Democratic legitimacy and the ethics of asylum

by Chris Bertram on June 4, 2018

I was invited to participate in a panel at Oxford's Refugee Studies Centre last week on the theme "Democratic legitimacy and the ethics of asylum" alongside David Miller and Mollie Gerver, with Matthew Gibney in the chair. My remarks went something like this:

Our title today is "democratic legitimacy and the ethics of asylum". There are many things this could mean, but I think that the person who formulated this title probably had it in mind to draw our attention to a supposed conflict between two principles or ideals. The first is our duty as citizens and as the states that we constitute to live up to our responsibilities to refugees (perhaps as understood in relation to the 1951 Convention to which the UK is a party and in subsequent jurisprudence, including its 1967 extension). The second is a requirement that the governments of democratic states be responsive to what their citizens want and should not pursue policies, including in the general area of immigration, that go against those citizens' wishes. It then looks as if there is a tension or even a contradiction, because the UK's declared international commitments point to an openness towards those fleeing their countries out of fear of persecution, whereas the general public, often fed a diet of stories alleging that asylum seekers are really economic migrants in disguise, want a generally restricive immigration policy backed up by fairly robust enforcement measures.

But there is much that we can usefully challenge in that brief account of the issue, both in the areas of fact and of principle. Let me deal with some issues of fact first. At least in the case of the UK, the reality is that an extremely hostile and restrictive policy towards refugees corresponds with and is responsive to the putative attitudes of the general public. Despite the propensity of both ministers and the Home Office robotically to utter the stock formula, "The UK has a proud history of providing protection …", the UK actually hardly takes in any refugees. According to Refugee Action, in mid-2015 there were, 117,234 refugees and 37,829 pending asylum seekers (0.24 per cent of the population). To get a sense of those numbers, if Bristol City's Ashton Gate stadium (capacity 16,600) were full, that proportion is equivalent to a grand total of 40 spectators. As we know, the UK takes active measures to prevent people likely to claim asylum from arriving on its territory, using methods including visa restrictions and carrier sanctions. The few who slip through the net are made to live in substandard housing, forced to exist on £35 a week, are sometimes detained, are often subjected to harsh reporting regimes that require them to travel long distances, are routinely disbelieved by Home Office staff who often assess their claims incompetently and unfairly (as we know from the high rates of successful appeals), are excluded from the labour market and sometimes from other activities such as study. Failed asylum seekers who cannot return home are forced into destitution; those whose refugee status is recognized often become destitute because of the obstacles in the way of them getting bank accounts, housing etc. I could go on, but there is no need. So it turns out that there is no gap between democratic legitimacy, so narrowly conceived, and the UK goverment's own miserable conception of its ethical duties to refugees, a conception that it claims to be in line with its international commitments.

We are not obliged, though to construe democratic legitimacy so narrowly. One way in which we might take a more expansive view is to ask whether the global refugee protection regime as constituted by the Convention and by agencies such as UNHCR and then interpreted and applied by particular states and their legal systems has democratic legitimacy in relation to those who are subject to it or who might reasonably hope for a regime that could give them effective protection. We might ask a similar question in relation to the populations of many of the states in which refugees are warehoused in large numbers under the current regime, states which bear a disproportionate burden of refugee protection at present. Developing countries house more than 80 per cent of the world's refugees, with Turkey having the largest number (£2.9 million), just ahead of Pakistan. It is mere

conjecture, of course, but my guess is that neither the population of the vulnerable nor the population who currently host them would give their democratic assent to the current system if they were asked, which of course they won't be.

Not only does the narrow construal of democratic legitimacy leave those people out of the picture, the exclusionary policies pursued by states such as the UK, the rest of the EU, the United States, and Australia also suffers from another democratic failure. They rely for their operation on co-operation with other states whose democratic credentials range from the non-existent to the questionable. States beyond the external borders of the EU, such as Turkey, Morocco, Libya and even Eritrea are engaged in formal or informal partnerships that aim to stop people from coming. Nobody asked the populations of these countries to approve of these partnerships, and the methods used to carry out these policies are flagrantly in violation of human rights standards and democratic values. In Libya, for example, we have control outsourced to militias which often torture and enslave migrants including refugees, all at the behest of European governments who are occasionally shocked, very much in the manner of Captain Renault in *Casablanca*, when the facts are drawn to their attention.

