right to acquire membership in a rich, prosperous and democratic state

Thus, questions of justice are applicable to immigration and

² "My aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau and Kant." Rawls (1971) p. 11.

refugee policy. The three foundation stones of a Rawlsian approach to adjudicating justice issues are its individualism, its foundation in rights theory and its abstract theoretical character, claiming universality in both the abstract and global senses.

Are current Australian and Canadian immigration and refugee policy goals just? Are the norms for regulating and controlling entry just? Do the consequences of those policies raise or lower the standards of justice in the world? To ask such questions is to assume we possess three key factors in order to answer them. It assumes: 1) that a principle of justice can be abstracted from the political, economic and social context and used to assess historically and politically rooted policies; 2) that the agents formulating policy utilize the abstract principles and make policy on the basis of conscious goals, norms, anticipated consequences and a perception of reality; and 3) that those assessing the policies assume that a knowledge of those goals, norms, consequences and perceived circumstances give rise to existing policies so that those policies can be assessed in terms of a prescriptive concept of justice.

Finally, to ask such questions may also assume that the principle of justice regulates other needs or goods, such as survival, the economic well-being of the individual, the social welfare of the whole or even the demands of a divine will. That is, a concept of right rooted in a concept of justice has priority over

and is independent of any good. Rights trump needs or utilities. Right rooted in justice also regulates other rights, whether they are considered necessary to achieve certain goods, or are considered as rights independent of the good to be achieved by them. Such rights might include the right of nature to maintain itself in a balanced way, egalitarian rights, rights to security of persons and property, and even the collective rights of the chosen, whether they are those of a particular nationality, an aristocratic or intellectual elite or the working class.

Given these foundation principles, why, then, in creating a universal system of human rights, do individuals not have an inherent right to move anywhere?³ Why is the right of free individual movement restricted by state borders and regulations? Because the rights were asserted, not on behalf of individuals everywhere, but on behalf of the individual members of a state. Rights were set out to justify placing limits on state action, action which was to be dependent on citizen consent while allowing individuals to pursue their various goals unimpeded. State actions not based on consent of the governed were illegitimate.

³ Recent United Nations initiatives have attempted to articulate such rights. cf. "The Right of Everyone to Leave any Country, Including his own, and to Return to his Country. Report of the Working Group on a Draft Declaration on Freedom and non-discrimination in Respect of the Right of everyone to leave any Country, Including his own, and Return to his Country." Document # E/CN, 4/Sub.2/1991/45. But this articulation is confined to the rights of citizens to leave and return to their own country and not the right of citizens to go anywhere in the world they like.

This is true of modern rights theories as well as the classical contractarian theories of Locke and Rousseau. Thus, an ideal rights theorist, such as Rawls, depicts society as a closed and isolated system (1971, p. 8), or "a nation-state (which) controls a connected territory" (1980, p. 536) and which is a self-sufficient association.⁴ Movement from one state to another is only permitted at the sufferance of other states. The right to move between and among states is only granted as a result of the contracts and covenants between and among states. The only inherent right an individual has is the right to return to a state in which he or she holds legitimate citizenship.

In other words, rights are supposedly universal, but a) those rights only belong to members of liberal states; b) those rights are not universal in extending to individuals when they leave their liberal states; and c) on the basis of rights theory, there is no right to claim the protection of, let alone membership in, a liberal state if an individual's "universal" rights are abused by the state in which they habitually live. Yet the latter is precisely what has happened with the evolution of refugee law since the signing of the refugee convention after the Second World War.

⁴ William A. Galston (1989) recently demonstrated that Rawls himself, in a series of subsequent essays responding to criticisms, not only retreated from the global to the state sphere, but in doing so, retreated from his purely individualistic approach to justice. Rawls subsequently allowed values relative to a specific community, (e.g., a democratic society), that is communitarianism rather than individualism, to become a basic metaphysical presupposition. (See footnote 8)

(Adelman, 1988) Whatever the merits of a Rawlsian position in creating a system of justice for those who are already members of a state, it seemed to provide no basis for adjudicating decisions about who should be allowed to become new members of that state and how to adjudicate the rights of the members of a state versus the rights of immigrants and refugees.⁵ As a state-based thesis, it did not seem to provide a means for adjudicating needs issues on a global level either. Nor did Rawls seek to provide a theory for determining issues concerning the distribution of goods and services over the whole globe, including the distribution of access to membership in the wealthier states⁶.

Thus, two fundamentally different critiques have been aimed at the universal abstract theory of Rawls: first, the theory is rooted in a state - it is not global in its foundation or applicability; second, the theory ignores history and is too abstract when, in reality, history and socialization, not human nature, are the key determinates of immigration as well as other policies. In other words, Rawlsian theory is synchronically parochial and spatially universal, and diachronically abstract making it universal and ahistorical and ignoring its rootedness in history and a particular type of society.

⁵ Rawls (1980) is concerned with the "freedom and equality of *citizens* (my italics) as moral persons", not all persons present in a society. Further, he is concerned with the "just form of basic institutions within a democratic society" rather than a "conception of justice suitable for all societies."

⁶ For an attempt at globalizing Rawls, cf. Pogge (1989) ch. 3.

Two additional critiques have been aimed at the individualist rather than the universalist postulates of Rawlsian theory. One is a realist and statist critique. Individuals do not make immigration and refugee policy. Nation-building elites and/or the state itself make policy.⁷ And that policy is made in the interests of the state no matter how moral questions and concerns enter the policy-making process. Secondly, (paralleling the historicist critique of the abstract universality of Rawlsian theory), a communitarian critique claims that Rawls's theory says nothing about preserving the identity of the nation, such a concern providing one criterion for adjudicating decisions about who could become a member of one's

⁷ Both Walzer and Rawls assume that the members of states make the decisions. If, in fact, the decisions are really made by a nation-building elite (a mixture of politicians, mandarins, judges and an 'active' public - the latter a very small minority of those citizens) or, as in statist theory, the state itself considered as the prime actor (cf. Parkin et. al., Holton & Lanphier, and Burstein et. al. in this volume), this may not only relocate the locus of the decision, but the type of ethical theory appropriate, though not the applicability of questions of justice to those decisions. (cf. Alan B. Simmons and Kieran Keohane, "Canadian Immigration Policy: State Strategies and the Quest for Legitimacy," forthcoming in the Canadian Review of Sociology where the authors argue that the state in formulating immigration policy is engaged in a hegemonic project, monitoring and garnering support and minimalizing criticism by the control it exercises in setting the context for discourse with ethnic groups, humanitarian organizations and provinces.) Even the realism of George Kennan (1954, p. 49) allows for justice to be applicable to the state treatment of individuals outside the state. In realpolitik, morality is still applicable to individual behaviour within a state (particularly in setting standards for individual virtue in a civil society), secondly, to state behaviour towards its own citizens and, finally, to state behaviour to individuals outside the borders of the state even when interests of state enter into immigration and refugee decisions. It is only in state to state relations that amorality reigns.

tate.⁸ Should immigration policy be rooted in the ^{of the} individual members of the state or in inherited community values particularly since essential values and the character of our society are affected by immigration and refugee decisions and the rationale behind them?

