

Morality and law in the context of asylum claims

Anthony Good
University of Edinburgh

Morals in the Moral Panic

ESRC Seminar Series, Glasgow Caledonian University

16 May 2014

Abstract: The 1951 Refugee Convention arose out of a recognition of the special moral claims of refugees as persons suffering persecution because of their beliefs or ethnicity. Yet in asylum-granting countries a countervailing moral panic focusing on ‘bogus asylum seekers’ reached its peak in the early 2000s. To what extent do legal procedures for granting or withholding refugee status reflect either of these moral pressures? More broadly, what are the links between asylum, law, and morality in common-law countries like the UK?

* * *

[slide 1] The 1951 Refugee Convention is often depicted as a recognition of the special moral claims of refugees, as persons suffering persecution because of their beliefs or ethnicity, and British politicians are fond of extolling our ‘proud tradition’ of welcoming refugees. In fact, however, it has been argued that the purpose of the Convention is rather different, and that its continued observance despite perceived popular antipathy towards asylum seekers, is a paradoxical confirmation of the legitimacy of immigration controls more generally in a modern liberal democracy. In short, there is an irreconcilable tension between the need for liberal democracies to portray themselves as representing shared communities with common values, including recognition of basic human rights (such as the right not to suffer persecution); and the discretionary right assumed by all modern states, of deciding who can enter and reside in their territory. **[slide 2]** This accounts for what Matthew Gibney (2014) terms the ‘schizophrenic response’ of European states, whereby they ‘continue to embrace asylum but spurn the asylum seeker’.

In his introduction to the third edition of *Folk devils and moral panics*, Stanley Cohen looks back at further examples of ‘moral panics’ that arose in the 30 years following the first appearance of his book; one of these examples is the case of refugees and asylum seekers. Cohen (2002: vii-viii) characterises such panics as focused on issues that are actually new forms of older worries and concerns. In these terms, the asylum panic is clearly a particular manifestation of a long-running, perhaps eternal, fear of strangers or outsiders. Indeed, British government policy displays both the classic responses to outsiders identified by Zygmunt Bauman (1995: 2) **[slide 3]**. ‘Anthropophagy’ – ‘devouring’ strangers and ‘metaphorically transforming them into a tissue indistinguishable from one’s own’ – is clearly evident in recent Home Office requirements that would-be citizens should first display mastery of British culture and language. At the same time ‘anthropoemy’, ‘vomiting’ out strangers and ‘banishing them from the limits of the orderly world’, is exemplified by the increasing use of detention and suggestions that asylum applicants be marooned on remote islands.

The form taken by public concern on asylum displays differences from that in most other moral panics, however. First, as Cohen himself notes, it has been long drawn-out rather than focused on ‘specific newsworthy episodes’ (for example, in the ‘deliberate and ugly... campaign of vilification’ performed by the *Daily Mail*) (2002: xxiii). One might say that this is a rare example of a moral panic that is chronic rather than acute in nature. Second, it is more directly political; the main political parties have ‘not only led and legitimated public hostility, but spoken with a voice indistinguishable from the tabloid press’ (*ibid.*). Third, as

pointed out by Finney and Peach (2004: 22) in their study of public attitudes carried out for the Commission for Racial Equality, there are marked differences between people's views on asylum (and, indeed, on immigration generally) in the abstract, and their responses at a personal level, when the asylum seekers are their neighbours or fellow parents at their children's school. In this latter context, empathy and tolerance become far more evident (Finney 2004; D'Onofrio & Monk 2004). For instance, the report by Aileen Barclay, Alison Bowes, et al (2004) on asylum seekers in Scotland refers several times to the 'reservoir of goodwill' among host communities in Glasgow.

Finally, Welch and Schuster note that British and American attitudes to asylum seekers correspond broadly to what Cohen (2002: xxviii) calls noisy and quiet constructions of moral panic, respectively. The popular stereotype of the 'bogus asylum seeker' is, they point out, far more evident in Britain than in the USA, where the perceived threat posed by immigration – insofar as it is seen as threatening at all – relates more to notions of terrorism than to economics and is 'quietly contained within government agencies and not a publicly shared construction' (Welch & Schuster 2005: 407).

