Summer 2006

Asylum Claims and the Translation of Culture into Politics

Gregor Noll

Asylum Claims and the Translation of Culture into Politics

GREGOR NOLL†

ABSTRACT

Since the early 1990s, we have witnessed how the system of asylum law reacts to the relativization of the nation-state in the global domain. The growing emphasis on cultural aspects in the conceptualization of "being persecuted" has stressed the dimension of positive obligations. This emphasis has widened the discretionary margin of decision makers. The substantive vacuum at the "human rights core" of the concept of "being persecuted" is a precondition for processes of acculturation through the asylum procedure. In asylum decisions, constructions of a particular cultural identity are cloaked in the universal language of human rights. A central role is played by the assessment of credibility of the applicant, which is modeled on the Christian practice of auricular confession. An applicant is credible where her "true identity" and that of the state of asylum correspond. Credibility assessments are but a reconfirmation of the identity of the asylum state and its protagonists.

SUMMARY

I. INTRODUCTION

This Article attempts to show that the emphasis on culture in the conceptualization of "being persecuted" has stressed the dimension of positive obligations and thereby widened the discretionary margin of decision makers in the asylum procedure. This emphasis enables them to uphold and reproduce constructions of a particular cultural identity through the universal language of human rights. Central to this process of acculturation is the assessment of credibility in the asylum procedure, which is modeled on the Christian practice of auricular confession.

† Associate Professor of International Law, Faculty of Law, Lund University, Sweden.

The argument is developed in three steps. Part II is devoted to the "culture turn" and tracks how the discourse on weak states concurrently amplifies the importance of culture and positive obligations in human rights law. Part III shows how this came to increase the degree of discretion in determining what constitutes persecution in refugee law. The exercise of such discretion, I argue, is based on cultural difference rather than on the formal framework of human rights law. Shifting perspective, Part IV focuses on credibility assessment in refugee status determination procedures, and argues that it should be seen as a process of acculturation, premised on the material emptiness of human rights law. Part V offers conclusions.

II. HUMAN RIGHTS, SOVEREIGNTY AND CULTURE

Human rights law lives off the state, in perpetration of violations as much as in protection from them. A strong state is a good counterpart for hard human rights arguments. A weak state's limited resources also limit the extent of its positive obligations to protect. This state-centricity of human rights law reemerges in the asylum discourse, where a classical trope is the strong perpetrator state repressing a deviant individual. As a matter of legal argument, an asylum claim in such cases is straightforward. The strong state would set aside its negative obligations under human rights law, by torturing one individual, denying another the practice of her religion, and so on. In some jurisdictions, this state-centricity grew into a full-blown legal doctrine, holding that only state or state-like actors could be agents of persecution under the Refugee Convention.[1] The image so conjured points to the totalitarian state. It is comfortable to handle for a lawyer. In a totalitarian state, any issue is by definition one for the *polis*. Any issue experienced by the individual as a violation will more easily turn into a human rights violation, and it will be comparatively straightforward to show its nexus to "political opinion," imputed or not. In a totalitarian context, "culture" is absorbed into the state, and hardly plays a role as a source of persecution.

Where states of origin are weak states, or even failed states, the image of the persecutor changes—so do the legal parameters of the asylum case, and so does the use of the "culture" argument. First, private persecutors are harder to capture in the language of human rights law. Although we see them covered by horizontal effects of human rights law, we need the state as a mediator for the force of norms. Doctrinally, it would be necessary to construct harm afflicted by a private party in such a way that it clearly comes within the purview of the weak state's positive obligations. For those believing that non-refoulement[2] hinges on the identification of human rights violations by a country of origin, this can be a problem, just because weak states have less extensive positive obligations under human rights law. This problem can be overcome by constructing non-refoulement

1. The German Federal Administrative Court [*Bundesverwaltungsgericht*] developed a doctrine making state responsibility for persecutory acts a prerequisite for a grant of protection as a refugee. See RALPH GÖBEL-ZIMMERMANN, ASYL-UND FLÜCHTLINGSRECHT 37–41 (1999), for an overview of pertinent case law. In 2004, this doctrine was changed in the course of a broader legislative reform, which ran in tandem with efforts to harmonize asylum law within the European Union: acts by non-state actors are explicitly included in the concept of persecution. Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern [Law on Control and Limitation of Immigration and on the Regulation of Presence and Integration of Union Citizens and Aliens], July 30, 2004, BGBl. 1 at 1950, § 60.1 (F.R.G.).