Statist critiques are aimed at the gap between reality and the theory of popular sovereignty, that is, the myth of popular control of government (Morgan 1988) which is basic to Rawlsian justice; communitarian critiques are aimed at the gap between the ideal conception of contract theory and the reality of community control, that is, the fact that a set of essential values define the character of a particular society and impact on immigration and refugee decisions and the rationale behind them. Hence, there is a perceived need to ensure that immigration and refugee policy preserves those values while recognizing that those values are

⁸ By contrast, others have argued that communitarianism was inherent in the theory itself. Liberal societies entail shared values about legitimacy based on consent of the governed, rules for adjudicating when consent has been obtained and rules for accepting the decisions of those who are considered to have legitimate authority, in other words, patterns of principles and values based on reciprocal interdependency. Cf. Shapiro (1986) who developed his criticisms based on Sandel (1982) and Flathman (1976) who all argue that even ideal liberal theory is based on communitarian premises. See also Garry Wills, Lincoln at Gettysburg: The Words that Remade America, for a concrete illustration of a political leader who both articulated these universal liberal theories within the framework of a classical idiom of eternal verities and polarities while shifting the substance of the premises of the American enterprise from a compact between states for their mutual convenience and defence to a thesis of perpetual union decided by the people (not states) where the function of the state was viewed as forging a national (communitarian) identity, thereby creating a unique meld of universal liberal theory and American exceptionalism.

determinants of immigration and refugee policy, even if they only set the parameters within which the statist elites operate.

Finally, if both the universalist and the individualist theses of Rawls are both attacked from two very different directions, so is the postulate that rights are the basis for a moral theory of the modern state. From this critical vantage point, needs, not the rights of individuals, are basic to immigration and refugee policy. The key measurement is either the needs of one's own society, or the needs of the immigrants and refugees, or some combination of both. From one set of critics, utilities trump rights; rights do not trump utilities.

This perspective raises its own problems. It is difficult to agree upon a universal framework, such as the greatest happiness of the greatest number, to use as a relevant universal utility from which to assess immigration or refugee policy. There is no single end to adjudicate the conflicts among the various conflicting goals. There are a variety of ends, such as survival of the group or the human race, or economic well-being or interests of state. And each goal has different applications dependent on whether the reference is to an individual or to a specific group. Not only are there questions about a transcendent rights theory; there are also questions about a transcendent utility or needs theory as a basis for immigration policy.

From the opposite angle, we find an Aristotelian attack on Rawlsian ethics as a basis for immigration and refugee policy. It is the capacity of the state and the society within it to absorb immigrants and refugees that provides the key foundation for determining how many immigrants and refugees a society can take. Neither rights nor needs provide such a basis.

The choice, however, may not be selecting one principle - such as individual rights - to rule over the other two - needs or the absorptive capacity of society. All three may be applicable. Thus, although justice issues are a constant aspect of justifying and legitimating immigration policy, such justifications take into account the rights of the existing members of a state and the rights of refugees who are not members of the state, but only those who are already on its territory. When refugees overseas are allowed entry, the *needs* and *capacities* of the state granting entry, combined with both the *needs* and *capacities* of the refugees, seem determinate. (Adelman and Cox in this volume). The *needs* of the society are used to determine which immigrants are to be selected and the *capacity* helps to determine the overall number. There appears to be something very inadequate about discussing immigration and refugee policy in terms of a justice theory rooted in rights alone.

The various criteria of justice applicable to immigration and refugee policy, using Rawlsian theory as a centerpiece, can be

summarized as follows:

SUMMARY OF RAWLSIAN THEORY AND ITS CRITIQUE

Critique	Rawls	Critique
State is the reference	Universal Theory	Historically rooted
Statism - decision makers	Individualism	Communitarianism
- interests of state		
Capacities	Rights	Needs

This essay will argue that in immigration policy, justice is achieved by adjudicating among various utilities and normative rights criteria, as well as the capacity of the society to absorb those immigrants and refugees. In refugee policy, communitarian liberalism has extended rights to include the right to move as a universal right. and applied it to those who feared being persecuted for claiming such rights and who have fled to country

that protects such rights.⁹ There is no right independent of communitarian base in which such rights are articulated. On other hand, within the liberal tradition and communities, a universal right to move and resettle has emerged for those who, lack membership in a state that guarantees the protection of liberal rights, b) has been persecuted by his former state, and c) has arrived on the territory of a liberal state and requested protection. Refugees have been granted a right to move and, further, receive protection and become members of a state. mandarins and politicians who make immigration and refugee policy with the interests of their own state as primary must take these rights seriously as a fundamental value in policy formulation

However, in immigration, as distinct from refugee policy, no independent prescriptive conception of justice abstracted from history exists to regulate the choice of the Good and to assess needs served by immigration policy. Rather, various rights as means are correlated with specific kinds of needs as ends.

Further, in both immigration and refugee policy, justice is not an abstraction but a concept rooted in historical development. Moral rules do not arise from a deductive rational moral science, akin to classical geometry, but arise out of the interaction of

⁹ The corollary, that there can be no universalist theory of right at all if there is no right to movement over the whole earth is a separate and more elaborate philosophical argument which will not be attempted here.

precedent with experience. The task of applying these principles globally is one of negotiation and development rather than a direct product of the abstract theory.

