Refugee Policy

Towards a Liberal Framework

William Maley

The Howard government's policy to stop asylum seekers coming to Australia is at odds with the requirements of classical liberalism.

For a classical liberal, the protection of freedom under the law is a matter of fundamental importance. Where migration is concerned, difficult questions nonetheless arise. Some liberals will argue that since time immemorial, 'state sovereignty' has justified interference with freedom of movement by individuals from one part of the globe to another. Some go further, claiming that liberty will be directly threatened by freer movement, either because new arrivals will allegedly bring with them values hostile to freedom and the rule of law, or because they will be incapable of supporting themselves and thus underpin a burgeoning welfare state. Some go as far as to argue that since high levels of immigration are desirable, it is necessary to secure 'community support' for such migration by deterring the flight of refugees—those with a well-founded fear of being persecuted in other countries for certain clearly-recognised reasons—by granting them only temporary protection unless they have been given prior authority to move by some bureaucratic instrumentality of the state. Some are even prepared to sanction constraints on judicial review of administrative decisions as a way of containing costs. Occasional references to public opinion and election results are sometimes put forward to give these arguments a patina of democratic legitimacy.

These arguments, however, are not as simple and straightforward as one might initially think.

Sovereignty

Classical liberals should always be wary of sovereignty-claims, since they are *prima facie* assertions about the illegitimacy of constraints on state power. But there are deeper reasons for being wary of arguments based on sovereignty. First, sovereignty is an organising principle of international politics,[1] but of itself provides no moral justification for particular exercises of power. Second, states as part of their 'sovereign' capacity can act to constrain their own freedom of action. This was what the Menzies Government did in 1954 when it acceded to the 1951 *Convention Relating to the Status of Refugees*.

When states enter into relations of this kind, they can approach them in either of two ways. One approach is *legalistic*, in which states seek to minimise the effects of constraints which they have previously accepted, by construing them as narrowly as possible. The danger is that this may induce other states to do the same. It may therefore be preferable to approach such obligations from a *good faith* perspective, recognising that this provides leverage to demand 'good faith' responses by other states in respect of their obligations.

In a world in which Australia seeks to exploit the indisputable benefits of interdependence and globalisation, it is the latter approach which is more in keeping with the demands of our times. The main challenge to such an approach has come from different varieties of Hansonism, which are based on a conception

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of Australians as fearful, apprehensive, and in need of protection by an interventionist state.[2] The challenge for policymakers is to avoid pandering to such counsels of fear, apprehension, and hatred.

The desperate at our doors

Refugees are victims of the failure of an international system in which sovereign states are supposed to provide protection to their citizens. They inhabit a messy and confusing world. Erika Feller, Director of the Department of International Protection in the Office of the United Nations High Commissioner for Refugees (UNHCR), made this clear in a recent article: 'Refugees have always entered countries illegally—often without proper documents and with the help of traffickers. None of this detracts from their refugee status. On the contrary, these facts may confirm it.'[3] Refugees flee not by choice, but from compulsion. They naturally head for states which are legally obliged to offer them protection, and which credibly proclaim a commitment to valuing freedom and protecting human rights. It does not make sense to jump out of the frying pan into the fire. Yet those who show initiative by saving themselves (and sacrificing resources to do so) these days run the risk of being scorned for moving beyond dependence on state instrumentalities.

Refugees flee not by choice, but by compulsion.

Some states have set up programmes for what they call 'refugee resettlement', and it is tempting to think that it is through such means that the neediest refugees might best be helped. Such reasoning deserves close scrutiny, not least because of its sentimentality. Most states have a notable propensity to pursue their own interests, and in the area of 'refugee resettlement' this all too often involves excluding the sick and disabled,[4] and even the resettling of ***non***-refugees who are cheap to help or who are supported by existing domestic ethnic lobbies.[5] Fully 6,000 places in Australia's humanitarian resettlement programme of 12,000 for 2002-2003 have been set aside for 'Special Humanitarian Programme' applicants, who must have sponsors in Australia ***but need not be refugees under the 1951 Convention***. Resettlement systems reward most highly those who know how to negotiate the bureaucratic maze. The neediest typically do ***not*** get priority. Indeed, a former Secretary of the Department of Immigration and Ethnic Affairs recently observed from experience that the 'idea of a queue is the invention of bureaucratic minds who probably mislead even themselves that there is some order in their selection work'.[6] The Refugee Convention quite deliberately does not establish a 'hierarchy' of refugees. A refugee is a refugee, and once refugees reach their territory, it is not for states to pick and choose which refugees they are willing to protect.

Why might states find this disturbing? The clue, in my opinion, is to be found in a story told to me last year by a senior figure in the Office of the United Nations High Commissioner for Refugees. He was approached in Africa by an Australian bureaucrat who wished to discuss 'refugee resettlement'. Over tea, the Australian looked at him and said: 'You and I speak the same language. What we want are English-speaking engineers.' 'There's a problem here', replied the UNHCR staffer. 'I can give you some non-literate women who've been raped.' To put it bluntly, in the world in which we live, wise people do not wait to be saved by governments. Just ask the dead of Rwanda how much help they got when they needed it.