2. Refoulement refers to return or expulsion of refugees by the host state. Article 33 of the 1951 Refugee Convention provides that: "[n]o 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." United Nations Convention relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 150.

as a positive obligation of the asylum country and regulating its extent by the resourcefulness of the state of asylum. This construction (which is correct in my mind) bypasses the weakness of the country of origin, but it casts doubt on the conceptualization of persecution as a violation of core or basic human rights.[3] Second, private persecution always raises the question of whether the state of origin and its authorities are not the proper addressees of a protection claim, rather than the state of asylum. "Return to your home country and call on its institutions to help you" is what a rejection might say in such cases.

As long as the perspective on asylum claims focuses on the relation of the state and the individual, keeping with the traditional view of human rights law, this type of rejection is unsurprising. It bolsters the image of an international system of nation-states, and any fault of that system shall be primarily cast as one of state power wrongly used. Logically, any response will reproduce a call for more state power, or, put in an orthodox way, state power properly used.

To respond to the challenge of weak state and strong private actors in advocacy and the legal construction of claims, constructs of culture might appear helpful. Yet it is a double-edged sword. When the focus on a private agent of persecution individualizes and diminishes the threat, the focus on culture lets the threat appear omnipresent and impossible to control by the institutions in the source country. In that case, culture is a concept suggesting power *en par* with that of the state, yet diffusely located, removed from volition and unaffected by calls for institutional intervention or diplomatic demarches. This would suggest that asylum advocacy should embrace constructs of culture as the source of persecution to demonstrate ever more forcefully that there is little help to be expected from the state of origin.

There are downsides to this approach. The first is obvious. Weaving culture into the causality chain of persecution concurrently increases the divide between civilized countries of asylum and uncivilized countries of origin. It casts the North as rational and enlightened, while the South still has not come out of a state of nature. Second, where persecution is located in culture, it risks being essentialized together with it, and perceived as part of a sphere which is to be respected, just as states are to respect each other's sovereignty.[4] Unlike the case for state sovereignty, however, human rights arguments are not constructed to oppose culture, but rather to protect it.[5] Third, the culture argument can be used to support rejections as well. Where cultures are drawn up as powerful collective

3. An approach seeking to single out a range of human rights violations in order to define what "being persecuted" means is quite widespread in refugee law literature. The UNHCR Handbook states that "serious violations" of human rights other than the ones named in article 33 of the 1951 Refugee Convention would also constitute persecution. UNHCR, HANDBOOK ON PROCEDURES & CRITERIA FOR DETERMINING REFUGEE STATUS, para. 51, HCR/IP/4/Eng./REV.1 (Jan. 1992), http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PUBL&id=3d58e13b4). Hathaway suggests that persecution be defined "as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection." JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 104–05 (1991). This approach is often referred to in doctrine, and finds its way into doctrinal texts in languages other than English. *See, e.g.*, TERJE EINARSEN, RETTEN TILL VERN SOM FLYKTNING 297 (2000). Interestingly, one of the classical textbooks on refugee law carefully avoids a technical linkage between the persecution concept and the formalism of human rights law. *See* GUY GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 68–69 (1996).

4. Jacqueline Bhabha, *Internationalist Gatekeepers? The Tension Between Asylum Advocacy and Human Rights*, 15 HARV. HUM. RTS. J. 155 (2002).