To assess whether any of these theories of justice are, in fact, applicable to reality, we must ask what principles of justice, if any, are entailed in the current immigration and refugee policies of Australia and Canada? Are there any principles entailed at all, just or unjust? Are the policies merely ad hoc, determined by multivariant circumstances, with neither coherence nor any principle of justice governing them, or do they reveal an emerging concept of justice? In other words, the question of justice vis-à-vis immigration and refugee policy cannot be examined by comparing an "ideal" model of justice with the second-rate world we live in, but rather by examining our world and how questions of justice, in the context of immigration and refugee policy, have actually been adjudicated. To do that, we must go beyond deliberations about abstract justice to elucidate the categories in which actual policy decisions in this field are made.

II A CATEGORY FRAMEWORK

In order to clarify existing policies, it is helpful if we create

a map outlining the range of policy decisions. What are possible goals and objectives of immigration and refugee policy? One objective may be protecting and enhancing economic growth by importing capital and expertise, and, perhaps, labour to maintain a balanced proportion between workers and the retired. Another goal might be demographic to obtain a larger, stabler or even a smaller population by balancing emigration with trends in reproductive rates and government programs for encouraging or discouraging couples from having children. Immigration driven by a population policy might be based in a desire to increase the number of consumers to improve domestic productivity through the economies of scale or to improve the state's ability to secure itself any threats to its national security. On the other hand, such a population policy used as a basis to determine immigration totals might be driven by a sensitivity to the country's ecological system leading to a demand to restrict immigration. But there may also be a need to reduce ecological pressures in overcrowded countries and, hence, increase the immigration intakes of less crowded ones.

A different goal might be to maintain and enhance, or, alternatively, to alter a cultural system of values characterize the nation. If those national values are considered to be genetically inherited or transmitted by the traditions and practices of a dominant ethnic group, a goal of immigration and refugee policy may be to maintain or even enhance the dominance of that ethnic group within the population as a whole. If, among those

values, the unity of the family is highly regarded, both for the stability it creates for society as a whole as well as society's inherent respect for the family, then family reunification programs will be lauded, regardless of the immigrants' countries of origin. On the other hand, if the survival of the language and culture of a dominant ethnic group is threatened, then that group might scrap even some of its most cherished values to ensure group survival.

Finally, the goals of immigration and refugee policy may not be driven primarily by domestic considerations. Foreign policy concerns, for example, might have been one of the factors in Australia's rejection of its traditional White Australia Policy. Asian xenophobia may still be an influential factor in Australian and Canadian immigration policy. On the other hand, humanitarian concerns and recognition of the rights of the suffering, the persecuted and the dispossessed might counter such influences. Such policies may be rooted in humanitarian or religious values dictated by divine commandment.

This depiction of possible goals for an immigration and refugee policy regime intermixes the conceptual basis of such policies rooted in different ideas of justice with various realms - nature, the civil society, the nation-state and the divine or supernatural - that are the repositories of such values. It may be helpful to distinguish the values central to those realms from their goals.

Each of the above four realms has two aspects. Nature may be viewed parochially from the perspective of the nation-state's territory and the ability of the ecology to support the existing population. Nature may also be viewed globally from the perspective of world ecology and the right of all individuals, including future generations, to have access to the essentials of life. In either case, the preeminent value in determining justice claims is the preservation of an ecological balance. The goal sought is survival.

The civil society, the second realm in which individuals and groups advance their own interests, may be considered either from the perspective of equal rights for all individuals or from the need to guarantee equal opportunity for various disadvantaged groups. The preeminent value, equality, may be the same, but from the individual perspective it limits the state's right to interfere with or restrict an individual. From the group perspective, equality demands interventionist and affirmative action by governing institutions. The civil society's interest in advancing the economic well-being of its members may encourage a business investment program that invites immigrants who wish to invest substantial capital in Australia and Canada and create jobs for Australians and Canadians. At the same time, based on principles of equality, but applied to group rights, that same program may be opposed by some because it gives one group, those with capital, a separate entrée, thereby appearing to undermine the principle of equal opportunity for all groups. But the goal, whether advanced by

affirmative action or by laissez-faire, is always to advance economic well-being.

The governing institution, the nation-state, is the third realm. As a state, its main concern is the security of its citizens. As a nation, its main concern is securing and enhancing the identity of the dominant nation which the state was created to protect. On one side, the security concerns are physical. Entry shall be denied people who would threaten that security in any way. On the other side, the nation-state is concerned with protecting the spirit of a people and the language, culture and values which define that spirit. By what means and to what extent should a country admit into membership individuals from other societies who may not share the dominant language, culture and values if the overall goal of the host society is to secure and preserve its own physical and spiritual well-being?

The fourth realm refers to some transcendental source for determining human value issues. Those transcendental commandments may demand individual self-sacrifice to help others in need. Or they may command acting so that one's actions reveal and enhance the inherited values of one's community. In the latter context, salvation is perceived to be communal rather than a product of individual acts. In either case, a preeminent value of self-sacrifice and charity (in contrast to preserving a natural balance or guaranteeing equality or security) is espoused in order to

enhance the prospects of replacing the messy human order with a transcendent universal one.

Each of these realms has a universalist and a particularist aspect as well as a common value applied to both. There are very different implications for immigration and refugee policy, depending upon whether the universal or the particular is given priority. Thus, global ecology, concerned with giving all individuals access to the essentials of life, might direct immigration policy in Australia and Canada to take greater numbers of immigrants to reduce the pressures on the rain forests of overpopulated countries. On the other hand, domestic ecological concerns focused on the physical survival of one's own community might indicate a need for reduced immigration inflows to preserve the small areas of habitation among the vast territories of Canada and Australia, little of which is good for sustained population support.

Currently, a more common basis for determining immigration and refugee policy, particularly where the liberal ethos has become dominant and the concept of economic man holds sway, is economic well-being. It is possible to develop an immigration policy that offers as many individuals as possible from the Third World an opportunity to enhance their personal well-being as long as such immigration enhances the well-being of the members of the Australian and Canadian states. This does not mean that uniform

immigration policies result. A policy may guarantee equal opportunity to every individual or, alternatively, enhance the opportunities of disadvantaged groups.

