Refugee Law after 9/11

Sanctuary and Security in Canada and the US

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Introduction: Refugee Law after 9/11: A Canada-US Comparison

In the days and years immediately following the September 11, 2001 (9/11), terrorist attacks on the United States, the mainstream wisdom, as Reg Whitaker has correctly noted, was that those tragic attacks changed everything and altered the world forever.[1] According to this view, the attacks triggered socio-political and legal rupture, a sharp departure from our social and legal "past," whatever that past was. While this view was, of course, not shared by every scholarly commentator and has since become less dominant, its resonance has not fully dissipated, necessitating the present inquiry. Does the available evidence of the responses of the Canadian and US refugee law regimes to the post-9/11 security vigil lend any significant weight to scholars (such as Whitaker, Kent Roach, and Reem Bahdi) who have suggested that 9/11 did not really change everything?[2] And given the lessons we ought to have learned from "earlier periods of panic ... and the cyclical process that swings along the security/humanitarian continuum,"[3] what are we to make of these post-9/11 refugee law developments in Canada and the United States?

To be sure, 9/11 did levy other kinds of important changes. It precipitated a renewed "war on terror," the overthrow of the Taliban regime in Afghanistan, a step-up in US interventionism in other countries, and the augmentation of the reconfiguration of government agendas/priorities in the United States and Canada.[4] The attacks of 9/11 also led

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to the invasion of Iraq (albeit on a false pretext),[5] and attracted renewed and even augmented interest in border/migration control.[6] Yet, one must keep in mind the fact that there is always "the danger of exaggerating" the extent and importance of these post-9/11 developments.[7]

Against this backdrop, the main purpose of this book is to determine *more precisely* the extent to which the heightened sense of security vulnerability that was produced by the 9/11 attacks did in fact trigger significant alterations in the refugee law regimes of Canada and the United States.[8] It is not, of course, in doubt that this heightened sense of vulnerability did trigger some changes to the form and content of the Canadian and US refugee law regimes.[9] The critical and challenging task is to map in as much detail as possible the extent of the alterations and stasis that may have occurred in this area of the law post-9/11.

Thus, on the broad level, the book is concerned with the relationship between refugee laws and national security – how such laws (mis)treat refugees under conditions of a felt national security emergency. More specifically, it is concerned with the relationship between a particular era of national security emergency (the post-9/11 era) and the law's (mis) treatment of refugees in Canada and the United States. This primary concern triggered two broadly related, if less central, conceptual preoccupations: 1) the precise extent to which a mentality styled "security relativism" helped shape the law's (mis)treatment of refugees in either Canada or the United States post-9/11; and 2) what the results of the first inquiry tell us about the cogency, coherence, and integrity of the dominant national self-images of both Canadians and Americans.

With this in mind, the book aims to do the following:

- Examine in a relatively comprehensive, more detailed, and systematic way the available legal evidence regarding the exact changes that were made or not made to refugee law in Canada and the United States after and/or because of 9/11. How precisely does each such change compare to the pre-9/11 refugee law regime in each country?
- Compare the post-9/11 refugee law regime in Canada (a country that was not directly attacked on 9/11) to the corresponding experience in the United States, which was directly targeted by those attacks.

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Has it been better or worse in either country, or have they been similar?

- Explain the logics behind the changes (or lack thereof) observed in refugee law in Canada and the United States after 9/11, as well as the reasons for any differences in the respective characteristics or orientations of the post-9/11 refugee law regimes.
- Explain the relationship between refugee law and national security in each of the two countries after, and because of, 9/11. Was it undergirded by a mentality of security relativism?
- Tease out the logical inferences that can be drawn from the foregoing analyses regarding the cogency, coherence, and integrity of the national self-images of the two countries.

It should be emphasized the last two goals are less crucial than the first three.

This book offers the first overarching and detailed treatment to date of the situation of refugee law in Canada and the United States after 9/11, compared to the pre-9/11 situation in both countries. It is also the first book-length comparative study of the Canadian and US experiences, and the first broad-based study to probe this deeply into two important conceptual linkages: 1) the link between the law's (mis)treatment of refugee rights in Canada and the United States post-9/11 and the mentality of security relativism, as well as 2) the cogency, coherence, and integrity of the national self-images of Americans and Canadians.