5. Article 15 of the ICESCR protects a number of rights related to culture. *See* A. Eide, *Cultural Rights as Individual Human Rights*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS 281–301 (A. Eide et al. eds., 2001), for an overview of the protection of cultural rights in human rights law. Unsurprisingly, Eide concludes that "[t]he individual cultural rights can, to some extent, coincide with collective cultural rights, but may also represent a challenge to them." *Id.* at 300.

agents, they might as well protect as persecute. In rejecting an asylum claim based on sexual orientation, authorities may argue that a formal penalization of homosexuality is not likely to be enforced.[6] The idea is, again, that culture is stronger than the state. In all, invocations of culture as the source of persecution imply a risky gamble. The power of these invocations critically hinges on our assumptions of the power relationship between state and culture. These are rarely made explicit. However, as we will see later, they generate important repercussions in the practices of refugee status determination.

III. THE "CULTURE TURN" AND THE SHIFTING LOCATION OF PROTECTIVE OBLIGATIONS

Before looking into how this change of emphasis affects the asylum procedure, I would like to think a little further on what it means to be persecuted and who bears the ultimate responsibility to protect.

The axis of the argument developed here is the linkage between persecution and human rights. The shift from public to private described above took place in tandem with what could be described as an expansion of human rights. Treaties developed in the last decades of the Cold War entered into force, and ever more states signed and ratified them. If human rights norms multiplied, gained in precision and obliged ever more parties, would not also asylum obligations multiply, gain in precision and bind an ever larger group of states? Would the increasing codification of human rights norms imply more protection through asylum, where countries of origin default on their obligations? And, given the state of affairs in the world, would that not simply mean asylum to more applicants?

Yet, as is well established in refugee law, the concept of being persecuted in the refugee definition is not the equivalent of being exposed to *any* human rights violation. In one widely quoted reading, "'being persecuted' may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection."[7] However, the question of which human rights are basic enough to come within this definition cannot be answered by formal deduction. What is basic could be established in a substantive or procedural manner: to qualify, a human rights norm should belong to a class somehow "more important" than other human rights norms,[8] or, it should bind a minimum number of states.[9] Faced with the arbitrariness of selecting an appropriate standard, we realize that the very link between refugee law and human rights law is a frail one indeed. "Being persecuted" is but an empty signifier[10] and hinges on the subjective choice by doctrinal writers, judges and decision makers.

---

6. In one rejected claim, the applicant was reminded of the possibility to relocate to urban areas, where laws banning homosexuality would not be enforced. This decision contrasts the rural, as accomplice to retrogressive laws, and the urban, whose specific sexual culture is assumed to be above the law. Singh v. Minister for Immigration and Multicultural Affairs (2000) 178 A.L.R. 742.

7. Ward v. Attorney Gen. of Can. [1993] 2 S.C.R. 689, 709, 733–34. The source of this reading is Hathaway's formulation, as quoted *supra* note 3.

8. Inevitably, this implies the construction of a hierarchy within the body of human rights law. Suffice it to mention that this is a problematic endeavor in a system of norms which purports to be universal, indivisible, independent and interrelated.

9. What is the threshold for a human rights norm to qualify? A number of choices are conceivable: the norm must be universally valid as a matter of general international law; the norm must have been enshrined in the international bill of rights; or the norm must have been enshrined in a binding treaty that has entered into force. International lawyers lack a legal meta-criterion to govern their pick amongst the three options. Therefore, such choice is subjective.

10. In Laclau's discourse theory, a signifier is empty where it merely signposts the limits of discursive signification, and thereby an exclusionary limit. ERNESTO LACLAU, EMANCIPATION(S) 37 (1996). *See also*

It is precisely this emptiness that makes the concept of being persecuted so useful. It allows the decision maker to transform the subjective bias of a normative choice into the purportedly objective language of human rights. Here, we are merely interested in one single facet of this selection process—the interplay between negative and positive obligations. Even where it is clear that a certain human right is relevant to establish the content of persecution, nothing has been said about the extension of that right.

In the preceding section, we have opposed the strong, totalitarian state with the weak state, in which culture grows into a factor of power, capable of persecution. The weak state emerges as an accomplice rather than the instigator of persecution. We have also stated that this has effects on the formalities of human rights obligations. The strong state is associated with negative obligations, that is, obligations not to violate human rights, while the weak state is associated with positive obligations to prevent the violation through the private agents carrying out a repressive culture. This gradual shift—from the public, the political, and the negative obligation, to the private, the cultural and the positive obligation—concurrently weakens the linkage to what could be described as the "negative core" of human rights law. When establishing whether a certain risk can be subsumed under the concept of being persecuted, the decision maker enjoys much more leeway where positive obligations are the focus of analysis.