The economic self-interest of individuals with equal rights to pursue economic gains is not the only aspect of a civil society. The interests of groups may also be relevant. A society may wish to ensure that disadvantaged communities are guaranteed equal opportunity once they become constituent members of the society. Such equal opportunity may focus on education, job mobility, the right to acquire the language skills, technical tools and the formal recognition needed to participate in the society. But group rights not only affect settlement policies for immigrants and refugees once they are admitted; they may also affect the right to entry itself. Thus, women may be disadvantaged by some immigration policies, while their entry (though not their situation once they enter) may be facilitated by other policies, such as the women-at-risk programs of both countries or the special program for the admission of domestics into Canada. Similarly, disabled individuals or those with treatable illnesses, such as tuberculosis, may be discriminated against by immigration policies. Other groups may be disadvantaged when applying for entry because they may have very limited access to immigration officers, given the very uneven distribution of those officers around the globe. In Australia, economic self-interest and a foreign policy concerned with overseas links through increasing the educational levels of the citizens of

its neighbours may have combined to produce an educational program for overseas students who could pay fees and enter special educational institutions. However, when those entrants on student visas from China asked for asylum because of the events in Tiananmen Square, many saw this use of educational visas as a method of purchasing entry into Australia by providing those students with a way of circumventing the immigration queue. This form of entry ran counter to the principle of equal access.

When goals such as protecting and enhancing the import of skills and capital are cited, we may develop a policy of importing temporary workers or, alternatively, allow immigrants to enter but place restrictions on the numbers and the type. We may attempt to balance age groups so that the proportion of retirees to the workforce does not become distorted; this may lead to age restrictions on entry or, alternatively, attempts to use financial incentives for women and families to bear more children to offset a dependence on immigration for maintaining the population size. Immigration may also be decreased to offset increases in unemployment in the belief that large-scale immigration cannot be continued when there is a great deal of unemployment during an economic recession. In this respect, Australia and Canada appear to have followed opposing policies in the 1990/91 period, with Australia reducing immigration intakes as the recession took hold, while Canada increased its immigration intake, thus introducing an immigration pattern running contrary to the business cycle based on evidence that immigration,

even in a recession, if anything, benefits the economy.

On the other hand, establishing a larger population base to create economies of scale within one's domestic market, or allowing the entry of immigrants from existing or potential significant trading partners, or even importing workers who are more self-sacrificing, disciplined, harder working or more motivated to earn a living and succeed, usually lead to more expansionist and less restrictive immigration policies. When any of these restrictive or expansionist arguments are used for determining immigration policy, the appeal is to economic self-interest as the basis for adjudicating justice. The reference realm is the civil society and the economic self-interest of its members. Justice is defined solely in terms of what is in the best interests of one's existing membership.

In addition to ecological balance in the quest for survival, in addition to equality when concerned with economic self-interest, security is a third value reference for determining immigration and refugee policy. The physical security of the population is the state's responsibility. This should not be surprising since, in the social contract version of modern state theory, issues of security became the monopoly of the state, which, in return, was obliged to protect the right of individuals to pursue their own interests.

The concern for security is related to a variety of very

different goals vis-à-vis immigration policy. The security issue might be used to argue for a large population increase so that a state has the population base to protect itself against more powerful neighbours; but it could also be used to argue against immigration in relation to national security. The import of "foreigners" might be viewed as building a fifth column within the state, one undercutting the ethnic homogeneity or majoritarian status of the society and the mutual loyalties among its members.

The White Australia Policy of the past is an example of grounding immigration policies to secure the continued dominance of one national group defined by racial criteria. The desire and importance any community or nation places on ensuring its own survival may be a prime determinant of immigration policy. When the survival of a nation and its language and culture is threatened, restrictionist rules governing entry and resettlement may be perceived as more acceptable than the racist policies of the past. Thus, the primacy given to the survival of the Quebecois may be accepted and may constitute one of the most important determinants of immigration policy for Canada.

The dilemma is to distinguish an argument used for discrimination from one used to preserve a nation's language and culture. In fact, these very same arguments can be used to drive people out of one's state and/or conquer adjacent territory populated by one's own ethnic group. Croats can attempt to drive

Serbs from Croatia or Serbs from Serbia can attempt to annex portions of Croatia and Bosnia and drive Croats and Muslims out of the latter area. Armenians can be driven from Nagorno-Karabakh in Azerbaijan. The other ethnic groups are cited as threatening the security of those respective nations. The conquest of territory or expulsion of populations out of one's territory are complementary territorial-based security policies related to restrictive immigration policies lest the entry of those who do not belong to the dominant ethnic group endanger state security.

The security of the state and the nation's continuity is not to be confused with the rights of a nation to preserve, protect and enhance its inherited values, even if a restrictive immigration policy is sometimes the outcome of both rationales. However, the concern with national rights and values is not necessarily related to restrictive immigration policies. For example, an expansionist immigration policy might be defended by such mundane arguments as a way of introducing more interesting and perhaps tastier cuisines into the national repertoire, or introducing more variety into a culture that is perceived as staid and stagnant. Expansionist immigration policies are defended in relation to the inherited values of the nation, not simply to preserve those values, but to transform and enlarge them.

Nor do arguments for preserving traditional values necessarily lead to restrictive policies. An inherited respect for the

protection of individual rights and the obligation to respect international human rights treaties form part of the current national heritage of most democratic western liberal states, so that the institutional basis has been developed for guaranteeing a refugee claimant a right to protection, a right to due process in the adjudication of such claims and hence, in most cases, to membership in the state in which a claim is successfully made. There may be different degrees of achieving justice based on this criterion, a criterion rooted in rights and obligations related to the inherited values of a community that celebrates individual rights. But it effectively results in an expansionist immigration policy.

Inherited humanitarian values rooted in the ethos of a nation rather than a narrower concern for the protection of individual rights may have led to Australian and Canadian large intakes of Indochinese refugees. But the obligations assumed may be rooted neither in a respect for individual rights when individuals make refugee claims, nor in the right of a national group to preserve, enhance or transform its values and beliefs. Instead, the obligations may be rooted in supranational or transcendental responsibilities unrelated to any rights whatsoever.

Thus, there is a final and distinct value reference for justice claims as a basis for influencing those immigration and refugee policies not rooted in the principle of natural balance or

in equality of opportunity for individuals or groups or in security for either the state or the nation. This reference to justice is built on categorical imperatives or moral commandments related to some transnational, transcendental or even supernatural realm and frequently claims to have a monopoly on justice.