Law, morality, and culture: professional discourses

With or without such caveats, Cohen's characterisation of public and media attitudes towards asylum seekers in terms of the language of 'moral panic' has frequently been echoed by other writers over the past decade (see, for example Finney 2004; Robinson *et al* 2003; Welch & Schuster 2005), to the extent that describing asylum in this way now risks becoming virtually a dead metaphor that has lost much of its explanatory power. In any case, given the theme of today's seminar it seems potentially more productive to approach the link between refugees and morality in a slightly different way. As invited, I shall try to focus on the moral aspects of this particular panic, looking particularly at the administrative and legal processes through which asylum seekers attempt to obtain recognition of their status as refugees. This requires us to look more broadly at the relationships between law and morality, as seen by both legal professionals and lay litigants.

(i) Professional discourses

Is law a distinct, autonomous domain, or is it embedded in the broader moral discourses and cultures of the societies within which it is located; if so, to what degree? Law is clearly culturally embedded to the extent of being normative, but is it *moral*? Answers to this question vary according to context. For simplicity, I discuss only cases where decisions are made by judges or judges and assessors, rather than by lay juries. This limitation is appropriate anyway in the present context, because this is what happens in asylum appeals in both common-law and continental courts.

The American legal anthropologist Lawrence Rosen, studying *qadi* courts in Morocco, [slide 4] which specialise in family law and inheritance but in theory have jurisdiction in criminal cases too, takes a cultural approach to law, resembling Clifford Geertz' attitude to religion. Rosen argues that law, like religion, serves as 'a kind of metasystem which creates order in a universe that is often experienced in a more disorderly way' (1989: 17). He recognises, however, that his approach is only partly applicable to western common law systems since whereas 'law and morality are seen as entirely consonant' in Islamic legal systems, there is in western law 'a fundamentally problematic aspect' to this relationship. For these *qadi* courts, he says, 'culture is not outside of the law but integral to it', whereas western common-law judges, as Rosen puts it in a later publication, 'are not supposed to bring their own moral values into their decisions' (2006: 26).

In common law countries, [slide 5] as the American legal anthropologists Conley & O'Barr point out, 'the dominant view in both the teaching and practice of law [is] that most cases

are decided by a *value-neutral* process of rule selection and application' (1990b: 60; my italics). Students are required to concentrate on 'the structures of text and authority that give legal opinions power', rather than the 'attendant moral and social contexts' (Mertz 2002). If common-law judges are to appeal to moral propositions, Rosen explains, 'their views may have to be couched indirectly... through a claim that they accord with such deep, shared sentiments of society as to be almost invisible in the process' (2006: 27). In brief, legal ethics can be seen as Kantian, as deontological rather than consequentialist in approach; that is, virtue consists in taking decisions in closest possible adherence to the rules rather than decisions that lead to the most desirable or most useful (utilitarianism) outcomes.

Although common law rules out judicial appeals to public morality, it does place limits on the extent to which legal decision making can *depart* from the moral standards of society at large [slide 6]. These limits are encapsulated in the notion of 'Wednesbury unreasonableness' (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223). For example, Home Office caseworkers were told in their office manual that they should only consider appealing court decisions if there were strong grounds for thinking that the judge had made a legal error or that the decision was 'Wednesbury unreasonable', glossed as 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person ... could have arrived at it' (IND 2002: ¶14.1, Annex A).

Common law, then, addresses matters relating to public order (*ordre public*) rather than matters of morality (*bonnes moeurs*) [slide 7]. Seen in that way (though not all legal scholars do), common law systems appear almost as the antithesis of the Moroccan courts studied by Rosen. In these terms, too, continental code-based legal systems can be seen as occupying a middle-ground between these two positions. German law, for example, uses the term '*gute Sitten*' – 'good morals' or 'good manners' – which is understood to encompass both public order and morality (Alexidze 1981: 239). As Rosen puts it, German judges are 'personally authorised to look for "good moral precepts"' (2006: 27).

