

OBJECT OR SUBJECT? THE ONGOING ‘OBJECTIFICATION’ OF ASYLUM SEEKERS¹

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Abstract. This article considers how over time asylum seekers have been ‘objectivised’ by the Convention relating to the Status of Refugees 1951. International law is predominantly instrumental in nature. Whilst it may often contain ethical aspects and sometimes be underpinned by liberal objectives, these are usually secondary in nature, with the purpose of regularising the relationship of states around some common aims usually being the paramount goal. In this way, the focus of international law often turns from the ethical components of the law to terms, procedures and mechanisms. This arguably applies to Convention relating to the Status of Refugees 1951. Whilst originally conceived for Second World War refugees, it placed at the pinnacle of its preamble the moral impulse, ‘...to assure refugees the widest possible exercise of these fundamental rights and freedoms...’ The Protocol relating to the Status of Refugees 1967 removed the temporal and other limitations, however, arguably this moral impulse has waned as the words of the 1951 Convention have been used to control asylum seekers. This article argues that this has objectivised asylum seekers.

Keywords: Dignity; Subject; Asylum; Objectification; Values

“We are so alike. Why are you here? We came here to give our child a better life. My husband said you’ll love it here, the people are so nice and everything is so cheap and it’ll be really exciting. And there’ll be so much freedom and choice, but it just meant freedom for them to mock us. Five years have passed and you realise you never really fitted in. Even though I could never really grasp your way of life, somehow it clings to my skin changing the simple things within, and returning home suddenly feels frightening...” (Khaou: 2007)

Introduction: The ‘Subject’ of/in Human Dignity

This piece is about the personhood and dignity of asylum seekers. It posits that there is a clear distinction between the notion of a ‘subject’ and ‘object’, and that some of the asylum provisions that have been adopted by contracting states under the Convention relating to the Status of Refugees 1951 (‘Refugee Convention’) have instrumentalised, or *objectivised*, asylum seekers, rather than affirming them as *subjects*. This rendering of asylum seekers into objects has enabled some states to control asylum seekers with stern provisions that have sometimes resulted in severe human rights violations.

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Concepts such as ‘dignity’ and ‘freedom’ have been looked at as inviolable. (Habermas: 2010) Indeed, they form the very basis of the nomenclature of contemporary human rights law and can be found in the preamble of most human rights instruments, such as the Universal Declaration of Human Rights 1948. However, whilst human dignity does exist, the matter is one of definition. What does human dignity consist of? Does it consist of a specific body of rights? How does one enforce dignity? Dignity is a comparative concept. It is this relativity that some would argue has generally affected the enforcement of human rights. (Buchanan: 2007) However, despite the nebulosity and difficulty of giving concreteness to concepts such as dignity and freedom, that they do inhere within human beings is something that most people would not argue with. For example, as Article 1 of the Universal Declaration of Human Rights 1948 makes very clear: ‘All human beings are born free and equal in dignity and rights.’

Article 1 of the Declaration actually goes much further than this. It adds, straight after the line in the preceding paragraph that ‘[human beings] are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’ This conjunction suggests a link between dignity and human rationality - that human beings undoubtedly have a strong sense of worth because of ‘conscience and reason’, amongst others things. (Gilbert: 2015)

As such, there is a tie between the notions of ‘dignity’, rationality and ‘subjecthood’. (Adorno: 2014) Human beings *have* dignity because they are thinking and rational *subjects* - and are capable of exercising reason, amongst various other human faculties - and allied to this, of course, is the wider existential notion of ‘freedom’. It is beyond the scope of this current paper to go deeper into the theoretical meaning of these concepts. Instead, the paper’s focus, at this stage, is just to emphasise some synergy between rationality, subjectivity and human dignity (McCrudden: 2008) – this is essentially what distinguishes a ‘subject’ from an ‘object’.

Here, dignity fulfills a special role in the enforcement of human rights too, whether it be interpretative or teleological amongst others, and enables us to understand the different rights contained in various human rights treaties, such as the right to life, right to respect for family life and freedom of expression. It allows for the protection of what it means to be a subject leading a life – a rational being ‘endowed with reason and conscience’ - and not merely an object as described above. This is, of course, not to say one is bound to accept everything that another person does! Acceptance that the other person *is* human and a subject does not necessarily equate to the acceptance of everything they say. (Levinas: 2005) But it does call for some prior form of special *recognition* and respect that they are human: the opposite is to render them into ‘objects’ and strip them of their very humanity.