For these defenders of universal justice, barriers created by the state may be anathema to those who consider the right to move around God's globe as the most basic right of all. Allowing a state to exercise restrictions in this area, restrictions that may lead to suffering, is akin to giving ethical responsibility to an institution which, by the very definition of its creation in contract theory, has no ethical responsibilities to anyone else except its own members. Even if the foundation stone is not security, even if it is not the rights and obligations based on equal opportunity to pursue individual or group economic self-interest, even if it is not a quest for natural balance in the ecology, as long as the adjudication of any justice claim is left in the hands of the state, there can be no justice.

For many with transcendental convictions, placing the responsibility in the state's hands for the most basic freedom of all, the freedom to move around the globe, or the most basic issue of security, the continuity of one's family and nation beyond one's own life span, is an act of sheer folly that can only lead to the most severe restrictions on both. Surrendering the adjudication of

ethical issues to the state is akin to locking oneself in a prison, vast though its territory may be, and turning the keys over to one's jailer. And the danger is that not only does one restrict one's movements arbitrarily, but one gives the jailer control over what one may think. The state then becomes an object of idolatrous worship. Faith in the state and loyalty to it is presupposed to guarantee the individual's freedom to move to ensure the security of one's family and nation over time. From such a perspective, immigration policy based on self-interest or nation-state security should not be replaced by any immigration restrictions whatsoever. In an extreme situation, all state intervention restricts a fundamental right, the right to move.

Those who hold such a position regard debates over migration as blasphemy, particularly when it comes to refugee cases. For when lives are at risk, debates about humane deterrence, burden-sharing, inequitable allocations to those who have developed the most advanced principles of protection, etc., appear akin to reducing fairness and justice to a pact with the devil in which justice is merely the equal allocation of responsibilities and duties, the very root of envy and resentment and, further, one that willingly sacrifices the individual at the stake while bureaucratic norms of a fair allocation of responsibilities are sorted out.

The framework for deciding what is just when assessing immigration and refugee claims is summarized in the following chart

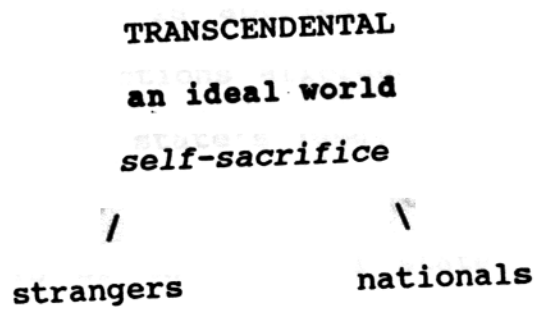
with various typefaces differentiating the various categories:

REALM	goal	normative value	application.
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Categories of Reference for Adjudicating Migration Justice Claims

REALMS	goals	normative values	applications
TRANSCENDENTAL	ideal justice	self-sacrifice	everyone or nationals
CIVIL SOCIETY	individual economic well-being	equality	all members or kin
NATION STATE	well-being of the totality	security	state or nation
NATURE	survival	balance	global or national territory

A Justice Framework for Migration Policy



CIVIL SOCIETY

NATION-STATE

economic self-interest

communal interests

equality

security

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/

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individual

family

state

nation

NATURE

survival

balance

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global

national

ecology

territory

III JUSTICE AND POLICY

My first thesis in conceptualizing the emergent values of justice that have developed in immigration and refugee policy in western liberal states, and in Australia and Canada in particular, is that the refugee issue is one that runs primarily through the vertical axis (between the transcendental ideal state and nature). That is, the right to move, which is applicable to refugees under the Convention, and the protections afforded a refugee by a liberal state, are aspects of the state's ideal values and the effort to universalize those values and make them transcend the state. They articulate the ideals of the liberal state. Rather than being

rooted in the pursuit of self-interest, those ideals are, in fact, rooted in a normative rule of humanitarianism and self-sacrifice for others.

That self-sacrifice has two dimensions. One is a priority for those who are considered kith and kin. Thus, Germany takes in Germans even though they may not have lived in Germany for generations. Israel accords rights to Jews under the Law of Return. Hungary may give priority for refuge to Hungarians in Romania or Yugoslavia.

The other dimension includes those who are strangers but who want to uphold the values of a liberal community and fear persecution because of that. As a result, they have fled a country that was unwilling or unable to protect such values. The justice in such cases is universally applicable because there is no distinction based on kinship or the ideology actually held by the refugee claimant. The only reference is to the transcendent values inherent in a liberal community itself.

When those refugees are not on the territory of the state offering refuge, they may be selected by a combination of immigration criteria (the needs of one's own civil society and, therefore, the ability of the refugee to resettle successfully) and the needs of the refugees who are only selected for resettlement when the prospect of return seems non-existent. The quest is not

only for balance in nature, but for a balance between the needs of one's own society and the needs of others in the world who lack the protection of a state. Rights are only accorded refugees not on state territory who are considered kith and kin

Notice that if refugees are not on state territory, unless they can claim to be kith and kin with rights under a Law of Return, the only refugees with rights are those on one's native soil. In addition to rights granted to others not on state soil on the principle of *jus sanguinis* (descent) as an expression of the self-definition of a nation constituting the state, and as an extension of a state's transcendent values extended to strangers on one's soil who are given rights to claim refugee status, protection may be accorded to others who, though neither strangers nor kith and kin on the one hand, nor complete strangers on the other hand, help distinguish the national persona from that of the state they fled.

Canada admitted over 100,000 Americans who fled because they did not want to fight, or did not want their children to fight, in the Vietnam War. Though not called refugees, they were allowed to become landed immigrants within Canada after their arrival. Though not ethnic kin, they were the closest ideological kin to English Canadians. For English Canada had been founded by United Empire Loyalists who either refused to join the American revolution in the first place or who were rejected by the United States of America

when the revolutionaries won.

The result yields a trifold application of rights applied to refugees on the basis of transcendent values, where 'R' refers to Rights and 'S' and 'O' refer to Self and Other respectively depending on the relationship of the subjects to be protected.