French law also deals more directly with personal morality through the notion of the 'intimate conviction' (*intime conviction*) required of judges when coming to their decisions. [slide 8] Whereas British and American judges are enjoined to decide cases by weighing the evidence and seeing whether the appropriate standard of proof has been met – 'beyond reasonable doubt' in criminal cases, according to 'the balance of probabilities' in civil courts, and to 'a reasonable degree of likelihood' in asylum cases – French judges must examine their consciences and reach decisions according to their 'innermost conviction'. Clearly, such a requirement offers far greater scope for judges to draw on their personal moral convictions and broader societal moral codes. As Christoph Engel puts it, 'On the continent, proof is understood as the strictly subjective impression in the judge's mind. By contrast, in [common] law, proof is an objective concept' (2008: 2).

(ii) *Lay discourses: 'legal consciousness'*

I now turn from the approaches to law as taught in law schools and internalised by legal professionals, to what Sally Merry terms 'legal consciousness' (1990: 5) [slide 9], that is, the understandings of the legal system displayed by members of the public who come intermittently into contact with it. For example, the American legal anthropologists Conley and O'Barr (1990) have carried out detailed ethnographic studies of language use in small claims courts and magistrates' courts in the United States, in which litigants generally present their own cases rather than hiring lawyers. Their key finding is that the ways in which lay persons present their problems to the court, lie along a continuum. At one extreme, some adopt a *rule-oriented* approach, whereby they identify their problems with reference to specific laws, local bye-laws, rules or regulations that have allegedly been

violated. This is likely to be quite a successful strategy because their perspective chimes with that of legal professionals themselves. There is thus a good chance that people who present their problems in this way will be fully understood.

At the other extreme, the *relational orientation* is characterised by a ‘fuzzier’ definition of issues whereby rights and responsibilities are predicated on ‘a broad notion of social interdependence rather than on the application of rules’ (1990: 61); their testimony ‘contains frequent references to ... items which are significant to [their personal] social situation but are irrelevant to the court’s more limited and rule-centered agenda’. Lawyers tend to view the testimonies of relationally-oriented litigants as illogical and unstructured. In reality, the problem is that the folk model underlying their arguments conforms to a logic so different from that of the legal system as to be largely incomprehensible to those trained in formal legal analysis. It is fundamentally a moral discourse. Consequently, the courts ‘often fail to understand their cases, regardless of their legal merits’ (1990: 61).

So this seems to be another example of the deontological/ consequentialist distinction, but this time as poles of a continuum rather than distinct or mutually exclusive stances.

Sally Merry herself, in her work on lower courts in the USA (1990), focuses on the role of court officials rather than litigants themselves, and identifies three types of legal discourse rather than Conley and O’Barr’s bipolar continuum. These discourses are, respectively, legal, moral and therapeutic. She shows how court officials, knowing from bitter experience how messy cases involving close relatives or neighbours – what they term among themselves, ‘rubbish cases’ – usually become when treated according to strict legal procedures, do their best to persuade would-be litigants that their problem is not a legal one at all, but results from a failure of inter-personal relations, to be resolved through mediation or counselling. Clearly, many aspiring litigants are open to such a re-framing of their problems; after all, Merry’s ‘moral discourse’, being ‘a discourse of relationships, of moral obligations’ (1990: 113), is clearly very similar to Conley & O’Barr’s relational orientation; that is, many litigants, when presenting their own cases in court, adopt precisely this form of discourse. It is worth noting, though, that court officials themselves are assuming a clear distinction between law and morality, whereby moral issues are ‘deemed trivial in a legal sense, though important in terms of... interpersonal relationships’; according to the gate-keepers to the American legal system, then, problems of inter-personal morality ‘are not suited for the court’ (Merry 1992: 224)

Morality and refugee status determinations

Despite what was said earlier about the impropriety in principle of common law judges appealing to general, non-legal moral precepts, asylum decision-making lends itself to the making of such judgments in practice, because of the central role played by credibility. Most asylum seekers, because of the circumstances under which they fled from their countries of origin, are unable to support their claims to the extent normally expected in a court of law. Typically, they cannot call witnesses or produce documents and the only evidence that have is their personal history, their individual narrative of persecution.