In the past two decades, the issue of gender and persecution has been one of the most noted arenas for this shift, joined by the issue of sexual orientation and persecution. These two categories have been central to the progressive agenda of refugee law at least since the early 1990s. It is hardly mere coincidence that the paradigm of the persecutor shifted from strong to weak states roughly at the same time. The discourse on gender and refugee protection pivoted on the opposition of the enlightened female individual with an alien and premodern culture, which the state of origin was unable or unwilling to control. The cultural element was apparently important to sever those cases which would be clearly worthy of refugee protection from those whose worth would be not so clear. Female genital mutilation (FGM) is not practiced by majority populations of states in the North. Therefore, it is comparatively easy to include the suppression of FGM amongst the positive obligations which a state has under international human rights law, in particular the right not to be treated inhumanely. There is hardly a risk that a state in the North will default on this particular obligation, so the grant of asylum or alternative forms of protection to a person at risk of being subjected to FGM upon return comes at no risk to the self-perception of the host state.

The converse is true for the case of domestic violence. At face value, domestic violence is as much borne out by a societal culture as female genital mutilation. Conceptually, it would not be a problem to subsume the latter under the former, and it is striking and illustrative that the two forms of harm have been put into separate boxes by the discourse on gender and persecution.[11] However, the issue of violence against women in

---

Ernesto Laclau, *Violence, Power, Democracy: Democracy and the Question of Power*, 8 CONSTELLATIONS 3–14 (2001) (discussing the relevance of empty signifiers for hegemonic relations).

11. Interestingly, FGM and domestic violence are treated under different headings in relevant UNHCR documents. *See* UNHCR, *Position Paper on Gender-Related Persecution*, (2000), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=3bd3f2b04 (denouncing FGM as a persecutory practice under the straightforward heading "A Law, Policy or Practice as Persecution," while domestic violence is relegated to a separate and much more doubt-ridden section on "Discrimination as Persecution—Denial of Justice"). This depicts the hesitant approach of the office vis-à-vis domestic violence throughout the 1990s. More recent documents show that this attitude has begun to change. For a much more outspoken view on domestic violence in the context of refugee status determination, see UNHCR, *Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention*

the privacy of family and partnership relations is a problem that is not particular to the South, but also haunts states in the North, many of which have proven unable to effectively counter their own cultures in this area. Here, the grant of protection would come at a considerable price. From the perspective of the restrictive governments in the North, the group of potential beneficiaries appears excessively large. And legally, the grant of asylum would imply that the protection of women from domestic violence is part of the positive obligations under human rights law which states in the North must also honor. Indeed, it is part of a core obligation—an obligation strong enough to come within the ambit of the persecution concept. Culturally, the difference between the enlightened urban North and the premodern rural South would break down, and the asylum procedure could no longer reproduce the identity of the host state. Therefore, applicants may be referred back to the protection of the institutions of her country of origin in cases of domestic violence. In doing so, the positive obligation has been displaced from the state to the individual. It is for the individual to ensure that the state protects her human rights, rather than for the state to ensure that the individual's human rights are respected by other individuals. The outcome is manifestly absurd. Under the logic of human rights law, it makes no sense to "oblige" an individual to protect herself.

This selectivity—female genital mutilation tends to be included, while domestic violence tends to be excluded—would not have been possible without the malleability of the concept of being persecuted and the shifting of positive obligations under human rights law. Cases on sexual orientation offer further illustrations. In a 2004 case from New Zealand, a homosexual Iranian was recognized as a refugee on the basis that he could not be expected to be "discreet" about his sexual orientation upon return to Iran, and that openness about it would evoke persecution.[12] The central question identified by the case is whether a person has to suppress a quality protected by a human right in order to enjoy the protection by human rights at large. This is as much a cultural as a legal opposition. Can the applicant be expected to compromise her personal identity to form part of the national cultural identity? Can the enjoyment of human rights at large be conditioned on the personal sacrifice of one component of a human right? In the quoted New Zealand case, the answer was a firm "no," and the Refugee Status Appeals Authority took great pains to justify its response as flowing from obligations under human rights law. At its core, however, this justification is tragically empty,[13] as there is no objective human rights gauge

---

and Response, ch. 8 (May 2003), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=3b9cc26c4.