Suppose though that we stick with the narrow conception of democratic legitimacy, where does that get us? We shouldn't treat the decisions of democratic electorates as the final word, determining what states may and may not permissibly do. States have to conform to general human rights standards, which plausibly include duties to refugees, just as they have to conform to other provisions of international law. For example, they have to pay their debts (or live with the consequences if they don't) and so on.

As a practical matter and to some extent as a moral matter, there are limits to what outsiders can and may do to get states to behave as they should, but the mere fact that a democratic public has decided on something is not sufficient reason for outsiders to refrain from putting pressure to try to get them to shift their position. A state that fails to pay its debts, reneges on international agreements, violates human rights, pumps excessive CO2 into the atmosphere may justifiably face action from others, even where the decision to do those things is unimpeachably democratic in form. To return to the issue of refugees: a state like Hungary which decides to exclude as many refugees as it can, mistreats those within its borders and criminalizes those who assist refugees may reasonably be subject to sanctions of some kind to try to get it to act better. The same might be true of other states, such as Australia which plausibly breaches its non-refoulement obligations under the Convention and its human rights obligations with its warehousing policies in places like Nauru.

One of the claims I make in my new book is that states have duties of justice to work in co-operation with other states towards the establishment of a just global migration regime. Of course we don't live under such a regime, but I argue that the idea of one and the duty to work towards it, have implications in the here and now for the authority which states claim to control migration and for the attitude individuals should take to that purported authority. The Refugee Convention is a highly imperfect document and states ought to be looking to replace it with a better one. But pending such reform states that try to undermine the present system, to renege on their obligations under it (such as the duty of non-refoulement) and which actively work towards a *worse* regime lose the authority they currently claim. States are, of course, powerful actors. They are even more powerful when they enjoy the support of democratic publics. Both those seeking asylum and those committed to helping them have to deal with the realities of that power. But I would argue that there is no moral obligation on individuals to comply with laws and measures that subvert refugee protection, even when majorities think differently.

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1

faustusnotes 06.05.18 at 1:27 am

On the pitiful numbers of asylum seekers that the UK accepts, and its punitive attitude towards applicants, it is worth perhaps comparing with the attitude in the aftermath of world war 2, when huge numbers of refugees were moving around Europe. My grandfather was a refugee from Spain, and he was accepted into the UK with no restrictions on his right to work or move freely, and his only legal obligation being that he should report to the local police twice a month to sign a form. It's hard to believe that the people of the UK were then any less racist than in general they are now, yet those comparatively lax standards were considered acceptable to the population, one assumes. It was only later, and as the empire unraveled, that the UK became so punitive.

It's also noteworthy how far the modern perception of the treatment of asylum seekers is removed from reality. I learnt of my grandfather's asylum conditions from my grandmother, who opposes all immigration (despite having married a migrant). She told me that the conditions he faced were much harsher than those facing modern refugees, who she thinks have it easy. She is, of course, a *Daily Mail* reader. I'm not sure what that says about democratic legitimacy, but when the people voting for harsh policies are doing so while simultaneously knowing those policies are worse than anything their generation faced, and yet believe they aren't, I think you have a crisis of democracy with its roots in the irresponsible behavior of modern media, and the political parties that collude with them.

2

dax 06.05.18 at 5:45 am

"My grandfather was a refugee from Spain"

Not a communist or not in 1939? That is, I was under the impression (I have quickly looked for the source, but have been unable to find it – sorry) that, upon the collapse of the Spanish left-wing government in 1939, there was a massive flow of Spanish refugees – almost half a million – into France, and other countries in Europe or North America accepted very few. The few (about 10%) who emigrated mostly went to South America.

3

faustusnotes 06.05.18 at 7:58 am

Dax, my grandfather was a member of the POUM, I think. He fled to France, was recruited by the French Foreign Legion, and then ended up in a Spanish unit fighting with the British Army (he spent 9 years killing fascists and ended up voting Thatcher!) After the war he migrated to the UK. And the conditions that the UK placed on him were trivial, compared to what he would experience now if e.g. he were fleeing conscription in Syria.

4

dax 06.05.18 at 8:17 am

OK that coheres with what I believed. I don't think the UK let in many Spanish refugees before the war began.

5

Fergus 06.05.18 at 8:38 am

Thanks for posting this, Chris, I only heard about the event too late to make it. Sounds increasingly like I should stump up for the book!