It is therefore one of the core tasks of an immigration judge to make findings on the credibility of each episode in the asylum applicant’s story, and Muller-Hoff (2001) [slide 10] notes that such credibility decisions may provide scope for judicial decision-makers

make normative statements outside the scope of law, to set morality standards and to enforce policy decisions and to give them the authority of legal ‘knowledge’, thus, disguising their subjectivity and challengability [sic].

Unlike most legal processes, which are concerned with attributing blame or responsibility

for past events, asylum decisions are future oriented. It is the risk that the asylum seeker might suffer persecution on return that is crucial, given the ban on *refoulement* imposed by the Refugee Convention. Although it is generally necessary in practice for asylum seekers to demonstrate that they have experienced persecution in the past, this serves merely as a proxy indicator of future risk. Given the importance of the notion of ‘risk on return’ in asylum decision-making, it is worth noting that the very extensive broader discourse on risk is entirely ignored in legal reasoning. While this lacuna is striking, it is not at all surprising, given the prevalence of solipsism in legal thought.

Stanley Cohen himself [slide 11] in the introduction to his third edition, lists notions of risk as one of the ways in which moral panic theory has had to be extended since being initially formulated. Building on Ulrich Beck’s (1992) notion of ‘risk society’, Cohen adds that:

The global scope of the risk society, its self reflective quality and its pervasiveness create a new backdrop for standard moral panics (2002: xxxi).

There are of course different ways of understanding risk, and Sheila Jasanoff (1993) has drawn attention to two broad ‘risk cultures’ that can be distinguished analytically. ‘Artefact risk’ approaches assume that the risks are ‘objectively knowable’ (Kemshall 2003:49), while ‘constructivist’ approaches see risks as socially constructed. Virtually all academic writers on the topic are constructivists at least to the limited extent of recognising that the term ‘risk’ itself has undergone historical evolution, but the approaches of the courts, in keeping with the naive empiricism of legal processes generally, are firmly artifactual.

Douglas and Wildavsky (1982: 5) adopted the fairly strong constructivist position that choices between risky alternatives (let us say, the risk that asylum applicants suffer persecution on return, versus the risk of undermining immigration policy by allowing them to remain) are always political, cultural, and indeed moral decisions, because they require a degree of consensus over the relative desirability of possible outcomes. It follows that no absolute or objective risk calculations are possible, since the knowledge of the actuarial sciences, too, is socially constructed. This does not of course mean that risks are not real: as Douglas herself later clarify clarified, the argument ‘is not about the reality of the dangers, but about how they are politicised’ (1992: 29).

In asylum appeals, [slide 12] multiple associations between risk, morality, and otherness are in play. There is (1) the asylum applicant’s claimed fear of mistreatment by the dominant ‘other’ if forced to return; most Sri Lankan Tamils, for instance, fear detention and torture by the security forces of the Sinhalese-dominated state, or, in the past, the forced conscription and violent suppression of political dissent practised by the LTTE. Moreover, applicants themselves risk a more radical, double, ‘othering’ by those in power, whereby they are stigmatised as (2) ‘terrorists’ or ‘deviants’ by their state of origin, and as (3) ‘bogus welfare scroungers’ by political, media, and public in their would-be country of refuge.

Judges are avowedly concerned only with risk in the first two contexts: information on the first helps them identify the nature of the appellant’s fear, while expert evidence on the second helps them assess whether that fear is ‘well-founded’. The third type of risk, the stigmatisation of applicants as dangerous outsiders to British society, ostensibly plays no part in their decisions except in those rare cases where such dangers are deemed severe enough to bring into play Article 1F(b), the Convention’s ‘exclusion clause’.

