

Books

MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR
MIGRATION AND LAW by Catherine Dauvergne (2008)

ALISON KESBY*

In *Making People Illegal*, Catherine Dauvergne presents a compelling analysis of the relationship between globalisation and illegal migration. As ‘the last bastion of sovereignty’ migration law serves as a key site for examining debates about globalisation. Dauvergne’s aim, however, is not only to explore the processes by which people are being made ‘illegal’, but also to identify progressive counter strategies. The book’s structure reveals the ambitious and impressive scope of the analysis: Dauvergne commences her investigation by examining the legally and politically charged term ‘illegal’ (ch 2). She then situates migration law within accounts of globalisation (ch 3). These framework chapters ground the analysis in the following four ‘sampling’ chapters (chs 4–7) examining refugee law, the trafficking and smuggling of human beings, security and citizenship. Each chapter explores a different way in which people are being made illegal and one aspect of ‘the story of law in globalizing times’ (p 3). Across the chapters it is argued that globalising forces are transforming sovereignty such that migration law is becoming the key site in which sovereignty is being defended. Superficiality of analysis, however, is avoided through an approach of ‘core sampling’. For Dauvergne this means ‘drilling into each topic under consideration to extract a sample that in key ways reveals something about the whole’ (p 3). For example, she examines the intertwining of refugee law and illegal migration by focusing on the *Tampa* incident. Chapters 8 and 9 then examine sovereignty and law in a ‘global era’.

‘No one is illegal’ has become a manifesto of groups advocating a world without borders, and in chapter 1, Dauvergne examines the rhetorical and analytical function of the label ‘illegal’. While it is difficult to provide a precise definition of the term, it has emerged as a ‘globally meaningful identity label’ (p 18). At one level ‘illegal’ points to an identity constructed in relation to the law, signifying ‘legal transgression’ (p 19). However, it exceeds this minimal definition serving, for example, to distinguish between insiders and outsiders whether within the borders of the state or at a global level. Dauvergne also shows how illegality is constructed, but rarely remedied, through the law. The exclusionary function of ‘illegality’ is so effective that those labelled as illegals scarcely have human rights. Even migrant-specific rights such as those contained in the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* accord greater weight to state sovereignty than to the rights of illegal migrants, thereby pointing to the reciprocal relationship of sovereignty and illegality.

* Junior Research Fellow, St John’s College, Cambridge.

This intertwining of sovereignty and illegality is to be explained in terms of the changes accompanying globalisation. In chapter 3, Dauvergne argues that migration law is an ideal context for examining the nature of globalisation. To illustrate this, she explores two relationships — between globalisation and the law, and between the nation and migration — arguing that migration law is located at their intersection. In examining how law is to be conceptualised within globalisation, Dauvergne draws on the work of Boaventura de Sousa Santos and Peter Fitzpatrick. Santos poses the challenge of the law's emancipatory potential: can migration law be 'unhinged from the state and yet remain law-like'? (p 37). 'Is there an alternative between withdrawing altogether from law, on the one hand, and endlessly reifying nation and its sovereignty on the other?' (p 37). As will be discussed further below, Dauvergne's tentative answer centres on the notion of the 'rule of law'. Fitzpatrick's work points to the possibility of 'a thick version of the rule of law overlapping the boundaries of national legal systems' (p 40).

Refugee law, as the prime constraint on state sovereignty in the migration context, serves as the logical point of departure for Dauvergne's 'sampling' chapters. With the global crackdown on illegal migration, international refugee law is becoming intertwined with illegal migration such that asylum is becoming 'illegal'. Refugee law also reveals the paradoxical nature of globalisation. At the same time as states are resiling from their obligations under the Refugee Convention, human rights norms are expanding. Dauvergne argues that this tension may open a space for new avenues of advocacy and emancipatory change not least through the rule of law. Rule of law arguments — in particular procedural rights — create a space in which other rights can be asserted. Moreover, as courts come to treat refugee law as 'rule of law' and 'reac[h] for a rule of law beyond their own borders' (p 67) the law becomes 'unhinged' from the nation. She discerns a similar potential for the rule of law in the migration-security context (ch 6). Recent cases on the indefinite detention of foreign terrorist suspects suggest the rule of law may counter an exceptionalist politics of security: migration law may shift from being a tool of unchecked executive discretion defining the limits of the community to one in which the law is separated from the nation. When we turn to human trafficking (ch 5), however, the emancipatory potential of the law is obscured. Here the language of victimhood prevails over illegality as human trafficking forms part of the 'globalized moral panic about illegal migration' (p 70). The final core sampling chapter (ch 7) examines how citizenship law works in tandem with migration law to create 'the border of the nation' (p 119): citizenship law completes the exclusionary filtering function of migration law. It also reveals the paradoxes of globalisation: increased inclusion and exclusion. Contrast, for example, the denial of citizenship to illegal migrants with the rise in dual citizenship. Dauvergne's analysis counters claims that citizenship is being 'denationalized'. Citizenship as a formal legal status is gaining importance in part in response to asserted globalising trends such as the invocation of human rights norms as a basis of entitlement.

In the penultimate chapter, Dauvergne examines migration law trends in the European Union and the United States — two powers central to accounts of globalisation — arguing that they demonstrate that sovereignty is being 'recast' in terms of control over population movements. It is to 'sovereignty and the rule of law in global times' that Dauvergne turns in the final chapter. Here a more in-depth analysis is provided for the argument that in the migration context, a potentially emancipatory rule of law unhinged from the law of the nation is emerging. Unlike

human rights arguments which have proved weak for those 'without a legal right to be present' (p 184), a 'robust' rule of law may 'embod[y] standards of treatment for those who come before it that are distinct from rights claims but that protect individual interests' (p 183). The 'norms' of the rule of law could derive their legitimacy from an 'ethical community' 'formed by values of equality, freedom, and impartiality rather than people' (p 185). Such a community would examine what it means for the law to behave as it 'ought'. This may even extend beyond the context of illegal migration to a global concept of the rule of law grounded in 'a global ethical community of the law' (p 189). These remain tentative and ambitious proposals. However, it is clear that for Dauvergne a decentering of sovereignty is required if we are to think progressively about illegal migration and enact change.

Making People Illegal is essential reading for those seeking to understand migration, law and sovereignty and test accounts of globalisation. Clearly, these issues are relevant to many jurisdictions, but may also have particular resonance in Australia, especially in the context of the renewed debate on 'illegal' boat arrivals and asylum seekers. A key strength of the analysis lies in Dauvergne's approach of drawing connections between topics often examined in isolation. This results in nuanced analysis tracing complex relationships beyond the scope of most treatments of either migration law or globalisation. While the paradoxes of globalisation are frequently noted, Dauvergne brings them to light in all their complexity. Nevertheless, whether migration law is the last, as opposed to a key, bastion of sovereignty, remains unclear. The analysis is also engaging as it seeks to identify emancipatory potential within the law. A difficulty for the reader, however, lies in fully grasping the 'robust' rule of law Dauvergne is advocating. Understandably, the cases she examines merely foreshadow and cannot capture her intent. She admits, for example, that some are not 'enormous victories' (p 180). Much seems to depend on the emergence of an 'ethical community' beyond the nation. Leaving aside questions as to whether any such community could be a legitimate source of rule of law norms, the question of the faith being invested in the 'rule of law' remains. However conceived, the rule of law cannot eradicate exclusion from the law. Ultimately, Dauvergne's insightful analysis challenges us to continue the debate and the reconceptualisation of the law she has begun.