12. N.Z. Refugee Status Appeals Auth., Case No. 74665/03, 7 July 2004, http://www.refugee.org.nz/Fulltext/74665-03.html.

13. *Id.* In an extraordinarily well-reasoned judgment, Judge Haines embarks on a comprehensive inquiry on whether discrimination due to sexual orientation equals "being persecuted" in the Convention sense, running for 90 of the judgment's 133 paragraphs. At paragraph 92, he concedes that "[s]exual orientation is not explicitly recognised or mentioned as a human rights category in any of the human rights instruments to which reference has been made." Therefore, he has to ground his approach in other human rights, such as those related to private life or nondiscrimination. He goes on to state:

> If the proposed action is at the core of the right and the restriction unlawful, we would agree that the claimant has no duty to avoid the harm by being discreet or by complying with the wishes of the persecutor. If, however, the proposed activity is at the margin of the protected interest, then persistence in the activity in the face of the threatened harm is not a situation of "being persecuted" for the purposes of the Refugee Convention. The individual can choose to carry out the intended conduct or to act "reasonably" or "discreetly" in order to avoid the threatened serious harm. None of these choices, however, engages the Refugee Convention.

Id. But how are we to separate the core of a protected interest from its margin? At this point, the judge engages in an exercise of discretion under the veil of human rights formalism. Therefore, it can hardly surprise us that there is

to identify exactly where protection obligations of a state end, and where those of the individual start. The answer could be just as well a "yes." In so doing, the positive obligation of human rights protection would be shifted from the collective to the individual.[14] The choice is not a legal one.

IV. ACCULTURATION THROUGH THE ASYLUM PROCEDURE

In the preceding two parts, I have argued that the emphasis on culture in the context of persecution has widened the margin of discretion in asylum cases by emphasizing the dimension of positive obligations. Decision makers were enabled to uphold constructions of cultural identity through the universal language of human rights, while making subjective choices on the extent of positive obligations under human rights law and the location of such obligations with the collective or the individual.

In this final part of the argument, I would like to abandon the macro perspective of the preceding sections and look into the asylum procedure proper. I believe that it is not neutral ground to juxtapose a "culture of persecution" with the state of asylum. Rather, the asylum procedure is a place of acculturation, where applicants, advocates, interpreters, case workers, and decision makers struggle to create culture. In a Weberian sense, they single out a finite excerpt from the totality of events in the world and accord it meaning and significance (and, one should add, at times they fail).

Why should lawyers be interested in this acculturation process? Because it is where the fate of their clients is decided. In the asylum procedure, credibility is produced, weighed, and considered. More often than not, it is the decisive element in asylum cases. And the production of credibility takes place precisely in the vacuum left by human rights formalism. Filling this vacuum in a manner acceptable to the self-imagination of lawyers is what we call "credibility."

Initially, I would like to illustrate the interrelation of faith, law, and culture through the story of A, a citizen of a Middle Eastern country, who had been living in Sweden without a residence permit for a period of four months.[15] Faced with the insecurity of his situation, he contacted an experienced lawyer to assist him in the formulation of an asylum claim. The lawyer had her doubts and pointed out that the length of stay negatively impacted the claim. After all, the authorities would wonder, why had he not applied for asylum right after entry? His credibility would be tainted through this delay. To A, this was not a problem. He suggested that he could simply state that he entered Sweden a couple of days ago, rather than a couple of months. After all, the risks he feared at home were the same. Faced with this suggestion, the lawyer shed her calm and exclaimed that he now was in Sweden, a Protestant country: "Here, we don't lie!" She declined to engage in the case.