In a recent article based on fieldwork in the French asylum courts, [slide 13] Didier Fassin and Carolina Kobelinsky (2012) analyse court procedures in terms of the notion of a ‘moral

economy'. Whereas E.P. Thompson applied this term to the exchange of material goods and services, they use it in a broader sense, to designate the allocation of rights and responsibilities that are becoming increasingly scarce – because in France, as in the UK, the increase in numbers of asylum applicants has been more than matched by the decreasing percentage of applicants who succeed in their claims.

This moral economy, they say, is characterised by three fundamental moral dimensions, all of which display internal paradoxes. The most basic of these concerns the right to asylum itself: the paradox here is that, given the prevailing political context, the court's decisions simultaneously promote the concept of asylum while making it ever more difficult to achieve in practice – a version of Matthew Gibney's point mentioned earlier. The second moral dimension reflects the notions of justice held by judges and other court officials. Justice is seen by them in terms of both accuracy – that is, the courts decision should accurately reflect the situation of the account; and fairness – that is, there should be no discrepancies between the decisions of different courts and different judges when confronted with similar cases. The third and final moral dimension concerns the judges' personal emotional responses to the applicants appearing before them, and the stories that they tell. These responses are usually negative: French judges typically hear thirteen appeals one after another in a single day, and frequently make audible derogatory comments along the lines of 'we have heard this story 10 times already'. Occasionally, however, their emotional response is positive: either in court, or during their deliberations afterwards, the judges express empathy, respect, or even admiration towards an applicant who in their opinion embodies the ideal qualities of a persecuted political refugee (Kobelinsky, in press).

While this final aspect might seem more likely under the French system than in a common-law jurisdiction like the UK, the broad conclusions drawn by Fassin and Kobelinsky seem applicable here too. They argue that the paradoxical nature of these moral dimensions is not formulated as such by the legal actors in the process, who tend to focus more on ethical than on moral issues. I use ethics in the sense of a set of rules generally associated, as here, with a specific professional identity or a particular institutional context, whereas morality relates to fundamental principles of right and wrong, operating primarily at a personal level.

What is more, and it is here that I think the analysis applies to the British courts too, the ethical concerns of the immigration judges are Kantian in form. As postulated earlier, asylum courts do indeed seem to operate on the basis of deontological rather than consequentialist or utilitarian ethics; that is, justice consists in taking decisions that are demonstrably in accordance with the rules rather than decisions leading to the most desirable or most useful outcomes. Such a response is particularly understandable given the peculiar difficulties of asylum decision-making – the dearth of evidence; the focus on possible futures – as well as the potentially extreme consequences of getting it wrong, of sending this particular appellant back to face torture or even death. I suspect, though, that it is also true to at least some degree of all forms of legal decision-making.

It is certainly the case, from my own experience of doing field research in the British asylum courts, that some judges experience moral qualms; they worry about the consequences of their decisions for particular appellants. Knowing my own status as a 'country expert' witness in Sri Lankan asylum appeals, these judges would tell me about some particularly tricky Sri Lankan case they had recently had to deal with, and ask me, 'do you think I did the right thing?' Needless to say I was never able to supply this moral reassurance, partly because I had not seen the actual case documents. but more basically because outcomes are no more predictable for experts than for judges. How much easier, one imagines, is the sleep of those other judges seemingly untroubled by such moral doubts,

who are able, as Fassin and Kobelinsky put it ‘to substitute their deontological concern, that is to say, their consciousness of duty done’ (2012: 685).

