

CURRENT THINKING IN REFUGEE LAW: PERSECUTION AND CONVENTION REASONS

**– LECTURE SERIES 2 (Mark Symes and
Hugo Storey)**

Questions

1. Is it legitimate to attempt to define persecution?
2. Must we adopt a human rights approach?
3. Should a human rights approach construe 'being persecuted' to mean a 'sustained or systemic' violation/denial of human rights/basic human rights?
4. Do current formulations of the human rights approach wrongly rely on an 'events-based paradigm'?
5. Should the definition of 'being persecuted' be 'recalibrated' to include (and make central) the concept of discrimination?
6. In relation to the 'causal nexus', is pitting a 'protected characteristics' test against a 'social perception' test a false antithesis (see e.g. Fornah [2006] UKHL)?

Article 9(1) QD

- “1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must:
 - (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
 - (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

Article 9(2) QD

2. Acts of persecution as qualified in paragraph 1, can, *inter alia*, take the form of:
- (a) acts of physical or mental violence, including acts of sexual violence;
 - (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
 - (c) prosecution or punishment, which is disproportionate or discriminatory;
 - (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
 - (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);
 - (f) acts of a gender-specific or child-specific nature.
3. In accordance with Article 2(c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1.”

Article 1 of Refugee Convention - Definition of the term "refugee"

- A. For the purposes of the present Convention, the term "refugee" shall apply to any person who: ...
- **(2) As a result of events occurring before 1 January 1951 and 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.**

Article 33(1) of 1951 Refugee Convention - Prohibition of expulsion or return ("refoulement")

- 1. 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.

1979 UNHCR Handbook: the 'circumstantial approach'

- 51...From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of (Convention grounds) is always persecution. Other serious violations of human rights - for the same reasons - would also constitute persecution.
- 52. Whether other prejudicial actions or threats would amount to persecution will *depend on the circumstances of each case*, including the subjective element to which reference has been made in the preceding paragraph ...“

- [Attempts to define persecution] “...could limit a phenomenon that has unfortunately shown itself all too adaptable in the history of humankind”.
- (V. Türk & F. Nicholson, “Refugee protection in international law: an overall perspective”, in E. Feller, V. Türk & F. Nicholson (eds.), *Refugee Protection in International Law*, Cambridge, Cambridge University Press, 2003 at 39).

UNHCR position as stated in 2003

“[a]s there is no internationally accepted definition of what constitutes ‘persecution’; it would be unwise to limit its application to serious human rights abuses. It is possible that all forms of persecution have not yet been identified or codified in international human rights law”

(A. Edwards, “Age and gender dimensions in international refugee law” (in E. Feller, V. Türk & F. Nicholson (eds.), in E. Feller, V. Türk & F. Nicholson (eds.), *Refugee Protection in International Law*, Cambridge, Cambridge University Press, 2003, *supra* n.11 at 50 and 80.)

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Article 9(2)(e) QD

- [Acts of persecution can include:]
- “(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2)”;

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Hathaway's summary definition of persecution

- 'sustained or systemic **violation** of **basic** human rights demonstrative of a failure of state protection' (Hathaway, *TLRS*, 1991)
- 'a sustained or systemic **denial** of human rights demonstrative of a failure of state protection' (Hathaway and Foster, *TLRS*, 2nd edition, 2014)

Article 9(1) QD

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- Mathew Scott, *Refugee Status Determination in the Context of ‘Natural’ Disasters and Climate Change: A Human Rights Based Approach*, Lund University, May 2018

Article 1 of Refugee Convention - Definition of the term "refugee"

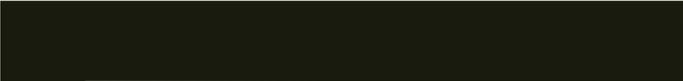
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Persecution as discrimination?

- According to Scott,
- “[t]he distinctiveness of the experience of being persecuted is **not** the fact that such people are subjected to sustained or systemic violations of basic human rights demonstrative of a failure of state protection, **but rather that being persecuted is a condition of existence in which discrimination is a contributory cause of (a real chance of being exposed to) serious denials of human rights demonstrative of state protection**” (253).



CONVENTION REASONS

THEIR DELIMITING PURPOSE - BUT CAPABLE OF DYNAMIC
INTERPRETATION

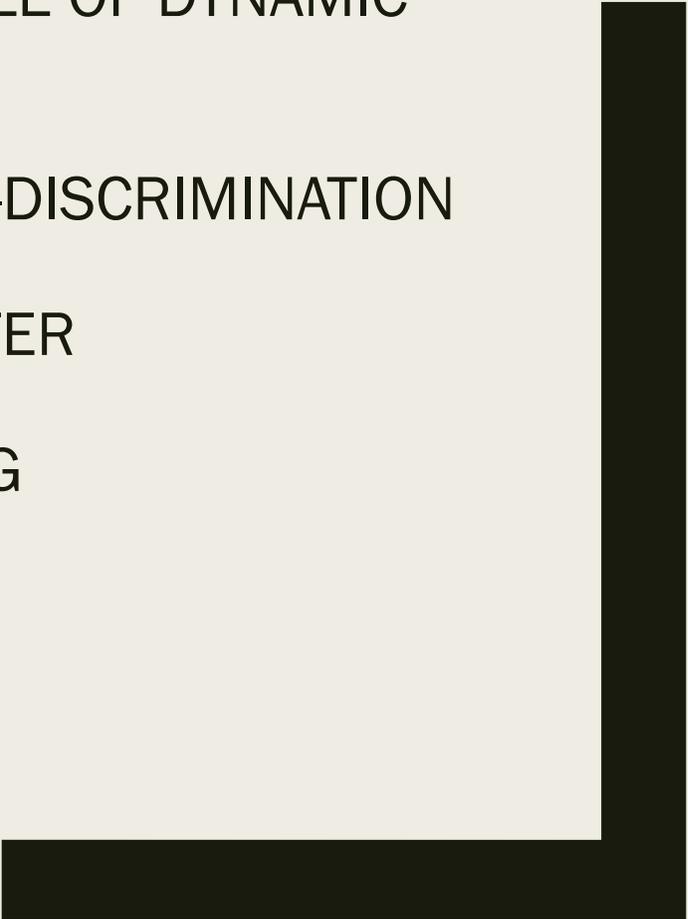
COMMON UNIFYING CHARACTERISTIC: NON-DISCRIMINATION

NON-HIERARCHICAL CHARACTER

ABILITY TO BE OVERLAPPING

INDIVIDUALISED BASIS

IMPUTABILITY



Convention reason of membership of a particular social group: common features

- Identification independently of the persecution
- No requirement of cohesiveness
- No requirement of interdependence
- No requirement of homogeneity
- No requirements of size

In *Ward* La Forest J identified three possible sub-categories which he accepted as coming within the category of a particular social group:

"(1) groups defined by an innate or unchangeable characteristic;

(2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and

(3) groups associated by a former voluntary status, unalterable due to its historical permanence.

The nexus clause

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- Intensity of causation: sole (no), dominant(no), effective/substantial (yes)
- Article 9(3) QD(recast) reflects this {a connection”)
- No necessity for persecutory intent
- ‘Bifurcated’ nature of nexus (see Article 9(3) QD(recast))

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“Protected characteristics” versus the “social perception” tests: Article 10(1)(d)

- “a group shall be considered to form a particular social group where in particular:
- - members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, *and*
- -that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society”.