Something I've been thinking about in this area is the way a lot of governments treat only asylum claimants as engaging these concerns about democracy, and not refugees brought to the country through

resettlement programmes. Of course most resettlement schemes are very small, which explains some of it, but it's interesting that eg. in Australia there is a more-or-less all party commitment to gradually increasing the size of the resettlement programme. Likewise in the US until last year, and a lot of new countries are starting to do resettlement as well. It's treated much more as an administrative issue, and/or something to be done (if only begrudgingly) out of international obligation, like foreign aid, and doesn't feature anywhere near as heavily in democratic politics. Which gives the lie to the idea that a decision to admit refugees must necessarily have a domestic democratic endorsement.

6

Sebastian H 06.05.18 at 7:46 pm

I don't really understand the democratic legitimacy issue (concern? question?) as raised. If GLBT rights were put up to a world vote, we would lose them. There are lots of things we value that wouldn't exist if the world were given a vote. How do you distinguish in which areas non-citizen/non-residents have a claim to the democratic processes of other countries? This seems much more usefully framed as a basic justice question (i.e. we shouldn't let people starve in the streets) than a democratic legitimacy issue.

7

J-D 06.06.18 at 2:52 am

A system is democratic to the extent that it has effective mechanisms for aligning its decisions with the will of the people (and, conversely, undemocratic to the extent that it fails to have effective mechanisms for aligning its decisions with the will of the people).

On the other hand, there is nothing undemocratic about citizens disagreeing with, opposing, or seeking to change decisions even when those decisions reflect the majority will. Being democratic doesn't entail agreement with the majority; it can't, because that would make the concept meaningless through circularity. For example:
'Do you vote for chocolate or for vanilla?'
Citizen One: 'I vote for whichever the majority wants.'
'Do *you* vote for chocolate or for vanilla?'
Citizen Two: 'I vote for whichever the majority wants.'
'But *somebody* has to vote a personal preference, independent of what the majority wants, or we'll never make any progress towards finding out what the majority does want!'

In the same way, democracy doesn't entail that citizens have to vote for the re-election of the government just because the majority voted for it in the last election; democracy means, among other things, that citizens can work against the government, even if the government was elected in a completely democratic way. Likewise, democracy means that citizens can actively oppose decisions made and supported by the majority.

In a completely undemocratic system, there is no internal inconsistency in a demand that people think and wish only in conformity with the thoughts and desires of the rulers: that's the nightmare of *1984*. A democratic system depends on people having, and acting on, opinions, preferences, desires, and political stances for reasons independent of what the opinions, preferences, desires, and political stances of the rulers are, even when the rulers perfectly reflect the majority; democracy requires that citizens be able to oppose the majority.

In a democratic system, it's undemocratic to try to change the *system* to make it less democratic, but it's not undemocratic to try to change anything else.

8

Ikonoclast 06.06.18 at 3:27 am

It's a mistake to frame refugee policy without any reference to ecological and geopolitical realities. I don't know whether Chris Bertram canvasses these matters in his book, as I have not read it. Certainly, the issues C.B. raises above, "democratic legitimacy" and "the ethics of asylum" are fundamental but then so too are ecological and geopolitical realities. At the same time, anyone referring to ecological and geopolitical realities, myself included, runs the risk of inviting conscious or unconscious racism and assumptions of privilege back in by the back door.

Notwithstanding this danger, we cannot pretend that limits to growth along with ecological footprint concerns on the one hand and entrenched geopolitical conflicts on the other, don't exist. The issue is how to deal with these as well with a workable blend of idealism and realism. In a previous post on an earlier thread, I indicated that it would be a simple matter, for Australia at least, to take all its intending asylum seekers into Australia and to assess them promptly and properly in the ethical and international law senses, granting asylum to all who thus qualify. Voluntary immigration could be reduced (on a lagging basis obviously) to permit this policy within a population policy which Australia, as an arid country with a low human carrying capacity, could reasonably, scientifically and ethically, implement.

As far as geopolitical issues go, the best policy by far would be for the West to stop conducting endless war against some other civilizations and ethnic groups. I mean particularly against Muslims and Arabs. Any proper analysis of geo-strategy indicates that this endless war is not only ethically wrong, it is also highly counter-productive in cost-benefit terms where these are measured in "blood and treasure". These endless wars are acting as strong push factor in the refugee and asylum seeker sphere.

