Book Reviews

Refugee Law's Fact-Finding Crisis: Truth, Risk, and the Wrong Mistake

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Hilary Evans Cameron
Cambridge University Press, 2018, pp. 219

> To make nothing but positive decisions, or nothing but negative decisions, all he needs is uncertainty – which, in a refugee hearing, is not hard to come by. (p. 41)

In a period when forced migration rates are unparalleled, Cameron's book is a timely account of how "the hole" in refugee law's foundation may destabilize refugee protection endeavours across the world. *Refugee Law's Fact-Finding Crisis: Truth, Risk, and the Wrong Mistake* is less focused on individual decision-makers themselves (i.e., Immigration and Refugee Board members and federal court judges), and more on the law that governs their decision-making. The book proposes a model to prevent decision-makers from making the worst mistake—denying a genuine refugee recognition. This innovative approach, which is based on risk assessments that resolve doubt in the claimant's favour, will lend itself useful to any refugee determination system.

The Wrong Mistake: The Role of Error Preference in the Law

In refugee determination hearings, Cameron asks, which mistake is the worst to make? Is it the one that will cause the most harm, or the one that the institution of law prefers? In Part 1, Cameron sets the context for her study by analyzing the role of refugee law's fact-finding structures (i.e., standard of proof, burden of proof, evidentiary burden, and legal burden). She specifically demonstrates how these fact-finding structures allow decision-makers to shift their doubt into findings of fact. Cameron's analysis of criminal and civil legal systems shows which types of error the law prefers. However, in Canada's refugee law, the court (i.e., Federal Court of Canada) fails to demonstrate a consistent preference, fluctuating between erring in the claimant's favour or against. Such a discretionary stance allows decision-makers to come to either a positive or negative decision when presented with the same evidence. Cameron employs a psychology-based theory of risk premised on the conceptual themes of "salience" and "framing" (i.e., certain kinds of harm will resonate with some people more than others, since people tend to overemphasize different types of information in their minds) to investigate how decision-makers respond when presented with identical risks. As decision-makers fear certain harms more than others, salience and framing ultimately influence their error preference. Cameron explores how refugee law frames a problem, and, in turn, she presents why the law may prefer certain errors over others (i.e., denying a "genuine" refugee claimant recognition with a negative decision vs. recognizing a "fraudulent" refugee claimant with a positive decision).

Refugee Law Through the Lens of Error Preference

Cameron analyzes the judgments of decision-makers who find themselves at either end of the spectrum in instances of great uncertainty—those who resolve doubt in the claimant's favour and those who resolve doubt against the claimant, eschewing court judgments that fall on the middle ground. Cameron analyzes particular judgments that more clearly illustrate the court's perspective on error preference. If a judge can uphold only tribunal determinations that are deemed reasonable, and the court itself has two completely different perspectives on what reasonable fact-finding is, then the refugee determination system is "vulnerable to influence and abuse" (p. 41). Cameron analyses dozens of judgments where the court had found that the Immigration and Refugee Board of Canada had assessed evidence unfairly in denying a refu-

gee claimant recognition. The court warned that genuine refugees may encounter dire circumstances when board members make erroneous decisions, which may occur from their rigid application of procedures or the dismissal of claimants' vulnerability. In one example, a board member chose to make a personal judgment of a claimant's mental health, despite a psychiatric report that warned that formal questioning could trigger PTSD, and irrespective of the fact that the claimant needed to be taken to the hospital during the hearing as a result of breathing difficulties from crying (see *Kuta v Canada*, 2009). Cameron also reviews instances where the court prefers to resolve doubt in the claimant's favour, demonstrating a concern for the potential harm a mistaken rejection may cause in instances of uncertainty. In these cases, the court reiterates that while the burden of proof rests predominantly with the claimant, the decision-maker must also share that burden. Here the court has a low threshold of risk, ultimately tasked with determining if a claimant faces "more than a mere possibility" (p. 87) of harm.

Cameron also documents judgments in which the court resolves uncertainty and doubt against the claimant, helping the board avoid the mistake of granting an unfounded claim. In these judgments, the court finds that refugee law is not different from other areas of law and demonstrates a preference of resolving doubt against claimants, treating them like any other type of litigant. Cameron suggests that the court's judgments here are guided by the comfort and the familiarity of traditional civil proceedings, where judgments that resolve doubt in the claimant's favour are governed by risk assessments. Finally, Cameron analyzes the law's fact-finding structure to help illustrate how Canada's refugee law allows the board in instances of doubt to "reach whichever conclusion they prefer for whatever reason they want" (p. 160).

A Way Forward: Resolving Doubt in the Claimant's Favour

The most compelling part of Cameron's work is her proposed solution. What should reasonable fact-finding look like when the court is of two minds on the matter? Cameron draws from British and Australian judgments (see *Karanakaran v Secretary of the Home Department*, 2000) to develop what she terms the Karanakaran approach. This method would require that decision-makers undertake a risk assessment by using abductive reasoning (as opposed to deductive or inductive reasoning), which in instances of great uncertainty could pass as one of the most effective ways to assess risk. With abductive reasoning, decision-makers are required to identify and contemplate counter-theories of explanations. The Karanakaran approach further requires decision-makers to carry all their doubts into the final stages of decision-making (as opposed to dropping them earlier on), enabling a rather global assessment of evidence. This approach would also require decision-makers to resolve doubt in the claimant's favour, as denying a genuine convention refugee recognition would be the more harmful mistake to make.

Cameron's book is impressive in its own right in the sheer quantity of court judgments that were reviewed, but also in her ability to explain administrative law concepts clearly to readers from non-legal backgrounds. While Cameron provides detailed and concrete legal solutions for legal scholars and administrative stakeholders alike, this work does not engage with the critical socio-legal theories of discretion. Considering that discretion is such a large theme woven throughout her text, it would have been helpful, from a socio-legal perspective, to engage with a broader theoretical analysis of discretion that goes beyond a simplistic law-discretion binary. Nonetheless, Cameron's research would make a great companion to coursework on topics of forced migration, as it is highly relevant to cross-disciplinary scholars interested in refugee determination systems in the Global North.

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