

## Asylum: Principled Hypocrisy

Matthew Gibney

In January 2014, The Guardian newspaper reported that UK Border Agency (UKBA) staff received financial rewards for winning appeals against asylum seekers challenging negative decisions. This generated public controversy, because it suggested that the Home Office had a systematic bias against individuals being granted refugee status. No one who has followed asylum's travails in western states could have been surprised. Academics have long described a 'culture of disbelief' pervading the UK government's asylum decision-making processes, in which asylum claims are met with incredulity and cynicism. This culture seems merely an extension of the battery of measures and mechanisms – including visa regimes, carrier sanctions, and interdiction – that western states have put in place over the last three decades to stop forced migrants from places like Bosnia, Iraq, Afghanistan and Syria arriving to access asylum. If the UKBA's offer was remarkable, it was only as the *reductio ad absurdum* of states' current restrictive responses.

Yet for all this hostility to asylum seekers, no western state has publicly entertained the idea of doing away with the institution of asylum altogether. On the contrary, the UKBA website lauds Britain's 'proud tradition' of offering asylum for those who need it. Nor is Britain alone. The US, Australia, and Canada all claim to have similar admirable histories. Their claims are not entirely without substance. As restrictive measures have developed across Europe and North America, the legal grounds on which individuals can claim asylum have expanded significantly. Far from confining themselves simply to the 1951 Convention on Refugees, western countries now accept a range of human rights grounds as a basis for asylum, including the threat of torture and inhuman and degrading treatment. Moreover, EU countries granted refuge (or similar protection) to almost 80,000 people in 2011 alone. Even Australia, surely the cynosure for asylum restrictive practices, granted almost 14,000 refugee and humanitarian visas in 2009/10. What needs to be explained is why, in the midst of antipathy towards asylum seekers, the institution of asylum has not only survived, but expanded.

One possible answer is that the continued existence of asylum helps affirm the legitimacy of immigration controls. Fundamentally, asylum works as an exception – founded on conditions of necessity – to the normal rule that states have the right to decide who can enter and reside in their territory. As an exception, asylum supports the general rule of state discretion. Border controls are intuitively difficult to justify in a world of egregious

inequalities between states, where one's state of birth is likely to determine whether one lives to be 85 (Monaco's average life expectancy) or 47 (Sierra Leone's). Justification is harder still because the territorial boundaries of states are typically arbitrary, artefacts of power rather than right. The provision of asylum for those who would face death or persecution takes the edge off these harsh realities, and so helps affirm the legitimacy of a bounded world. In this view, the institution of asylum exists not to limit the prerogatives of states, but to validate them.

A somewhat different explanation for asylum's resilience is that it reinforces the state as community. Contemporary states do not portray themselves simply as random collections of people sharing a legal status, but as communities of value, who share some common principles that provide a reason for them living together. The construction of the state as a community facilitates effective rule and makes the division of the world's population into states appear less arbitrary. One obvious way of affirming such collective values is through *exclusion*. For example, the practice of deportation illustrates that certain non-citizens are not worthy of residence or membership in the state because, unlike honest, hard-working nationals, they are 'fraudsters', or 'takers'. But the significance of state membership can be affirmed equally well through *inclusion*. By offering asylum, a state can fashion a vision of its citizens as 'generous', 'rights-respecting', or 'sympathetic', thereby (re)constituting the idea of a national community. Once again, asylum is less about protecting the vulnerable than bolstering a bordered world.

Each of these explanations helps explain why states might need asylum even if they don't want asylum seekers. But there is another explanation for the current responses of western states, one that takes values seriously. This focuses on the fact that the states we are discussing are *liberal democratic* states.

Liberal democratic states are simultaneously legitimised through the values of *liberalism* (with its respect for the individual as the bearer of human rights) and *democracy* (with its animating ideal of collective self-rule). These values tend to pull in very different directions on the issue of asylum. On the one hand, respect for *human rights* demands the provision of asylum by the state, for if there are any human rights at all, the right to asylum (which ensures that individuals can meet their basic security needs) is surely one of them. On the other hand, this right is always potentially controversial in democratic political systems, where the *demos* (electorate)

are likely to judge the entrance of significant numbers of non-citizens in need as costly to their own interests (for example, in terms of the job market, housing, and public services). This is particularly true when political entrepreneurs (and sections of the media) whip up grievances and racist anxieties against newcomers.

The result is the schizophrenic response evident across western states, where the importance of the principle of asylum is not denied, but the costs of respecting it are resented by the public and often evaded by governments. This conflict is built into the institutional fabric of western states. Courts often find themselves as the defenders of asylum seekers' human rights because of their role in interpreting human rights law, while politicians – who claim to represent the demos – bitterly criticise judicial attempts to constrain their efforts to deter refugee claims. Some argue that this conflict is not inevitable. If it weren't for tabloid newspapers or cynical politicians, the public would accept the value of asylum, and the tension between what human rights require and what the demos

wants would evaporate. While there is no doubt that the media and some politicians make the environment more toxic, I believe that the tension is fundamental and close to irresolvable within the international state system as we know it (at least as long as it continues to generate huge numbers of people in need of protection). Ultimately, universalist claims to protection will make heavy demands on democratic communities, and these communities will want to resist them.

This leaves us with a question: how do we reconcile the moral claims of non-citizens in desperate need with a meaningful democratic politics, which requires some degree of closure and a privileging of the claims of insiders over outsiders? I don't know of any compelling answer to this question, though one can perhaps take heart from the fact that more people (including academics) are now thinking about it than ever before. In the meantime, the paradoxical response to asylum continues: states continue to embrace asylum but spurn the asylum seeker.

.....