Rights

- R-S** rights of self determine that which is granted to others
on the principle of *jus sanguinis* (descent)
- R-O** rights of others who are given protection under the law
- R-S/O** rights of self-definition in relation to the significant
other

However, in analyzing refugee policy and the debates over the issue, the actual issue of refugee claimants is much more complicated. It results in a colour-coded taxonomy for refugees, which is quite separate from the issue of those who try to use a refugee claims system without any justification whatsoever. Legitimate refugee claimants can be classified as follows:

- a) red - those individually targeted for persecution;
- b) blue - those members of groups targeted for persecution;
- c) yellow - those fleeing from violent situations;
- d) green - those fleeing from environmental disasters;
- e) brown - those fleeing from a disastrous economic situation;
- f) black - warrior refugees.

There was a growing realization that the refugee claims system was attracting and allowing entry not only for those in the red and blue categories, but also for those in the yellow, green and brown

categories for whom the program was not intended. Put in abstract framework of categories for policy making, the question of refugee claims and assistance is the degree to which the right to move should be extended to those who flee, not so much because they are victims of a demonstrably illiberal state or because they share an ethnic or historical kinship with the citizens in one's state, but because they have fled in order to survive. What protections ought to be accorded to refugee victims of an assault on basic survival as opposed to refugee victims of an assault on transcendent values?

Put in a more philosophical way, if victims of civil war, environmental calamities or economic disaster flee to one's state, what are one's obligations? Convention refugees are protected by the values extended by a liberal contractarian state, applied universally, when territory not under the jurisdiction of a state is no longer available to which to flee and when a victim arrives within the jurisdiction of a liberal state or where the victims are assumed to be part of the original contract because of shared kinship or values. But the contractarian liberal state was also based on an imaginary assumption that humans had equal rights to self-preservation as well as the right to be governed by a government that ruled with their consent. The current debate about refugee law and protection is first about the degree to which protection ought to be accorded to those who flee states that breach liberal principles and, second, about the rules to be

developed within liberal states to ensure such protection. There is also a debate about whether to extend such protection to those who flee territory where there is no effective government, territory reduced to a state of nature which can no longer ensure there is enough and sufficient for all. The debate is whether refugee policy should encompass all the protective rules, given the liberal rights guaranteed by western states, and utilized for the victims of states with illiberal policies, and further, whether that policy should be extended to those appealing for protection on the basis

a 'natural right' of self-preservation. The refugee regime has been extended to such victims under the Charter of the Organization of African Unity and the Cartagena Agreement in Central America. Should such an extension be made universal, and, if so, by legislation or by the extension of case law?

The debates over justice in immigration, as distinct from refugee policy, occur on the horizontal axis of the chart above. That is, in immigration policy the civil society's self-interests and the state's security are primary criteria. Immigration policy, on the one hand, entails decisions made in the self-interest of Australian and Canadian citizens, either because it advances the economic self-interest of the respective countries through the admission of capital investors, entrepreneurs and skilled or needed labour, or because families are allowed to sponsor relatives in the belief that the integrated family unit is the backbone of the civil society. Immigrants who have been admitted based on their skills,

labour or capital contribution to the growth of Australia and Canada were admitted because of the host country's needs.

The other major source of immigrants, those who enter under family reunification programs, were admitted based on a concept of the right of individuals in Canada to be reunited with members of their immediate family. The reunification programs are rooted in the self-interest of both individual Canadian citizens and Canada in general in promoting family life and the happiness of its citizens. Enforced separation of family members would be detrimental to such goals.

But immigration policy is also decided on the basis of state and national security (excluding criminals and potential subversives). This dimension is well illustrated in the divisions within Canada between the French of Quebec and the English of the rest of Canada (ROC) where refugee policy is considered the exclusive prerogative of the federal state, whereas immigration policy has been devolved to Quebec while preserved within federal jurisdiction for the rest of Canada (ROC). For Quebec, control over immigration is central to the preservation of the Quebecois ever since the birth rate in Quebec fell steeply following the Quiet Revolution in French Canada during the sixties. That is, a primary consideration of immigration policy for Quebec is the security and survival of the Quebecois, which must be balanced against the economic self-interest and family unification premises of

immigration policy applied to the civil society.

For the Reform Party on the right of the political spectrum in the ROC, particularly Western Canada, immigration is also a central issue for preserving the inherited values and culture of English-speaking Canadians. But for those who were part of the Quiet Revolution that permeated English Canada in the 1980s, where the incorporation of the Charter of Rights and Freedoms into the Constitution (a variation of a key element of the American secular religion) became the basis for a renewed English Canadian identity, the Charter became a statement of the common rights of all Canadian citizens by which they would weld their attachments to the Canadian polity.¹⁰ With the Singh decision¹¹, it also became a Charter applicable to non citizens on Canadian territory. This decision radically transformed the protections and the legal basis for those protections for refugee claimants in Canada. In addition, refugee rights became a central concern of the internationally-oriented new-nationalists of English-speaking Canada while remaining a matter of indifference to the nationalists of Quebec. Control over immigration and enforcement of the French language for immigrants

¹⁰ cf. McRoberts (1991) where this thesis of the emerging national difference between English and French Canada was introduced. For a more detailed analysis of the role of a Charter of Rights and the Constitution in forging the Canadian identity, see Russell (1983) and Knopff and Morton (1985).

¹¹ On April 5, 1985, the Supreme Court of Canada used the Charter of Rights and Freedoms, in particular, its clauses requiring fair treatment, to apply to non-citizens claiming refugee status to require that refugee claimants be given an oral hearing.

to Quebec, even if it meant overriding the Charter of Rights and Freedoms, was the central issue for French Canadian nationalists of all stripes.

Note that on both the vertical refugee axis and the horizontal immigration axis, rights of both kith and kin are given priority. The only strangers who have rights are those who lack state protection and need it, and they only have those rights if they are on state soil to claim them, a claim which must be proven. Refugees chosen abroad are selected based on balancing the needs of the refugees with the needs of one's own society.

On the immigration horizontal axis, excluding family class immigrants, the presumption is that needs rather than rights have priority. Further, it is not the needs of others which have priority. Neither Canada nor Australia determine who to select as immigrants based on the applicants with greatest need so that the needs of others which are greatest determine who are selected as immigrants.¹² Rather, the needs of one's own society determines who are allowed to enter

IV JUSTICE THEORY APPLIED TO SPECIFIC CASES

¹² The Singers (1988) argue that it is the interests of all those affected, rather than self-interest, that is, universal interests versus self-interest, which ought to determine immigration policy on the basis of a needs theory - the more pressing the need, the greater the attention to it.

