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Edited by Susan Kneebone
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REFUGEES, ASYLUM SEEKERS AND THE RULE OF LAW

The contributors to this volume examine how the legislative, executive and administrative arms of government have responded to issues concerning the rights and status of refugees and asylum seekers in five common law jurisdictions: the UK, Australia, Canada, the USA and New Zealand. Who and what determine the legislative agenda in this context? Is the legislative agenda driven by the legislators, or are the responses of the jurisdictions driven by the international context? We evaluate the responses from a human rights perspective and assess the integrity and coherency of legal responses as shown by their impact on the rule of law.

SUSAN KNEEBONE is a Professor of Law and a Deputy Director of the Castan Centre for Human Rights Law at the Faculty of Law, Monash University, Victoria, Australia.

REFUGEES, ASYLUM
SEEKERS AND
THE RULE OF LAW

Comparative Perspectives

Edited by
SUSAN KNEEBONE



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- *The Refugees Convention 50 Years On: Globalisation and International Law* (Ashgate, 2003)
- *New Regionalism and Asylum Seekers: Challenges Ahead* (with F. Rawlings-Sanaei; Berghahn, 2007).

Susan has twice been a Senior Visiting Research Fellow at the Refugee Studies Centre, Oxford (2003, 2006), and in 2006 was a visitor at the Centre for International Studies (CERIUM), University of Montreal. In May 2008, Susan organized a major international conference on 'Best Practices for Refugee Status Determination: Principles and Standards for State Responsibility' at Monash University Centre, Prato, Italy.

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FOREWORD

The ‘Rule of Law’ is a sophisticated constitutional principle, crucial in many countries to the proper demarcation of the roles of national parliaments, the judiciary, and the executive structures. It is also, more broadly, a notion at the heart of national debates around certain of the more complex, multilateral issues confronting our modern world – terrorism, transnational crime, irregular migration and asylum among them.

If its importance is undisputed, in the experience of the Office of the United Nations High Commissioner for Refugees (UNHCR) its nuances and permutations are nevertheless many. In some of the societies where we work, conflict or human rights violations have rendered the rule of law very relative, to a point where the machinery of protection and of justice have lost their legitimacy, if they continue to exist at all. The rule of law has painstakingly to be reconstructed, institution by institution, law by law, capacity by capacity. In certain other more developed societies, particularly where security is driving the operation of asylum systems, the rights of refugees are moving to the periphery of the rule of law notion. International law standards may be applied very inconsistently within and between countries; arbitrary detention, not subject to judicial review, is leaving many asylum seekers in a sort of legal limbo; and the world of borders can be particularly immune – with interception, turnarounds and *refoulement* taking place outside the frame of proper scrutiny. The rise of populism in some countries has proved to be a big obstacle for refugee protection to overcome, as it tends to go hand in hand with racist, anti-foreigner campaigns. These are contributing to the growth, in many parts of the world, of more intolerant societies, which in itself challenges basic law and order precepts.

Undeniably, the concerns for governments in managing their borders, in the face of a growth in transnational crime and illegal migration, as well as the threat of terrorist attacks, can be daunting. Making the right

and necessary distinctions is not always easy. UNHCR has long been involved in supporting the development of efficient and responsive asylum systems in many countries, as one additional contribution we can make to advancing the rule of law. Our offices provide governments with advice on new legislation. They visit reception and detention facilities, monitor access to asylum procedures at land, sea and air borders, and promote compliance with international and regional norms.

I welcome the choice of core topic for this publication, which is how to foster and maintain the integrity of modern asylum systems. The analyses in it will, I hope, assist us all in healing what in the following pages is elaborated upon as the general malaise of the rule of law when it comes to the protection of asylum seekers.