Permanent versus temporary protection

On 2 July 1998, Pauline Hanson's One Nation released a policy document entitled 'Immigration, Population and Social Cohesion', which argued that refugees should be given only 'temporary protection'. On 20 August 1998, the Commonwealth Minister for Health and Community Services, Dr Michael Wooldridge, had this policy squarely in his gun-sights when he launched a 'GPs' Manual on Refugee Health and General Practice'. He noted the 'spurious claim' that Australia 'should only be a temporary haven for refugees before they are sent back again when things get better', and described these views as 'deeply flawed and dangerous'. He went on to observe that 'creating insecurity and uncertainty as these views undoubtedly do is one of the most dangerous ways to add to the harm that torturers do', and concluded that 'we must not and will not turn our backs on those who come here for refuge. To do so would be to betray our moral obligation as a community and to betray that great Australian tradition of helping out those in need.'[7]

A lot has happened since, but the logic of Dr Wooldridge's position is still compelling. Australian policy for decades was rightly based on granting permanent protection to refugees, irrespective of their

mode of arrival. Without some certainty, refugees cannot plan for the future, and are likely to become burdens on the taxpayers as their social and psychological problems escalate. The rationale offered by the Government for its introduction in 1999 of 'Temporary Protection Visas' for refugees who had arrived in Australia without prior authorisation was that they should be allowed to stay only as long as it was unsafe for them to return to their countries of origin—but with little recognition of just how long they might be left in limbo. Even in Afghanistan, from which many such refugees had fled, it will take years to reconstitute a stable political order, and people forced back prematurely could be at grave risk: on 25 August 2002, General Tommy R. Franks, Head of US Central Command, observed in an address to US service personnel that 'The fact of the matter is that Afghanistan is a very dangerous place.'[8] Finally, in certain cases, the predations which refugees have endured at the hands of their erstwhile neighbours have been so vicious that to force them back to their 'homelands' would be an act of cruelty, akin to sending German Jews back to Germany in May 1945 because Germany had been 'liberated'. There is no credible evidence that replacing permanent protection with temporary protection deters refugees from seeking asylum. It simply adds to the misery of their existence.

Deprivation of freedom is intrinsically punitive.

Refugee policy and the rule of law

Attempts to limit judicial review of executive decision-making in the refugee area have resulted in a little-noticed but significant erosion of the rule of law, to which successive Commonwealth governments have contributed.[9] The rule of law and the separation of powers form the core of the liberal doctrine of constitutionalism,[10] and we all stand to lose if they are undermined. When judicial review is limited, it becomes more and more a matter of whim for bureaucrats and members of specialist tribunals whether to follow the law or not. Detention without trial, which courts are denied the capacity to review through *habeas corpus*, is one disturbing development—for whether conditions of detention are 'adequate' or not, deprivation of freedom is intrinsically punitive. Another alarming development comes when legalism trumps any notion of substantive justice: an example can be seen in the case of *Kucuk* v. *Minister for Immigration and Multicultural Affairs*, where counsel for the Minister successfully argued in the Federal Court that a request for judicial review by a detainee in Villawood Detention Centre should be rejected on grounds of lateness, even though it was as a result of the failings ***of her custodians*** (or 'her gaolers', as Justice Hely put it) that her appeal papers did not reach the Court within the 28 days permitted for lodgment.[11] In a materially identical case, *WAFE of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, Justices Marshall, Weinberg and Jacobson rightly noted that the statutory time limit for the lodging of appeals 'has the potential to visit gross injustice upon persons who are in immigration detention, and has done so in the present case'. Such provisions, they went on, 'are capable of operating so unjustly that they may erode confidence in the rule of law'.[12] To any genuine liberal, it should be a matter of the deepest concern that such obvious perversions of justice are routinely occurring in Australia.

Finally, in 2001, the Government rushed through Parliament a series of legislative amendments which provided (through a new s.474 of the *Migration Act* 1958) that decisions relating to applications for refugee protection visas 'must not be challenged, appealed against, reviewed, quashed or called in question in any court'. Such clauses are nothing short of sinister, and are a danger to all free citizens. More than half a century ago, the Lord Chief Justice of England, Lord Hewart of Bury, offered some penetrating observations on provisions of this type, and his words bear repeating: 'Those who defend the system of departmental decision, without reasons given, without the possibility of appeal, and behind the back of the other party, are heard from time to time to say that it is cheap. Yet it may be much too dear at the price. They deplore the costliness of litigation. What they mean is that they do not wish the Courts to stand between the departments and the taxpayer. *Sunt lacrimae rerum*—also *crocodilorum*. Things have their tears, and crocodiles have theirs.'[13] It remains to be seen whether the regime installed by s.474 will survive the attention of the High Court. In the meantime, s.474 will deny refugees the protection they deserve. In *SDAV v. Minister for Immigration and Multicultural and Indigenous Affairs*, Justive von Doussa found that a finding as to an applicant's claim made by the Refugee Review Tribunal was 'plainly wrong in law', but concluded that because of s.474, the applicant's

request for relief nonetheless had to be dismissed.[14] Such cases should be borne in mind when one hears ministers blithely assert that particular people 'have been found not to be refugees'.

