

SUMMARY

of: “The Plight of the Unauthorized Stayer. Faith-Based Organisations and local Governments Challenge the State’s Legal Monopoly over Migration”

PhD dissertation by Dario Džananović

In this study, I compare the role of Christian faith-based organizations (FBOs) in migration in the United States and the Netherlands. More specifically, I examine FBOs’ assistance efforts to people without authorized residence status in the two countries. Since the end of World War II, FBOs have been instrumental in assisting migrants at various junctures of their journeys. In the post-war era, their efforts were largely concentrated on assisting migrants with resettlement. In more recent decades, however, the efforts have shifted from resettlement assistance. Beginning in the early 1980s, Central Americans from certain countries were systemically denied asylum in the United States. In fact, many did not even apply for asylum because they knew such an effort would have been futile. Finding the federal government’s immigration policy unjust, churches organized a response. The response became known as the Sanctuary Movement. At its core, the Sanctuary Movement was a concerted effort to assist people who were not welcome by the American immigration authorities. In this dissertation, I refer to such people as unauthorized stayers: people who do not have, or no longer have, the authorities’ blessing to remain in the country. FBOs’ assistance efforts ranged from providing shelter, to finding employment, to connecting people with legal advice. The movement that was started by the faith community did not operate in a vacuum, and was soon joined by local governments, universities, and other institutions sympathetic to the cause. The movement has waxed and waned over the years, due to geopolitical developments, but has seen a resurgence in the latter half of the 2010s when Donald Trump was elected president and vowed to deport unauthorized stayers. Nowadays, the tensions are primarily between FBOs and subfederal governments on the one hand, and the federal government on the other hand.

Though the Netherlands did not experience an *en masse* church asylum movement, it certainly did see a powerful response on the part of FBOs when the central government introduced restrictive immigration measures around the turn of the century. In 1998 and 2001, two cornerstone pieces of legislation were passed aimed at keeping unauthorized stayers out. The former, known as the Linking Act, disallowed most types of government aid to unauthorized stayers. The latter (Aliens Act 2000) would end government accommodation for an asylum seeker four weeks after his or her application for asylum was denied. Before these changes were even implemented, churches had already planned a response to organize shelters for unauthorized stayers who would soon be rendered homeless. Recognizing the threat to public order, health, and safety that destitution would bring about, municipalities quickly became involved in funding shelters that were run in conjunction with, and primarily by, the churches that had had experience in assisting asylum seekers for years. Thus, here too, the tension became one between FBOs and municipalities on the one hand, and the central government on the other.

It has become clear that due in large part to trends toward restrictive immigration policies in both countries, FBOs have been stepping in to fill the gaps left by such measures. But why? This is explored in Part One, which comprises Chapters 2, 3, and 4. American FBOs’ motivations in assisting unauthorized stayers are dealt with in Chapter 2. Dutch FBOs’ motivations are dealt with in Chapter 3. Chapter 4 compares the American and Dutch motivations, and discusses their implications on church-state relations. Even in the initial phases of the research, it became clear

that FBOs do not function in a vacuum. As mentioned, there is a close link between FBOs and local governments in both countries. Thus, these governments' motivations are explored in Part Two. Part Two comprises Chapters 5, 6, and 7. Subfederal governments' motivations and tensions with the federal government are dealt with in Chapter 5. Dutch municipal governments' motivations and tensions with the central government are dealt with in Chapter 6. Chapter 7 compares the two cases, with particular attention paid to the role of FBOs within the local-central tensions. Finally, Part Three comprises Chapter 8. In Part Three, I draw conclusions and offer a new framework of resolving the tensions described in Parts Two and Three.

From the outset, the assumption was that scripture likely play a role in the motivations of FBOs. Thus, before delving into the research of Chapter 2, I examined how migration and migrants are dealt with in the Christian biblical canon. I organized the discussion into three themes: equality, solidarity, and liberty. I chose these themes because they appear in Article 1 of the 1948 Universal Declaration of Human Rights, to which both countries of this study are signatories. In the Old Testament, the term *ger* appears at least 92 times. *Ger* is the closest approximation to the modern concept of the immigrant. The principle of equality can be found in many national and international documents relevant to both the American and European context, though both the US and EU continue to differentiate between citizens and non-citizens. The solidarity instruction is perhaps most succinctly captured by *Matthew 25*'s famous line: "I was a stranger and you welcomed me." Finally, liberty is exemplified by the very life of Christianity's habitual migrant Jesus Christ. There is also a basis for church asylum to be found in the Old Testament, which crates temporary places of refuge for those accused of murder. It is worth noting that there is a minority of scholarship that argues for a nuanced interpretation of these instructions, differentiating between the *ger* and *nekhar*. However, most scholarship argues against this approach, citing a lack of historical foundation. Tensions arise when the state enacts a law that curtails the faithful's ability to carry out the instructions discussed above, such as *Matthew 25*. Then the question becomes "do I follow my faith, or do I follow my state?" There is further guidance provided by *Romans 13*, which requires submission to governing authorities. However, this scriptural consideration is only one relevant factor. The next chapters explore other relevant considerations.