---

no substantive reasoning on how to discern the core from the periphery in this otherwise so ambitiously formulated judgment.

14. Cases on religion epitomize the same problem. In German practice, the passive right to hold a religion is protected under refugee law, while persons actively practising their religion might not qualify for refugee status. While there is no doubt on the relevancy of the right to religion as a human right under refugee law, the responsibility of protecting the active component of that right has been reallocated from the state to the individual. According to the German Federal Constitutional Court (*Bunderverfassungsgericht*), the right of asylum presupposes interference with the freedom of belief, which affects the domestic and private exercise of religion. BVerfGE 76, 143 (158). Again, a logic of core and periphery can be discerned in this approach.

15. I am indebted to Dr. Sharam Khosravi, anthropologist at CEIFO, Stockholm University, for allowing me to use this account, which will feature in his forthcoming ethnographical study.

This account illustrates a number of things. First of all, it defuses the traditional opposition of asylum advocates and decision makers, where the former is siding with the asylum applicant, and the latter with the sovereign. In the quoted account, the lawyer is gatekeeper as much as advocate, and the selection process inherent in the refugee status determination is already in full swing in her office. Again, we witness the vanishing of the purported "neutral ground" where the cultures of origin and destination are supposed to meet, where power claims are negotiated beyond the constraints of brute force. If it is not the interview room at the first instance authority, and not the lawyer's office, where is it?

Second, it demonstrates how intimately meta-legal and legal norm systems interact in the asylum procedure. In A's case, the lawyer clearly put Protestantism—or, rather, the Swedish acculturation of it—prior to any considerations of refugee or human rights law. In this sense, her conduct was predicated on a prelegal normative system. However, A's case cannot be reduced to the exigencies of Swedish-style Protestantism. The reason why A met the lawyer was, after all, the promise of the law. Had she taken on his case, the credibility issue would have emerged along with the material consideration of the law. So, the law and the meta-legal norm I am alluding to are intertwined in some way we have to untangle. This is what the remainder of this part will deal with.

As a backdrop, I need to introduce an argument I have elaborated at length elsewhere.[16] To my understanding, the credibility assessment in the contemporary asylum procedure is a secularized form of confession, absolution and reconciliation. The modern state inherited the personal and moral control devices of the Roman Catholic Church, and operates it in a number of settings. Just as the church exercised personal and moral sovereignty through auricular confession, the modern state does so to a large extent through the asylum procedure. And just as the Roman Catholic Church has defended its moral codes through auricular confession, the asylum procedure seeks to establish the moral code of cultural identity—both with the individual confessor and its membership at large. Finally, the asylum procedure reconciles the applicant with the system of nation states—either by admitting her to the state of asylum, or by returning her as an impostor to the state of origin.[17]

My central concern is how this establishment of cultural identity unfolds within the modern state. It is helpful to recall insights from the preceding section. We have seen that the emptiness of human rights arguments opens a space for a discretion based on cultural difference. Where it can be established that the culture in the state of origin is different from that in the state of asylum, we can be reasonably sure that the human rights argument will not turn into a boomerang. Let me provide somewhat exaggerated formulations to recapitulate the point. If Iranians persecute homosexuals, and we do not, there is no harm in deducing a human right to sexual orientation as a basis for protection. If Bosnians batter their wives, and we do, too, we better delimit our human rights argumentation in such a way that our domestic practices do not appear illegal and our culture no different from that of wife-battering Bosnians. Therefore, the Iranian may be included as a refugee, while the Bosnian will, at best, be admitted for purely humanitarian grounds unrelated to the operation of international refugee and human rights law.

---

16. *See* Gregor Noll, *Salvation by the Grace of State? Explaining Credibility Assessment in the Asylum Procedure*, *in* PROOF, EVIDENTIARY ASSESSMENT AND CREDIBILITY IN ASYLUM LAW 197–214 (Gregor Noll ed., 2005).