9

Robert Haralick 06.06.18 at 1:54 pm

What he says is correct for 100 years ago. It is not correct today. Why?

Because 100 years ago, the immigrants came to the country for a better life and had values that valued the culture and values of the country they came to. So they blended in. Many refugees that come from the mideast places of turmoil, want to change the society of the country they come to. I do not want my country to change its culture to that of these immigrants who do not have the same set of values the diverse citizens of my country have. Under these conditions a country does not have an obligation to take such refugees.

10

J-D 06.06.18 at 10:29 pm

Robert Haralick

Many refugees that come from the mideast places of turmoil, want to change the society of the country they come to.

That's a fabrication, a story, a made-up fable. It's not supported by evidence.

11

J-D 06.07.18 at 12:00 pm

Robert Haralick

Because 100 years ago, the immigrants … had values that valued the culture and values of the country they came to. So they blended in. Many refugees that come from the mideast places

of turmoil, want to change the society of the country they come to.

On further reflection, it occurs to me that it might be worth adding to my previous comment that similar unfounded allegations were in circulation a century ago about immigrants then.

[12](#)

Fake Dave 06.08.18 at 9:40 pm

@Robert Haralick

This comment is fascinating because of how generic it is. It's possible to imagine the Mycenaeans saying it about the Dorians or the Romans about the Jews or the Scotts-Irish about the Irish-Irish. Many refugees don't want to assimilate — and some dream of going back home one day, but that doesn't mean they have some secret scheme to take over and steal your country. Historically, groups have generally learned to live together if they're willing to try and when they can't it's almost always because the majority wouldn't tolerate the differences of the minority rather than the other way around.

I mean, think about what you're saying a little bit. Even if there was some secret conspiracy of Syrian war widows, orphans, and deserters trying to take over your country, how in the hell would they go about doing it? They don't have the numbers or the power or the money and the mere suggestion that they might be thinking about such a thing is enough to get people like you to start manning the barricades. Why would someone who gave up the only life they've ever known for the dream of security and dignity want to jeopardize that? If you were a poor migrant trying to live in a strange land with a family to take care of, would you be plotting culture war when you have work to do and mouths to feed? I doubt it.

Anyway, that out of the way, I actually was posting to mention the peculiar irony of discussing the "democratic legitimacy" of migration policy as concerns a country that, during its imperial heyday, had turned forced population transfers into something of an art form. The UK was happy to "transport" its unwanted population to exile in Australia, resettle South Asian "coolies" all over its empire, and send millions of starving Irish people fleeing for the Americas, and all of that is before I mention the slave trade. Many of these actions occurred while the UK had a veneer of "democratic legitimacy" as it was defined by the powerful, yet neither word remotely fits.

I'm also hardly the first person to point out how many of the refugees the West disdains come from countries that were savaged by colonialism and neocolonialism, so I'll dispense with the cliches. Suffice it to say that "hard border for me, freedom of movement for thee" is not a viable international system.

[13](#)

Robespierre 06.09.18 at 6:51 pm

@Robert Haralick:
Surely nobody in 1900 America ever complained about foreign anarchists or pesky Mary-worshippers taking orders from a foreign power.

[14](#)

Collin Street 06.10.18 at 6:05 am

I do not want my country to change its culture to that of these immigrants who do not have the same set of values the diverse citizens of my country have.

Jesus wept. "My country is diverse! We cannot have different people added to the mix and changing its diversity!"

[basically you're writing word salad: it's syntactically valid english, but because you don't actually understand what it is you're saying — you're just shoving cool-sounding bits together — it doesn't actually gel to any sensible meaning. So you get "diversity" that's having new stuff added to it and changing and you presenting that as a negative, or treating the "values" of a diverse population as a singular "set": this isn't a question of ideas being *bad*, but words that simply don't have any "ideas", any coherent mental concepts standing, behind them. For all I can tell you could be a p-zombie.]

[15](#)

Dipper 06.10.18 at 6:44 am

Much of the discussion here seems to be arguing from the wrong end. Instead of looking at hard restrictions in movement and arguing for those to be relaxed, why not start from the other end? What is wrong with anyone being free to live wherever they choose? And if that is okay, what claims can they make on the financial resources of the particular region they have chosen to live in? Can they claim free housing, welfare and education?

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