Chapter 2 opens with a discussion on church asylum in the United States. It is discussed through the lens of the Sanctuary Movement, which is dealt with in greater detail here. The central question of this chapter is: what are the motivations and limitations that explain why faith-based organizations assist unauthorized stayers? In the American context, I identify three motivations and two limitations which inform a faith-based organization's decision to assist unauthorized stayers. FBOs were motivated by scripture, government accountability, and confrontation. Scripture is self-explanatory. With government accountability, I refer to a collective sentiment felt by an FBO's members that the government is not abiding by a variety of domestic and international laws, and should be held accountable for its actions. With confrontation, I refer to any communication that brings the person of faith closer to the plight of unauthorized stayers. This includes, first-person meetings with unauthorized stayers, hearing stories about unauthorized stayers' experiences, and biblical teachings retold during weekly worship services in church. These motivations can also be viewed as relevant normative considerations. In other words, *should* an FBO engage in this type of work. FBOs were limited by resources and organizational structure. These can be viewed as practical considerations: *can* this type of work be done? None of the motivations or limitations function in a vacuum; they must be considered holistically. They are

interdependent. The results of the research conducted for this chapter have revealed that scripture is just one relevant consideration in an FBO's decision to assist unauthorized stayers.

Chapter 3 discusses the Dutch situation. The central question of this chapter is: what are the motivations and limitations that explain why faith-based organizations assist unauthorized stayers? First, I provide an overview of FBO involvement in migration, particularly asylum, from the late 1970s through the late 2010s. I pay particular attention to the efforts of FBOs beginning around the turn of the millennium, when significant changes to asylum law left failed asylum applicants destitute. In the Dutch context, I identify three motivations and three limitations that inform FBOs' decisions to assist unauthorized stayers. One new limitation emerges in this chapter that was not present in the interviews conducted with representatives of American faith-based organizations. This limitation is the unauthorized stayer's religious conviction. A number of FBOs' representatives interviewed for this chapter stated that, for one reason or another, they help only those unauthorized stayers who were already Christian or wished to convert. As in the American chapter, the interdependence of the motivations and limitations is an important aspect to consider in answering the research question.

Chapter 4 compares the American and Dutch cases to draw broader implications regarding church-state relations. In this chapter, I look at the broader implications of the motivations and limitations that were revealed in the previous two chapters. I discuss their bearing on church-state relations and the related principle of separation of church and state. Drawing on the research data, I explain how existing models of church-state relations could be improved. First, I posit that there is a utility in the disaggregation of "church" and "state". Rather than thinking of these two as conglomerations, a closer look at the many and varied constituent parts of each paints a more accurate picture of the relationship. Second, existing models do not take into account the dynamic nature of church-state relations. The relationship between church and state is rather fluid, and evolves in response to certain stimuli. These stimuli can be understood through the lens of the motivations and limitations described in Chapters 2 and 3. The vast majority of said motivations and limitations overlapped between the two countries, and help explain why and when FBOs may become involved in the assistance of unauthorized stayers.

Part Two examines another set of actors relevant in the assistance efforts and tensions. These are the subfederal and municipal governments in the United States and the Netherlands, respectively. Almost immediately after the Sanctuary Movement began in the early 1980s, subfederal governments in the US began to support the efforts of FBOs. Since the early 1980s, more and more subfederal governments have aligned themselves with the Sanctuary Movement. This eventually led to the ongoing legal battle that dominated the courts beginning in 2017. In the Netherlands, municipal governments became involved in assistance efforts at the turn of the millennium, also shortly after the faith community became involved. The goal of Part Two is to identify the arguments used by these governments to justify their positions and efforts. It also pays attention to the role of faith-based organizations in this context. Part Two comprises three chapters. Chapter 5 examines the American case, Chapter 6 examines the Dutch case, and Chapter 7 compares and analysis the two cases.