17. This form of reconciliation testifies to the persistent, if not growing, power of the state idea as a mode of social organization. "Ours, this global era, is an era of the universal extension of state formation to all the peoples of the world. The universal extension of state formation reflects the establishment of a post-colonial standard of political legitimacy. It is no longer acceptable for imperialist structures of political organization to be the mode of governing global society." Anna Yeatman, *The Idea of the Constitutional State and Global Society*, 8 L. TEXT CULTURE 83, 83–84 (2004).

The individual applicant has a central role to play in this double drama of self-identification. Both auricular confession and the penal procedure deal with the perpetrator, as sinner or suspect.[18] The goals of confession as well as of penal punishment are largely identical: repentance, reform and reconciliation.[19] A secular asylum procedure, however, serves to identify victims, not perpetrators. As we have shown elsewhere,[20] the asylum seeker is treated as if she were a sinner-perpetrator, up until the very moment where general credibility is established. Only from then on, she is a victim—the victim of future, perhaps also of past, human rights violations. Structurally, this replicates the change from *attritio* (a state of mind characterized by fear of God) to *contritio* (a state of mind characterized by the love of God) in the process of confession and absolution.[21] The repentant reaches a stage where dissociation from sin is not caused by fear, but by love. The difference is evident—I may fear a sanction, but continue to identify myself with the sanctioned act. Any abstention from such acts will be strategic from my side, as my convictions have not really changed. If I abstain from sin for love of God, however, my conviction will have changed and I will dissociate myself from the sin. At the stage of *attritio*, I have committed a sin due to my power to commit evil. At the stage of *contritio*, I committed a sin due to my weakness to resist evil. This change is at the heart of repentance, and provides the nucleus of reform.

This is significant for the question of what we may call cultural membership. If the asylum seeker is to be recognized as a refugee, "we" have found it credible that she is one of us. How can we be, given that she originates from precisely the culture we seek to distance ourselves from? The applicant's *contritio* testifies just that reform from the culture of origin to "our" culture has taken place. In that sense, it is not enough to have "fear of being persecuted" (*attritio*) in the sense of the refugee definition. It must be "well-founded," that is, founded on the "true identity" of the true refugee. And the refugee's true identity is necessarily the same as "our" identity—the identity of the state of asylum and its protagonists. The credible asylum seeker is already a true refugee, and all the decision maker needs to do is to recognize him. Analogously, it is not for the priest to judge the *contritio* of the repentant, yet the priest may very well recognize such *contritio*. This resonates very well with the old maxim that refugee recognition is declaratory and not constitutive.[22]

It is now easier to understand why the Swedish lawyer was unprepared to represent a man who proved his inability to accept a basic tenet of Protestant Swedish culture: "we" do not lie, and your preparedness to lie proves your fear, but disproves its well-foundedness.

---

18. And both have great difficulties in dealing appropriately with victims, one should add. The penal procedure risks humiliating victim witnesses, and the confidentiality of auricular confession limits confessors' capability to effectively assist victims or would-be victims.

19. With regard to the penal procedure, Duff explicitly lists these as the "three 'R's of punishment." R.A. DUFF, PUNISHMENT, COMMUNICATION AND COMMUNITY 107–12 (Oxford Univ. Press 2001). These three are obviously inspired by the practice of auricular confession, which forms part of a larger concept of repentance. *See* H. GUNKEL AND L. ZSCHARNACK, DIE RELIGION IN GESCHICHTE UND GEGENWART. HANDWÖRTERBUCH FÜR THEOLOGIE UND RELIGIONSWISSENSCHAFT 1393–404 (J.C.B. Mohr 1927). The nucleus of reform is the concept of contrition with the repentant. The linkage between confession and communion reflects the dimension of reconciliation in Roman Catholic rituals.

20. *See* Noll, *supra* note 16, at 208–14.

21. H. GUNKEL & L. ZSCHARNACK, *supra* note 19, at 1400.

22. "A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee." UNHCR, HANDBOOK ON PROCEDURES & CRITERIA FOR DETERMINING REFUGEE STATUS, para. 28, HCR/IP/4/Eng./REV.1 (Jan. 1992), http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PUBL&id=3d58e13b4.