To ascertain the utility of applying this justice framework to specific immigration and refugee issues, we will take up four problems in determining refugee and immigration policy - a request by the UNHCR to resettle Shiite Iraqis who fled the repressive suppression of the southern revolt against Saddam Hussein following the end of the Gulf War, the adjudication of refugee claims who are fleeing violent wars rather than a fear of persecution, the proposal to give priority to children and spouses in the family class and the problem of dealing with immigrants with special needs or, alternatively, using the special needs of Canada or Australia to set conditions for immigrants who come to these countries.

About 20,000 Shiites fled to Saudi Arabia following the Gulf War and the suppression of the Shiite revolt in the south of Iraq. Sunni dominated Saudi Arabia would not let them become working contributors to that society; the refugees are confined to camps. (Saudi Arabia was already following the Kuwaiti lead and, though much more slowly, undertaking a process of replacing Arab guest workers - largely Palestinian and Egyptian - with Muslims from Pakistan and Bangladesh and even Christians from the Philippines, to offset a perceived security threat from other Arabs.)

If Saudi Arabia, a rich state, would not take in fellow Arabs who had fought against its own enemy, why should a country like Canada whose citizens have little connection with the Shiites from southern Iraq? Further, although the refugees did have a well-

founded fear that, if they returned, they would be persecuted by Saddam Hussein, they were not in danger where they were; even though Saudi Arabia was not a signatory to the Convention, the refugees seemed to be at very little risk of immanent refoulement. There was also the continuing prospect, although one which receded day by day, that Saddam Hussein would be ousted and they then could return.

The Shiites were a collection of refugees with internationally recognized rights, but without a way to gain access to a state that would adjudicate those claims while trapped in a state that not only was not a signatory to the Convention, but granted few rights to its own citizens. Further, the Convention imposed no obligations on states towards Convention refugees unless those refugees were on the soil of the signatory state. Further, in a minimalist interpretation, the only obligation the Convention imposed was not to refoule the refugee to his or her native land from which the refugee had fled. In this case, refugees had rights but ones which could not be exercised in any procedural sense because the state in which they found refuge was not threatening to deny them the minimal right of avoiding refoulement but, at the same time, provided none of the other rights which might allow the refugees to move beyond the bare and boring conditions of camp life.

Australia and Canada had no legal obligations to accept the refugees under the Convention. Did they have a moral obligation to

assume some responsibility? It is my argument that both countries did have such a moral obligation, but it was not unequivocal. The obligation was not clear and absolute because the refugees were neither in danger and posed no danger to the state in which found themselves. Urgency was absent. There were potential alternatives in the near future depending on the course of history. Further, there were other groups of refugees in parallel positions in parts of Africa. Would Australia and Canada to be asked resettle them? The refugees did not have the requisite skills that would induce Australia or Canada to volunteer to make space them in the annual immigration quota nor few, if any, family connections that would create a domestic pressure for their entry. Some might have argued, very erroneously, I believe, that an intake of Shiites opened the possibility of a radical fundamentalist Iran using the refugees for subversive purposes.

The obligation arose neither because of the needs of refugees nor the needs of either country, but because both countries, particularly Canada, sets the pace and marks the standard for defining obligations to refugees internationally. And refugees with rights that only allow them to remain in limbo year after year belies that those are rights in any real sense of the term. If refugee rights were to move towards a universal and transcendental standard, then some country had to take the initiative and ensure that the refugees had de facto though not merely de jure rights. Since the UNHCR was only asking the West to

resettle a total of 35,000 refugees that year, and Canada's annual quota for government selected refugees traditionally hovered around 13,000 (a quota which it had not come near to filling that year), taking in twice its normal allocation of 10% of the 20,000 Shiites, that is 4,000, would not make a significant dent in its program or interfere dramatically with intakes elsewhere, and the deed could be accomplished in one fell swoop. Canada could make the moral gesture, demonstrate its support to the UNHCR's resettlement program and all at little cost to itself

Rights as developed historically to that moment created some moral pressure and the Canadian definition of itself created additional incentive, but no legal or even clear cut immediate moral obligation to take in the refugees. Since this weak source of moral pressure was not supplemented by any incentive based on Canadian needs or pressures by a moral constituency, such as humanitarian organizations, churches or mosques, and since new Canadian immigration law was to be introduced in the near future and the government did not want any criticism from its right for being too generous, it was unlikely that the sense of moral obligation would become strong enough to offset all the negative factors against Canada taking a lead on this issue. And internationally no other volunteers seemed apparent.

The situation merely demonstrates a need to clarify and strengthen the international obligation and to develop a true sense

of burden sharing with formal obligations when refugees do not fulfill all the requisite conditions (such as being on the soil of a country which is a signatory to the Convention). Otherwise moral pressures will remain insufficient to create action let alone an expanded legal protective mechanism.

What about refugees who flee violent wars or totalitarian regimes but are not themselves subject to a threat of individual persecution? Tamils from Sri Lanka and Iranians in flight from the fundamentalist Shiite regime in power are cases in point. In these cases, Canada in particular does have both a legal obligation since refugees from Sri Lanka and Iran who have made claims in Canada have had high success rates before the Refugee Board. Case law in Canada has provided a broad interpretation of who can qualify as a Convention refugee. Further, Canada has a moral obligation not to return claimants to Sri Lanka and Iran unless we can verify that we are not putting the rejected claimants in danger, something easier to do in Sri Lanka than in Iran. The incentive to fulfill these moral obligations is helped by the fact that both the Tamil community and Canadians from Iran provide a small but forceful lobby on behalf of both groups. The numbers are not large enough to threaten other intakes or dramatically alter the population balance in Canada. The character of the civil society combine with the rights already won and recognized in Canada for refugee claimants, and the moral responsibilities Canada has customarily assumed towards those who are not qualified Convention refugees but whose

lives might be endangered by sending them back to their home countries.