1. The Objectification of Asylum Seekers: Turning those Seeking protection into Objects

However, the above does not always follow in the case of asylum seekers, or those fleeing persecution and seeking protection in another country under the Refugee Convention. In fact, the way in which contracting states implement the legal terms of the Refugee Convention renders asylum seekers into objects. The furor that sometimes accompanies the influx of large numbers of asylum seekers under the Convention, who are often just perceived as general migrants, creates a moral panic that leads to the creation of policy and enactment of domestic rules that often shrouds their humanity - facilitated by the fact that the Convention does not prescribe any legal provisions on how asylum seekers should be processed. (Thompson: 2005) Asylum seekers are perceived as an existential threat, a danger to housing, to education - an intimidating ‘statistic’ in the vast swathe of migration data and numbers that are compiled by a state.

It is true that the Refugee Convention does contain important legal provisions for the recognition and protection of refugees. Article 1 of the Convention contains an exhaustive definition of a refugee for the purposes of the treaty, made up of a synthesis of inclusion, cessation and exclusion clauses, and the rest of the treaty then contains a body of extremely important rights that are afforded to those who are recognised as refugees under Article 1. The most important right is without question the prohibition of expulsion or return in Article 33, which says ‘No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers

of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion' although this is limited in certain circumstances by the next subsection. But it is the absence of any clear legal definitions of the terms in the Convention that has sometimes enabled states to implement the Convention harshly. For example, Monette Zard found a restrictive correlation between the way in which the exclusion clauses in Article 1(f) of the Refugee Convention were implemented in the aftermath of 9/11 and terrorism. (Zard: 2002)

The same can also undoubtedly be said about the silence in the Convention of any legal procedures for processing asylum claims. States were reticent to accept any such limitations on their sovereign right to decide who enters their territory during the drafting of the Convention and as such, today, they largely decide such procedures for themselves, subject to the broad undertaking to cooperate with the Office of the United Nations High Commissioner for Refugees (UNHCR) under Article 35. But, as will be discussed below, because of the absence of clear procedures in the Convention, states have been able to invoke very restrictive measures to control asylum seekers into their territories. The same can be said of the failure to cooperate with UNHCR. (Zieck: 2009)

The reason for this is that positive international law is mainly instrumental in nature. Its primary aim is to normalise the relationship between states. What this means is that the emphasis is normally on the words of international law - and ethical concerns are sometimes pushed into the background and come second as states focus on the words and meaning of treaties. This has often been apparent with the Refugee Convention. Ethical concerns have sometimes been pushed to the background and dignity has suffered as asylum seekers have become the unfortunate victims of policy. Thereby, asylum seekers have been objectivised – sometimes as a mere number or statistic in some information-technology based system developed to make the asylum system run more smoothly. (This can be compared to Nussbaum: 1995)

This view that those seeking protection under the Refugee Convention have been rendered into objects, as opposed to *humans* 'endowed', as the 1948 Declaration says, 'with reason and conscience', adds light to and explains the very rigorous measures that have been introduced through time to manage and control asylum seekers, such as warehousing and detention, amongst others. This can be linked to what Margaret S Malloch and Elizabeth Stanley say: "While the use of detention may be seen as an attempt to deter 'undeserving' asylum seekers from seeking sanctuary in the UK, this article argues that this practice is in effect a fundamentally punitive method to assuage public fears concerning supposed risk and potential dangers to security." (Malloch and Stanley: 2005)

The *objectification*, or reduction of asylum seekers under the Refugee Convention into mere *objects*, as opposed to subjects with dignity with an existential notion of 'freedom' - runs antithetical to the objectives of the human rights movement that was instigated in the aftermath of the Second World War. While states, indeed, did not sacrifice their sovereign rights, and Article 2(1) of the Charter of the United Nations upholds the sovereignty of states, there was a clear acceptance on the part of states of the need to ensure that the horrors of the Second World War, when people were stripped of their humanity and subjectivity, did not occur again. As Matthew J. Gibney (2006), for example says: "Shamed by the experience of the Jews who failed to find protection from Nazi persecution in the 1930s, and desiring to reckon from rising numbers of people attempting to flee the Soviet bloc in the aftermath of the World War II, Western nations drafted and signed the United Nations Convention relating to the Status of Refugees in Geneva in 1951." (Gibney: 2006) This can be clearly related back to the view of dignity alluded to above, encapsulated in Article 1 of the 1948 Declaration, and also the preamble of the 1951 Convention itself: states signed and ratified the Refugee Convention clearly recognising that 'human beings shall enjoy fundamental rights and freedoms without discrimination'. The preamble of the 1951 Convention expressly says this.