The analyses contained here do not, however, run the entire gamut of refugee law. While they do deal with almost all of the key topics and themes regarding the law's (mis)treatment of refugee rights in our time in the context of national security fears (i.e., deportations to torture, detentions, terrorism-related inadmissibility, and safe third-country regimes), they do not treat each and every such issue. For example, they do not deal with the issue of how the Canadian and US refugee resettlement programs were affected by the pronounced security anxieties caused by the 9/11 attacks.[10] Neither do they treat the issue of the extent to which these post-9/11 security considerations affected the numbers of refugee claims processed and/or accepted by each country.[11] It should also be noted that the book is not really focused on a discussion of either

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the mentality of security relativism or the question of the cogency of the national self-images of Canadians and Americans. Rather, the treatment of these two issues flows logically from the execution of the main task here – namely, a comparative analysis of the extent to which the heightened post-9/11 security vigil can be viewed as causing a transformation of the refugee law regimes of the two countries.

In the light of the foregoing discussion, it is clear that a number of concepts and expressions are central to the analyses conducted in this book: refugee law regime, "after 9/11," security relativism, and national self-image. These require explanation at this point, even if only briefly in some cases. First, as used in this book, the expression "refugee law regime" refers to the set of laws, policies, norms, and procedures that govern the enjoyment or denial of refuge rights in a given national jurisdiction. This term "regime" is used here the way it is typically used in international relations theory. For example, Stephen Krasner defines a regime as a set of "principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given issue area."[12]

Second, references in this book to "after 9/11" recognize that an event that was widely treated as exceptional and as causing a break in historical time occurred on that date, and that there is therefore in most of our minds a "before" and "after" in relation to that date. Nevertheless, it is still recognized that history hardly ever ruptures, that the "before" and "after" are almost always deeply connected, and that the "before" usually fades slowly into the "after."[13]

Third, since the concept of security relativism is discussed and defined in much greater detail in the Conclusion, suffice it to state here that

- [t]he term "security" within the expression "security relativism" refers to "national security."[14]
- [l]egally protected refugee rights would be viewed as having been treated in a security-relative way to the extent that they have been held to arise from, or have been viewed as determined by, or have been considered in some other sense to be dependent on security imperatives.[15]
- [a] useful distinction may be drawn between "strong" and "weak" security relativism.[16]

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Finally, as it is used in this book, the expression "national self-image" refers to the complex composite of images of themselves as a group that the citizens of a country, the members of that national community, possess. This kind of composite image is usually held in relation to a number of different things, such as humanitarianism and diversity, and dominant national self-images invariably coexist with alternative self-identities.

In furtherance of these goals, the relevant refugee law–related statutes, regulations, processes, and procedures from Canada and the United States, as well as the relevant hard and soft international legal texts (and, to a lesser extent, jurisprudence) were identified and analyzed. Many relevant practices were also examined either through the facts of cases or through other sources to back up and illustrate the legal analyses that are the focus of this book. Clearly, the primarily legal methodology that informs the discussion imposes some limitations on the scope of the "data" that it is based on. Yet, while the greater deployment of socio-legal methodology might have yielded additional insight, enough of this approach has been integrated into the analysis – as a backup – to ensure that any such difference (if any) would not be all that significant. This having been said, it should also be remembered that the methodology adopted in the Conclusion is socio-legal. The book is therefore only primarily, and not totally, based on legal methodology.

The choice of Canada and the United States as the jurisdictions of focus was primarily due to the fact that the latter was the country that was attacked on 9/11 and Canada is its closest neighbour. This close neighbour status is ascribed to the two countries not just because they share a very long border but also because of their relative historical, social, cultural, political, and legal affinity. The United States, of course, shares a long border with Mexico and is also deeply interconnected with it culturally (largely because of its very large Hispanic population), but the dominant populations in these two countries are clearly not as close as the majority populations in Canada and the United States are to each other. For example, while the United States is a common law country, Mexico is not.[17] Furthermore, even other common law countries are, overall, not as close to the United States in the stated terms as Canada is. This significant closeness in socio-legal and other areas renders the two jurisdictions significantly more comparable for

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present purposes than, say, the United States and Mexico are. It is no wonder, then, that as Kent Roach has noted, "there is a long tradition of comparative studies of the politics, laws, and institutions of Canada and the United States."[18] Primarily based as it is on the study of Canada and US refugee laws, this book is part of this long tradition of North American comparativism.