In a way, the lawyer made the right assessment—this case was hopeless. Representing the applicant in a full-fledged asylum procedure was a waste of time. The procedure was over as soon as the applicant had suggested to lie about his length of stay.

Spijkerboer's comprehensive empirical research into the gendering of credibility assessment confirms the importance of acculturation processes. He describes how stereotypes govern refugee status determination and provide a form of cultural selection in legal forms:

> Credibility, political activities and persecution are constructed in part by gendered and ethnic notions. They do not per se work against women. They work to the benefit of women who succeed in fitting the mould, and to the detriment of women who don't. It seems that for Zairian women it was particularly difficult (but not impossible) to do so, and for Bosnian women it was relatively easy. However, the use of (sometimes blatant) stereotypes turns out to be crucial in fact finding, credibility assessment and deciding what has been proven.[23]

The notion of "stereotyping" should not merely be seen as the reproach of a critical academic. Rather, the applicant should be able to account for herself in a manner paralleling the expectations of the decision maker. We may take the notion literally: the applicant will cast herself as a double of those expectations, yet do so in a manner not appearing strategic, but being thoroughly true. This is what acculturation through the asylum procedure is all about.

Let us flip the coin. Could the credibility assessment be replaced by a simple conversation on values and beliefs? Would it not perform the same function? Not so. It is crucial that the applicant cooperates in the construction of cultural difference, yet this difference needs to be stated within the international system of nation-states. Therefore, the language of human rights is instrumental. It simultaneously affirms the sovereign equality of states, their obligations as a matter of law and the apolitical as well as *acultural* character of the institution of asylum, while it allows decision makers a margin to include on the basis of a deeply subjective assessment. However, the subjectivity of the decision maker is merged into the collective identity of the state of asylum, and becomes objective through its framing in a human rights argument. After all, there is nothing chauvinist, arbitrary and subjective in a decision about credibility, as long as we cast it in a context of a legal procedure on the evidentiary preconditions of asylum.

Empirical research confirms the acculturation thesis. Montgomery and Foldspang conducted structured interviews amongst 149 refugee families from the Middle East, all of them seeking asylum in Denmark in 1992 or 1993. On the basis of a statistical analysis, they conclude that "the decision process concerning asylum-seeking refugee families from the Middle East seems to favour the selection of socially and culturally well-situated and the concurrent rejection of socially and culturally disadvantaged refugees. Human rights violations seem to play a diminishing role in this process."[24] Education of at least twelve years duration made the grant of a residence permit more likely than not, while the opposite

---

23. Thomas Spijkerboer, *Stereotyping and Acceleration: Gender, Procedural Acceleration and Marginalised Judicial Review in the Dutch Asylum System*, *in* PROOF, EVIDENTIARY ASSESSMENT AND CREDIBILITY IN ASYLUM LAW, *supra* note 19, at 89.

24. Edith Montgomery & Anders Foldspang, *Predictors of the Authorities' Decision to Grant Asylum in Denmark*, 18 J. REFUGEE STUD. 454, 465 (2005).

was true for manual labor.[25] Practicing a religion other than Islam increased the probability of receiving a residence permit more than eight times.[26]

V. CONCLUSION

We have now shown that the discretionary vacuum at the "human rights core" of the asylum procedure has a distinct function. It serves to operate a procedure of acculturation[27] through the assessment of credibility, which is modeled on the Christian practice of auricular confession. After the cold war, the vacuum has grown larger because the emphasis has shifted towards positive obligations under human rights law.

This is no coincidence. With this twofold and interrelated shift of emphasis, the system of asylum law is reacting to the relativization of the nation-state in the global domain. Where states are divided between liberal democracies and rogue states, and where international law holds different responses depending on a state's classification, this limit will be reproduced in the law and practices of migration. Where international relations are depicted as a "clash of civilizations," the asylum procedure will inevitably restage this clash within the credibility assessment.

25. *Id.* at 459.

26. *Id.* at 458.

27. In cases where refugee status is determined, the acculturation process is about the culture of the host state. Conversely, where the claim is rejected, the asylum procedure serves to reaffirm the belonging of the applicant to the culture of her country of origin.