Chapter 5 addresses the following central question: why do subfederal governments become involved in the assistance of unauthorized stayers? Before answering that question, it is

necessary to understand the basics of immigration and governance in the United States. Thus, the chapter starts with a brief discussion on these topics before turning to the development of the conflict between subfederal governments and the federal government. The conflict is traced through 2017, when the defunding litigation began to dominate the legal immigration debate. Defunding litigation refers to the cases resulting from the federal government's threats to withhold funding from sanctuary jurisdictions. The first set of arguments I analyze are taken directly from the parties' arguments in the sanctuary jurisdiction litigation. The arguments, at their core, are grounded in federalism principles and the separation of powers. Thus, the vast majority are largely procedural rather than substantive in nature. The second set of arguments were gleaned from existing literature that analyzed sanctuary jurisdiction's policies. These documents, on the other hand, included more substantive arguments. For instance, equal protection, community trust, and public safety were often cited in subfederal documents to support the concept of sanctuary jurisdictions. At the end of the chapter, I question whether there is a better framework to resolving the issues in court that also takes into account arguments of a substantive nature (such as those found in policy documents).

Chapter 6 addresses the same question as Chapter 5, but in the Dutch context. That is: why do municipal governments become involved in the assistance of unauthorized stayers? In structure, it is also similar. First, I provide an overview of the basics of immigration and governance in the Netherlands. This is useful in understanding the municipal-central divide that I discuss in the following section. Because there has been considerably less litigation concerning the issues stemming from this divide, this chapter relies less on legal decisions and more on existing literature. I discuss one especially important case in detail as I provide an overview of the municipal central divide over the past two decades. This is the *CEC v. the Netherlands* case, also known as the BBB (bed, bath, bread) decision. Following this overview, I discuss the arguments that have been used by municipalities and their representatives to justify their decisions to provide unauthorized stayers with minimum care, despite the central government's position strongly against this. I also pay attention to the arguments advanced by people who have published in Christian academic journals in this arena (unauthorized immigration) to explore how these compare to the arguments used by municipal representatives. While the arguments in the Dutch context could perhaps be seen as leaning more substantive than in the American context, there is still room for improvement under a new framework of resolving the tensions described herein.

In Chapter 7, I compare the findings from chapters 5 and 6. First, I compare the roles that have been assumed by subfederal and municipal governments, and then examine the roles that faith-based organizations have played in the context of the intragovernmental tension. Faith-based organizations act as catalysts and implementers of assistance efforts, as well as liaisons between the faith community and the broader legal order. I then compare the arguments that are used by the governments in the conflict, referencing also arguments of faith-based organizations insofar as they are relevant to this intragovernmental conflict. I distinguish between arguments of a substantive nature and arguments of a jurisdictional nature. The findings suggest that there is a difference between having legal competence to govern a field (in this case immigration), and in practice governing the field. In other words, other actors besides the federal and central government play a substantial role in the actual governance of immigration. The subfederal and municipal governments are two types of actors in a broader network that works together to provide assistance.

Part Three comprises Chapter 8. In Chapter 8, I draw broader conclusions about the findings of Parts Two and Three, and offer a new approach to resolving the tensions analyzed in those parts. Many of the FBOs' motivations and subfederal/municipal governments' arguments identified earlier in the thesis are grounded in the fundamental three principles discussed at the beginning of Part One: equality, solidarity, and liberty. Though both sets of actors – FBOs and subfederal/municipal governments – are irregular actors in the field of immigration from a legal perspective, they are far from infrequent or inconsequential. They tend to become involved in assistance efforts when there is a substantial threat to fundamental human rights. Moreover, Christianity's prominence is visible in both countries, as even governmental actors rely on religious teaching to support their efforts. Assistance can be perhaps best understood as a network process involving many different types of actors.

As mentioned earlier, the framework of resolution for the tensions between the faith community and the state tend to take into account mostly procedural arguments, especially in the American context. At the end of Chapter 8, I explore the possibility of another approach that adopts a broader reading of the First Amendment free exercise clause, which allows the decision-maker to apply a broader set of factors in determining which side should prevail in a free exercise case. Adopting such a test could ameliorate the deficiencies inherent in a religion-only protection understanding of the First Amendment.