'Democracy' and refugee policy

Pauline Hanson sought to justify large chunks of her policy platform by attacking elites and claiming to speak for ordinary Australians. In the face of this populist attack, it is important to put forward a qualified defence of the roles which elites can usefully play. It may indeed be the case that large numbers of people supported her hostility to refugees. But leadership involves more than following the crowd, and constitutionalism is premised on the view that governments, even if they enjoy majority support, should be subject to checks and balances. The renowned liberal thinker F.A. Hayek famously warned against the view that 'right' is what a majority makes it.[15] After all, White Australia long enjoyed majority support.

Liberal democracy does ***not*** require that 'leaders' follow every current of public opinion, but rather that the public have the opportunity to change the government through peaceful means.[16] In the years between elections, elites play a crucial role in policy processes, and elite consensus can prevent potentially divisive issues from becoming politicised. Public concern about immigration is better managed through mature elite consensus than by throwing refugees into the Colosseum for Hansonites to savage. Elite leadership is a key to good public policy. Freer trade, deregulation, and more flexible market relations did not emerge in response to overwhelming mass demand, but rather through the impact of detailed analyses by scholars and analysts whose works were inevitably directed at shaping elite opinion. Leaders who do not follow the crowd on issues such as industry protection should be capable of standing up to the crowd on issues such as refugee protection as well.

Conclusion

Australia's longest-serving Prime Minister, Sir Robert Menzies, had very firm views on how refugees within Australia should be treated. On 9 February 1949, he led the opposition in Parliament to the *Wartime Refugees Removal Bill*. Policy in this area, Menzies argued, 'must be applied by a sensible administration, neither rigid nor peremptory but wise, exercising judgment on individual cases, always remembering the basic principle but always understanding that harsh administration never yet improved any law but only impaired it, and that notoriously harsh administration raises up to any law hostilities that may some day destroy it'.[17] In his call for sensible administration, in his demand for attention to individuals, and in his repudiation of harshness, Menzies struck a chord which every classical liberal should be able to recognise. He was a compassionate and far-sighted man, and we need to recover his vision. ■

Endnotes

1. See Christian Reus-Smit, *The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in International Relations* (Princeton: Princeton University Press, 1999), p. 159.
2. See Chandran Kukathas and William Maley, 'The Last Refuge: Hard and Soft Hansonism in Contemporary Australian Politics', *Issue Analysis* No. 4 (Sydney: The Centre for Independent Studies, 1998).
3. Erika Feller, 'The Evolution of the International Refugee Protection Regime', *Washington University Journal of Law and Policy*, vol. 5 (2001): pp. 129-139 at p. 137.
4. See William Maley, 'Multiculturalism, Refugees, and Duties beyond Borders', in *Multicultural Citizens: The Philosophy and Politics of Identity*, ed. Chandran Kukathas (Sydney: The Centre for Independent Studies, 1993), pp. 175-190.
5. William Maley, 'Improving Australia's Refugee Resettlement Policy', *Policy* 5:3 (Spring 1989), pp. 20-22.
6. John Menadue, 'Taking Advantage of the Earth's Most Vulnerable', *The Canberra Times* (22 July 2002), p. 11.
7. Dr Michael Wooldridge, 'Speech at Launch of GPs Manual on Refugee Health and General Practice', 20 August 1998.
8. *SBS Television News*, 26 August 2002. For further detail on the situation in Afghanistan, see Amin Saikal, 'Afghanistan After the Loya Jirga', *Survival* 44:3 (Autumn 2002), pp. 47-56; William Maley, 'The Reconstruction of Afghanistan', in *Worlds in Collision: Terror and the Future of Global Order*, ed. Ken Booth and Tim Dunne (London and New York: Palgrave Macmillan, 2002), pp. 184-193.
9. William Maley, 'Australia's Detention of Asian Refugees: No Rule of Law', *Policy* 9:3 (Spring 1993), pp. 53-54.
10. See Chandran Kukathas, David W. Lovell, and William Maley, *The Theory of Politics: An Australian Perspective* (Melbourne: Longman Cheshire, 1990), pp. 44-48.
11. [2001] FCA 535 (10 May 2001).
12. [2002] FCAFC 254 (21 August 2002).
13. Lord Hewart, *The New Despotism* (London: Ernest Benn, 1945), p. 76.
14. [2002] FCA 1022 (26 August 2002).
15. F.A. Hayek, *The Constitution of Liberty* (London: Routledge and Kegan Paul, 1960), pp. 107, 244.
16. Sir Karl Popper, *The Open Society and Its Enemies*, vol. II, (London: Routledge and Kegan Paul, 1966), p. 151.
17. Commonwealth of Australia, *House of Representatives Hansard* (9 February 1949), p. 68.