However, what the enforcement of the Refugee Convention, particularly in recent times, has shown is that there has been a tremendous vacillation in the way in which asylum seekers have been treated. Objectification and

very reduction of the thinking and feeling subject to vitally a vanishing point because of the silences in the Refugee Convention, especially on the terms and procedures, have loomed large. Asylum seekers have been reduced to a threat, a danger and sometimes a merely figure. This will be explored further below with express reference to some of the terms of the 1951 Convention itself.

2. The Binary Nature of the Refugee Convention and Objectification of the Asylum Seeker

As mentioned, Article 1 of the Refugee Convention 1951 contains an intricate web of inclusion, cessation and exclusion clauses in defining when an asylum seeker can be recognised as a refugee. The crux of this defining article is undoubtedly its inclusion clause in Article 1(A)(2) which generally says a refugee is a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” The Refugee Convention 1951 was limited in time, however, its temporal – and geographical – limitations were removed by its Protocol in 1967, so that now it is an open-ended treaty.

The 1951 Convention is largely quiet on the procedures for recognising refugees. Many contracting states have their own domestic laws for the purposes of processing asylum claims. It is here that *objectification* occurs. While the Convention is generally silent on procedures, it does require the relevant agent of the contracting state who is assessing an asylum claim to ask themselves the question: ‘does this asylum seeker meet the definition of a refugee in Article 1 of the Refugee Convention’? This step that has the potential to objectify an asylum seeker unless it is done correctly. It is suggested that the drafters of the Convention never intended this definition to be applied *just instrumentally* - but also *normatively* having clear regards to the circumstances in which the Convention was drafted. This distinction is key - the former is likely to lead to the instrumentalisation, objectification and reduction of human subjectivity; while the latter its reinforcement. If the agent takes a purely formalistic, black-letter approach to the Refugee Convention, and under Article 1 focuses mainly on ‘can this asylum seeker prove they have a fear of persecution?’, ‘is there fear well-founded etc’ without affirming and recognising the personhood of an asylum seeker, then they risk objectifying the asylum seeker.

However, this is precisely what, as Gibney identifies above, the drafters of the Convention sought to mitigate against – the dehumanisation of asylum seekers. As Paul Statham (2003) further adds: ‘Traditionally, west European states had small-scale systems for granting asylum on an individual basis to people fleeing persecution. Embodied in the Geneva Convention of 1951, the rationale for such a system was a moral response to the collective failures of countries to provide refuge for Jews fleeing Nazi persecution before and during the Second World War.’ (Statham: 2003) The drafters of the Convention and the Refugee Protocol 1967 *intended*, whilst not solely, that the very humanity of the asylum seekers ought to be taken into consideration, quite prominently, in the assessment of asylum claims under the Convention - to reaffirm the close link between the notions of dignity and human rationality placed at the pinnacle of the Universal Declaration of Human Rights. Particularly, there was a strong urge after the Second World War to avert the very dehumanisation and objectification of persecuted people who had been treated as such during the War. However, today there is undoubtedly some dichotomy in the way in which the Refugee Convention 1951 is applied between the formalism of the law and its morality. This poses a very strong risk to the subjectivity of asylum seekers – and going back to what was mentioned above, this is largely because of the threats that states perceive they face. Asylum seekers face, day to day, being rendered further into objects.

This is principally a question of moral priorities. Those responsible for processing asylum claims are without question faced with a number of pressing concerns. They must take national, social and economic reasons into consideration. Indeed, as Faisal Al-Rfouh (2000), writes: ‘It is the fundamental, primary, and basic right of every state to have its national existence. The renowned jurist Fenwick has opined that the right of a nation to exist is also known in international law as the right of national security or self-defence or self-preservation.’ (Al-Rfouh:

2000) However, as stated above, the ‘acceptance that the other person *is* a human and a subject does not necessarily equate to the acceptance of everything they say.’ Instead, it is just important to identify, first and foremost, that the other is a human being endowed with dignity. But this is growing increasingly difficult in a world that is now becoming dominated by processes, statistics, systems and technology, which have the potential to reduce people even further. As Martin Buber put it from one view: ‘For a century man has moved ever deeper into a crisis which has much in common with others that we know from earlier history, but has one essential peculiarity. This concerns man’s relations to new things and connections, which have already arisen by his action or with his cooperation. I should like to call this peculiarity of the modern crisis man’s lagging behind his work.’ (Buber: 2002)