It should also be acknowledged that the book has benefited much from the broader scholarly literature sets on "9/11 and its aftermath," national security, anti-terrorism legislation, and human rights. In this more general context, the work of scholars such as Kent Roach and Craig Forcese, as well as the separate volumes edited by Ron Daniels and colleagues, and by Niklaus Steiner and colleagues, have all been very helpful.[19] The same can be said of the Canada-US comparative work that has been done in this connection by some of these same scholars. For example, Roach has done substantial work in comparing Canada's post-9/11 anti-terrorism laws and praxis to their US counterparts.[20] The book has also benefited to an even greater degree from the earlier work on the impact of national security and anti-terrorism legislation on refugee law/rights in Canada, the United States, and even globally by scholars such as Howard Adelman, Sharryn Aiken, Reem Bahdi, Muzaffar Chishti, David Cole, François Crépeau, Catherine Dauvergne, Joan Fitzpatrick, Regina Germain, Lawrence Lebowitz, Audrey Macklin, Ira Podheiser, and Reg Whitaker, and by eminent practitioners such as Volker Turk.[21] Nevertheless, systematic comparisons of the Canadian and US post-9/11 refugee law regimes have been quite rare. Reg Whitaker's early but shorter overview papers on this subject are one of the few exceptions.[22] And although focused more widely on four countries and limited to the indefinite detention area, Catherine Dauvergne's important contribution to this kind of comparative work also stands out in this respect.[23] Even rarer (if they exist at all) are book-length scholarly comparative analyses of the changes or lack thereof that were experienced post-9/11 in the Canadian and US refugee law regimes. It is against this backdrop that one of this book's contributions is to offer the first such work. The book also benefited from the earlier work of scholars such as Monica Juma and Peter Kagwanja, who have discussed the long-standing trend of sacrificing (refugee) rights at the altar of security;[24] as well as Catherine

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Dauvergne's work on the intimate connection between migration law and national identity.[25] The book attempts to builds on the insights found in these writings.

Chapters 1 through 4 offer systematic and comparative analyses of the extent of stasis and change post-9/11 in the four key Canadian-US refugee law subregimes focused on in this book. Each chapter also assesses the validity under international law of the post-9/11 legal and other measures taken by each of the two focus countries. Chapter 1 considers the deportation to torture of refugees and other non-citizens; Chapter 2 examines the detention of refugees; Chapter 3 considers the application of terrorism-related inadmissibility to refugees; and Chapter 4 analyzes the Canada-US third safe country subregime. The Conclusion offers an overarching analysis of 1) the extent to which the mentality of security relativism was at play in shaping the developments and positions observed in Chapters 1 through 4, and 2) what the analyses in the preceding chapters teach us about the cogency, coherence, and integrity of the Canadian and US national self-images.

On the whole, the book, which is current up to March 2019, attempts to show that in many more respects than not, the pre-9/11 versions of these regimes looked much like their post-9/11 versions, "only more so."[26] In most respects, refugee law post-9/11 was refugee law pre-9/11, 2.0. The underlying point the book seeks to make is that in both countries, *things were already so bad with refugee law before 9/11 that there was significantly less room than many have supposed for them to get all that much worse*. It should be emphasized, however, that the argument here is *not* at all that nothing changed for refugee law after 9/11. The book also attempts to show that while there were significant differences in the post-9/11 refugees and in Canada and the US (especially in terms of the scale of their responses), *for the most part* the refugee law regimes in the two jurisdictions reacted in strikingly similar ways to the heightened security vigil triggered by the 9/11 attacks. This is interesting, even if only somewhat understandable, given that, unlike the United States, Canada was not directly attacked on that day. These points, separately and collectively raise equally interesting questions about the extent to which the mentality of security relativism has shaped refugee law in

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both countries (and why), and the accuracy of the national self-images of Canadians and Americans.

It is hoped that this book will add significantly to the broader debates about the precise impact of the heightened security vigil triggered by the 9/11 attacks, on law, politics, and institutions, both around the world in general and in Canada and the United States in particular. It is also hoped that the book will contribute significantly to the more *intra*-disciplinary debates on the actual impact (or otherwise) of this augmented security vigil on refugee law in the two countries as well as the world over. Such a contribution inevitably feeds into the debates on the age-old (if unwarranted) association between refugees and threats to national security,[27] a phenomenon that has become even more pronounced in the age of Donald Trump.

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