Erika Feller
Assistant High Commissioner –
Protection, UNHCR

PREFACE

This book arises from a project funded by the Australian Research Council entitled ‘The Asylum Seeker in the Legal System: A Comparative and Theoretical Study’. The purpose of this project is to conduct a comparative study of the responses of five national legal systems, including that of Australia, to the problem of reconciling the rights of asylum seekers with the ‘integrity’ of the rule of law. The overall aim is to conduct a theoretical inquiry into the normative principles or values underlying the five legal systems. The project’s specific aims are to identify:

- the responses of each of the three branches of government (the executive, the legislature and the judiciary) to the problem, and their relative significance as a response in each legal system, and comparatively;
- the significance of differences in the nature and structure of decision making at the administrative level in determining the response in each legal system;
- in this context, the differences in, and the significance of, constitutional and other legal guarantees of human rights in each legal system;
- the ‘community’ and its significance in determining the values that underpin the different legal systems.

The philosopher Ronald Dworkin’s ‘interpretive theory of integrity’ is used as a comparator and framework for analysis. In particular, the following issues are examined:

- Is there a coherent legislative principle? (Of what significance is the method and extent of incorporation of international law obligations into the legislation of the national legal system?)
- Of what significance are differences in the nature and structure of decision making at the administrative level?

- How integral is the adjudicative process? Of what significance are differences in the Constitution and the human rights framework for the adjudicative role? What values underpin judicial reasoning? Are the courts deferential to executive policy in their approach to refugee law?
- The community and its role. What is the relationship between the executive arm of government and refugee advocates, including non-governmental organizations (NGOs) in the formation of policy?

Initially, the participants in this project were asked to prepare written responses to the questions set out in the Appendix to this book. We then met at the Faculty of Law at the University of Montreal, Canada, in August 2006. The responses and the discussion at the Montreal round table were the basis of the proposal for this book. The original participants at this round table (in addition to me) were Rodger Haines QC, Colin Harvey, Stephen Legomsky and Audrey Macklin. The round table was generously hosted by François Crépeau of the Centre for International Studies (CERIUM), University of Montreal, who also arranged a follow-up open forum on *Refugees, Asylum Seekers and the Rule of Law* which involved a number of members of the NGO community and other academics and practitioners.

I organized a second meeting in Melbourne, Australia, in August 2007 attended by Rodger Haines QC and Stephen Legomsky in person, and Audrey Macklin by video link-up. This was also followed by an open round table on the 'Rule of Law' at which John Gibson, the Honourable Anthony North and Maria O'Sullivan participated, together with a number of members of the Refugee Review Tribunal, academics and practitioners.

I thank all participants at both meetings and follow-up forums in Montreal and Melbourne for the time and commitment they put into attending these meetings, and for their contributions to the project. Their ideas have contributed to the outcome – the current book. Although there have been some changes between the original participants and the final contributors to this book, it draws upon the summaries and comments provided at those initial meetings. In particular I thank those who have made written contributions to this volume.

I thank Audrey Macklin and Donald Galloway, who provided insightful comments on Chapter 1. I am particularly grateful to Maria O'Sullivan, who wrote Chapter 5, entitled 'The Intersection between the International, the Regional and the Domestic: Seeking Asylum in the UK' at

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short notice, and who has read and commented on the chapters I have written for this book. Maria has been a most supportive colleague on this project. I thank Robert Thomas and Gareth Morell, who read and commented upon Chapter 5 at short notice, and who provided detailed and helpful comments.

Various research assistants have helped at different stages of the project. In chronological order, they include Edwina Howell, Katie Mitchell, Stephanie Booker, Ellen Roberts, Bronwyn Polson and Madhavi Ligam. Extra special thanks are owed to Bronwyn Polson, who worked closely with me for several months overseeing the editing process with efficiency, calm and an unfailing sense of proportion and humour. Her assistance was invaluable.

I thank the Law Faculty at Monash University for granting me a period of study leave in 2006 to pursue this project, and the Refugee Studies Centre in Oxford where I was a Senior Visiting Research Fellow in October and November 2006, and where much of the thinking for this project took place.

I also thank Finola O'Sullivan at Cambridge University Press for her unflagging interest, support and encouragement for the book.

I thank my husband, Richard Kneebone, for his continual support and encouragement, and for assisting with the bibliography and in a myriad of other ways.

Finally, I express my thanks to the Australian Research Council for awarding me the grant which made this book possible.

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