In these days, an asylum seeker under the Refugee Convention 1951 faces becoming objectified even more, or being perceived as an object first and a human endowed with reason and dignity second – a mere number in a system that is process-led. Arguably in this process a transfer occurs – the asylum seeker’s humanity is turned from the subject to some control-based system or technology that may one day be simply a computer algorithm. This is even more likely in an ever changing, globalising and technology-based world. As Michael Hardt and Antonio Negri say, for example, ‘Imperial command is exercised no longer through the disciplinary modalities of the modern state but rather through the modality of biopolitical control. These modalities have as their basis and their object a productive multitude that cannot be regimented or normalized, but must nonetheless be governed, even in its autonomy. The concept of the people no longer functions as an organized subject of the system of command, and consequently the identity of the people, is replaced by the mobility, the flexibility, and perpetual differentiation of the multitude.’ (Hardt and Negri: 2000) This has strong ontological ramifications too. What does it mean *to be* an asylum seeker today? *Is* an asylum seeker a human being, first and foremost - a subject, who is claiming protection on the basis of persecution under the Refugee Convention 1951 – or can they be regarded as a statistic? This has a large effect on extent to which they are recognised and afforded dignity.

3. Reconciling Competing Values: Sovereignty and the Need for Protection

However, the view that the personhood of the asylum seeker under the terms of the Refugee Convention is not always recognised, and that there is a tendency to objectify or instrumentalise them, is not new. As Gibney (2006), for instance, says: ‘When the 1951 Convention came into existence soon after the end of World War II, Western states had a relatively clear idea of who was a refugee and thus eligible to the entitlements of the Convention. The refugee that concerned the Western states were congruent (in large measure) with their foreign policy objectives. From the early 1950s to the mid 1970s the status of the refugee overlapped almost completely with that of the defector. Refugees were those that had fled communist states in Eastern and Central Europe.’ This dehumanisation of asylum seekers is something that we are witnessing across Europe today, despite the fact that persecuted people were treated similarly during the Second World War. There has been a tendency in some places to perceive asylum seekers as an inert, faceless risk that must be managed or controlled. This may explain why some states have built fences and other impediments to segment their entry. (Baczenska and Ledwith: 2016) An inherent recognition of their humanity, and the dignity that comes allied with it, would arguably not have merited such an austere measure - but another, more moderate approach.

A conflict of values arguably arises. As Kok-Chor Tan puts it: ‘The fact of state boundaries is often said to be an embarrassment for liberals. On the one hand, on one understanding of liberal egalitarian justice the idea of equal opportunity applies globally to all individuals regardless of nationality and citizenship. On the other hand, taking political boundaries seriously means to limit the ideal of equal opportunity to members within a state...’ (Tan: 2005) Further, going back to what Al-Rfouh said above, states have a right to defend themselves and their interests. (Coleman and Harding: 2007) Undoubtedly, this is the sine qua non of a territorial state with defined borders and certainly accords with the political and Westphalian nature of a state. (Gross: 1948) States have a sovereign right to defend their own interests and values. However, at the same time, human dignity is also a value that applies to all – and some states have undermined this in their implementation of the 1951 Convention by debilitating what it means to be human by rendering asylum seekers into ‘objects’.

Conclusions: Reaffirming the Subjectivity of Asylum Seekers

The instrumentalisation of asylum seekers in order to limit immigration, particularly today, does reveal a huge abrogation of the spirit in which the 1951 Convention was drafted. Whilst Chapter 1 of the UN Charter, for example, envisaged some balance between human rights principles and state interests, the human rights calls after the War also widely affirmed that human dignity needed to be safeguarded – and this was also carried through via the schemata of the Refugee Convention that sought to offer asylum to those who had fled persecution and met the other terms of Article 1 of the Refugee Convention. The Refugee Protocol 1967 prolonged this. However, as Gibney and others have identified, asylum seekers have sometimes been affected by states for their own reasons – and we are witnessing this today. Asylum seekers have been rendered into statistics and data, and also controlled through the erecting of fences and other measures for the purposes of limiting them. Such objectification and dehumanisation is still occurring and human subjectivity and the existential notion of ‘freedom’ continue to be denigrated - and so does the very notion of human dignity, intended to be protected by the Universal Declaration of Human Rights 1948. As Christina Boswell (1990) correctly points out: ‘the first way of transcending the assumed conflict between refugee rights and national interests is to encourage the development of group identities that incorporate a commitment to liberal Universalist values. In other words, the point would be to promote ways of linking desire for recognition with generous treatment of refugees.’ As mentioned, this is not the same thing as saying all asylum seekers should be accepted. However, in light of the terms and the clear absences in the Refugee Convention 1951, the mere fact that they are human and not objects should be at the forefront of every state’s mind. This is, after all, what was envisaged after the horrors of the Second World War.

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