If we move from the issue of refugees to that of immigrants, can Canada, as proposed in its new immigration act, Bill C-86, give virtually automatic rights to quick entry to spouses and dependent children of those already landed in Canada, giving this group preferential treatment over other applicants to immigrate? Of course Canada is in a position to legally and practically do so, but can such a position be morally justified? I would argue that such preferential treatment is not only morally justified but that justice itself demands preferential treatment simply on the basis of the greater needs of those already in Canada as well as the greater needs of immediate family members compared to any other class of immigrant applicant. Further, it is in the interest of society as a whole to encourage and reinforce family life and stability. In this case, needs to trump rights and dictate that this class of immigrant applicant be given effective automatic rights of entry.

Are we not guilty of imposing western concepts of the nuclear bisexual family on the issue of needs rather than taking into consideration the broader concept of the family in traditional societies and the evolving change in the family concept in the postmodern era to include homosexual couples and single parent families? Yes, but it is not an imposition; it is merely the fact

that Canadian standards as they evolve and change (i.e., that is, Canadian community values) will dictate the definition of the family and not the source country. Communal interests and values combine with the needs of some members of the civil society to dictate that it is indeed just to give priority for entry to immediate family members.

Finally, can justice limit entry for persons with special needs or utilize specific regional needs to make entry conditional? As an example in the former case, could Australia and Canada deny the entry of a person requiring renal dialysis when the facilities for undertaking renal dialysis is in short supply. The answer here is unequivocal; Canada can not only deny such entry but must do so if it is to live up to its obligations to its own citizens. Here parochial country needs trump over any universal rule of distributive justice.

In the case of the latter, the new proposed Canadian Immigration Act intends to allow entry for immigrants with specific skills needed in a particular area of the country provided the individual agrees to reside in that area for at least two years. Such conditional admittance has little difference in principle from the conditional admission of domestic workers or the older programs agricultural workers that used to be an integral part of Canadian immigration programs when the country was predominantly an agricultural nation. For that matter, there is no difference in

principle from requiring doctors after graduation to serve the state for several years, either in the armed forces or in areas with a shortage of medical professionals if their tuition was financed by the state. Provided the conditions are clear, reasonable and known in advance then conditional admission into membership in a state offend no rights and are based on a contract of mutual need where both parties benefit.

Thus far, all the cases proposed have been consonant with existing or proposed state policy; the analysis endorses the actions of the state as satisfying various criteria of justice. I now want to analyze one proposal that I consider offends principles of justice. The existing Canadian legislation provides for a safe third-country provision. If a claimant arrives at the Canadian border after sojourning in another country where the refugee could have made a refugee claim, and that country was a signatory to the Convention and has a reasonable (not perfect or even one that lives up to Canadian standards) refugee determination system, then the law provides that the claimant can be denied entitlement to make a claim if the country in which the refugee claimant had sojourned had been proscribed as a safe-third country by Cabinet. The new proposed legislation reinforces this provision at the same time as it allows Canada to enter into bilateral and multilateral agreements for "shared responsibility" concerning refugee cases.

Shared responsibility can be an opportunity to develop a

multilateral system for reasonable refugee determination with responsibility for predetermined numbers of refugees allocated to the various countries on a percentage basis based on a formula which takes into consideration the abilities of the various countries to handle the responsibilities of resettlement. On the other hand, shared responsibility can be a euphemism to enter into agreements on the European model which compensate countries financially if they carry a disproportionate portion of the refugee flow, but, in reality, discourage a generous approach to refugee determination. In fact, the system encourages countries to enact very restrictive legislation lest that country, through a generous or even fair system attract too many claimants.

If the latter pattern is followed, then what we have is a beggar-thy-neighbour policy and not one of real shared responsibility. In addition to visa controls and carrier sanctions, it is but another device not only to prevent the entry of unwanted arrivals, but also to inhibit access to a country's refugee determination system for genuine refugees. We have a system which may be reasonably fair if one can gain access to the system, but one which is also designed to deter such access and also create pressures to ensure the determination system remains relatively restricted lest it become a magnet for claimants. As a complementary measure, the proposed legislation penalizes carriers harshly for bringing individuals with improper documents (necessary for many if not most genuine refugees) but provides no provision

for refunding the penalties if those claimants prove to be genuine refugees.

In sum, the proposed legislation does provide reasonably fair protection for refugees who gain access to the system but, at the same time, provides many barriers to prevent genuine refugees from gaining entry to make a claim and proposes to strengthen some measures, such as the safe third-country provision and carrier sanctions to greatly limit access to the system. Though such provisions satisfy the perceived self-interest of some political groupings, those perceptions cannot mount much of a defence on any reasonable needs criteria; they also fundamentally assault principle of rights for refugee claimants which Canada is both legally and morally bound to uphold. Since rights trump needs in the arena of refugees in any case, such provisions offend the principles of justice applicable to immigration and refugee issues set forth here. Since Canada does not even carry its fair share of refugee asylum claims in the West (1 claimant per 1000 population compared to an average of 1 per 850 of population) let alone any reasonable share of the world burden which is mainly born by Third World countries, one cannot even make the argument that Canada is so overburdened with responsibilities that it is impelled to offend principles of justice for the sake of self interest.

The right to move that has emerged has not been equated with a fundamental right. It has become more and more extensive, but it is not an abstract universal right. If the right to move is considered fundamental, and yet the right to move is rooted in history and changes over time, then such a thesis is predominantly communitarian. Rights are considered an offshoot of the development of society and of state and interstate law and practice. Though the rights of individuals have been granted increased recognition by the international community, states retain exclusive control over the rights granted to those individuals. Under a communitarian presumption, no abstract principle of justice exists independent of history. There is no abstract principle of justice by which to adjudicate the choice of which needs have priority. But rights are not reduced to historical practice. Rather, rights have emerged to advance and satisfy certain needs as well as to universalize the communitarian values of a liberal society, including not only the right to have a government that enjoys the consent of the people, the right to be protected by the rule of law, the freedom to speak and publish, or the freedom to belong to a group of one's choice, but also to move and claim such rights in a liberal state if, in the effort to stand up for such rights, one fears persecution

This paper was not intended to adjudicate migration and refugee issues in terms of justice. Rather, it was intended to assist policy makers in such adjudication by trying to show that immigration and refugee issues occupy different planes of justice

and to set out the importance of taking such justice claims seriously while providing a category matrix in terms of which the adjudication will be more careful, thorough and self-consciously done.

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