Bibliography

- Alexidze, Levan A. (1981). ‘Legal nature of *jus cogens* in contemporary international law.’ *Academie de Droit International. Recueil Des Cours, Collected Courses* 172: 219-70.
- Barclay, Aileen, Alison Bowes, Iain Ferguson, Duncan Sim, Maggie Valenti, Soraya Fard & Sherry MacIntosh (2003). *Asylum seekers in Scotland*. Edinburgh: Scottish Executive Social Research. www.scotland.gov.uk/library5/social/asis-00.asp; accessed 5 May 2014.
- Bauman, Zygmunt (1995). ‘Making and unmaking of strangers’, *Thesis Eleven* 43: 1–16.
- Beck, Ulrich (1992). *Risk Society: Towards a New Modernity*. London: Sage.
- Cohen, Stanley (2002). *Folk devils and moral panics: the creation of the mods and rockers*. (3rd edition). London & New York: Routledge.
- Conley, John M., & William M. O’Barr (1990). *Rules versus Relationships: the Ethnography of Legal Discourse*. Chicago: University Press.
- D’Onofrio, Lisa, & Karen Munk (2004). *Understanding the stranger. Final report*. London: ICAR. <http://www.icar.org.uk/pdf/uts003.pdf>; accessed 5 May 2014.
- Douglas, Mary (1992). *Risk and Blame: Essays in Cultural Theory*, London: Routledge.
- & Aaron Wildavsky (1982). *Risk and Culture*. Berkeley: University of California Press.
- Engel, Christoph (2008}. ‘Preponderance of the evidence versus *intime conviction*. A behavioural perspective on a conflict between American and Continental European law.’ *Preprints of the Max Planck Institute for Research on Collective Goods*, 2008/33. http://www.coll.mpg.de/pdf_dat/2008_33online.pdf; accessed 6 January 2014.
- Fassin, Didier & Carolina Kobelinsky (2012). ‘Comment on juge l’asile: l’institution comme agent moral.’ *Revue française de sociologie* 53(4): 657-88.
- Finney, Nissa (2004). *Asylum seeker dispersal: Public attitudes and press portrayals around the UK*. PhD thesis, University of Wales Swansea.
- Finney, Nissa, & Esme Peach (2004). *Attitudes towards asylum seekers, refugees and other immigrants*. London: ICAR (http://www.icar.org.uk/asylum_icar_report.pdf; accessed 5 May 2014).
- Gibney, Matthew (2014). ‘Asylum: principled hypocrisy.’ In Anderson, B., and M. Keith (eds.) *Migration: A COMPAS Anthology*. COMPAS: Oxford.
- Immigration and Nationality Directorate (2002). *Asylum Policy Instructions*. London: Home Office. <http://www.ind.homeoffice.gov.uk/default.asp?PageId=711>; accessed 15 April 2002.
- Jasanoff, Sheila (1993). ‘Bridging the two cultures of risk analysis’, *Risk Analysis* 13(2): 123–9.
- Kemshall, Hazel (2003). *Understanding Risk in Criminal Justice*. Maidenhead: Open University Press.

- Kobelinsky, Carolina (in press). 'Emotions as evidence; hearings in the French asylum court.' In Daniela Berti, Anthony Good & Gilles Tarabout (eds), *Of Doubt and Proof: Ritual and Legal Practices of Judgment*. Farnham: Ashgate.
- Merry, Sally Engle (1990). *Getting justice and getting even: legal consciousness among working-class Americans*, Chicago: University Press.
- (1992). 'Culture, power, and the discourse of law.' *New York Law School Law Review* 37(1-2): 209-25.
- Mertz, Elizabeth (2002) 'Performing epistemology: notes on language, law school, and Yovel's legal-linguistic culture.' *Stanford Agora* 3.
www.law.stanford.edu/agora/volume2/mertz.shtml; accessed 29 December 2002.
- Muller-Hoff, Claudia (2001). 'Representations of refugee women: legal discourse in Europe.' *Law, Social Justice and Global Development Journal* 2001(1)
<http://elj.warwick.ac.uk/global/issue/2001-1/mullerhoff1.html>; accessed 30 January 2004.
- Robinson, Vaughan, Roger Andersson & Sako Musterd (2003) *Spreading the 'burden': a review of policies to disperse asylum seekers and refugees*. Bristol: Policy Press.
- Rosen, Lawrence (1989). *The anthropology of justice: law as culture in Islamic society*. Cambridge: University Press.
- (2006). *Law as culture: an invitation*. Princeton: University Press.
- Welch, Michael & Liza Schuster (2005). 'Detention of asylum seekers in the UK and USA: deciphering noisy and quiet constructions.' *Punishment & Society* 7(4); 397-417.