The Origins of UK Refugee Status
A Historico-Legal Evaluation

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Overview

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1. Scope of Presentation

• To provide an examination of the origins of refugee status in the UK Historic period: Ancient Greece - 1905

• Will use broad definition of ‘refugee status’: *institutional recognition and protection of a person fleeing persecution (including internally displaced people)*

• Broad definition based on *Home Office* (2002) and *O’Sullivan* (2009)

• Why look at legal history?

1. To develop an understanding of the motives and vehicles for granting refugee status

2. To place current developments into context

3. To test claim of long moral tradition of UK refugee protection (Stevens, 2004)
2. Overview of Legal History

*Ancient Greece*

- 8th Century BC - 6th Century AD

- ‘Asylum’ – from Greek ‘Asylos’ = that which must not be seized or violated, usually referring to a sacred place, such as a temple

- First type of refugee status in Europe was ancient Greek temple asylum (sanctuary) (Schuster, 2002)

- Those who fled to temple, altar and statute of gods placed themselves under protection of gods and so out of secular control (at least for a short period until the wrong had been investigated and judgment had been handed down)

- Mainly used by slaves, debtors and criminals
Ancient Greece

• Greek city-states also able to grant of asylum. Thus the ancient Greeks are the first to construct asylum as a right granted by the state based on territory (Kimminich, 1983)

• Political refugees or exiles from Greek city-states, rather than criminals or slaves, could expect sanctuary in other Greek city-states, sure that they would not be extradited.

• Therefore, two types of ‘refugee status’ in ancient Greece:
  1. Spiritual (temple asylum)
  2. Territorial (city-state asylum)
Roman Empire

• Roman Britain 43-409 AD

• No territorial asylum - why? Roman Empire was a single legal entity and accepted no challenge to its power (Bulmerincq, 1853)

• Temple and then church asylum continued but limited by Emperor/Holy Roman Emperor (e.g. only grant of temporary immunity by temple/church) (Mossakowski, 2006)

• 347 AD first legal recognition of the right to grant asylum. Emperor Constantine decrees that Christian church entitled to grant refuge to those liable to deportation or exile
Roman Empire

• Church had been granting asylum as early as 303 AD

• Constantine’s declaration of 347 AD makes explicit that this practice derives from the Emperor - the temporal powers choose to recognise the separate jurisdiction of the sacred (Schuster, 2002)

• Church granted asylum in order to demarcate its spiritual territory and demonstrate its authority (Schuster, 2002)

• Those who challenged the Church’s authority (e.g. heretics ) not granted asylum

• Therefore grant of Church asylum was a capricious creature, subject to the influence and power struggles of the Emperor and Church
c. 600 AD – 1066 (Saxon Britain)

- 620 AD - Pope Boniface V releases legislation declaring church asylum valid throughout Christendom

- 693 AD - King Ine, the Christian ruler of the West Saxons, introduces church asylum into English secular law (in 597 AD King Ethelbert of Kent had released legislation confirming the sanctity of the Church)

- Church asylum was legally instituted in England in a time when ecclesiastical and secular government were indistinct (King Ine’s advisory council was composed partly of Bishops (Pope, 1987)

- In practice, refugee status during this period was subject to the individual decisions of princes, lords and the Church (Schuster, 2002)
c. 800 – 1100

• Later Saxon Britain and middle ages sees political tensions develop between the Pope and kings (strong central Governments develop in England and popes become temporal rulers in opposition to kings)

• Church asylum restricted in order to prevent papacy from interfering with internal political and civil affairs

• Thus, for example, in 1070 William the Conqueror set out the places where church asylum could be claimed and curtailed the Church’s power to intervene in the secular legal process (e.g. if a person had been lawfully banished, the Church could not intervene)

• Huge step given doctrine of apostolic succession (Pope, 1987)
c. 1100 – 1500

• 12th Century English Jews subject to increasing discrimination, culminating in the massacres of 1189-1190

• Jews forced to wear special badge, excluded from certain towns and from the age of 12 forced to pay special poll tax. By end of 13th Century many Jews bankrupt

• Increasing poverty of Jews renders Jews of limited value to treasury. In 1290 Edward I issues a decree of expulsion against all Jews. In excess of 15,000 Jews expelled from England

• Peasants’ Revolt of 1381 – feudal malaise un_masks xenophobia: 35 Flemings massacred on account of being alien. Not much change over century later (Stevens, 2004) – ‘Evil May Day’ (1517) foreign artisans and merchants singled out and attacked
c. 1500 - 1700

- Death of Church asylum and birth (return – if Greek) of territorial asylum
- Under Henry VIII, England breaks away from Rome (1533-1534)
- Henry intolerant of any challenge to his authority, severely restricts church asylum
- Chief Justice Coke in *Calvin’s Case* of 1608 – formalises in law the medieval distinction between ‘subjects’ and ‘aliens’. Subject = birth within king’s domain. Aliens = all others, except Jews (included travellers, traders, fugitives and asylum seekers)
c. 1560 - 1700

- Stevens (2004) – use of term ‘alien’ “precluded any need to distinguish the persecuted. Justified circumspection, sanctioned exclusion and paved the way for intolerance”

- Church asylum is abolished entirely in England by James I in 1623

- However as church asylum declines, conditions for territorial asylum emerge
c. 1560 - 1700

• Through breaking away from Rome England becomes a truly independent sovereign state

• Thus people fleeing persecution in other European states (at the time mainly Protestants and Jews) find refuge in England as it is a separate jurisdiction

• England provides refuge to these people for 6 reasons (Shuster, 2002; Stevens, 2004):

  1. Asylum seekers viewed as bringing valuable trades and skills with them (e.g. many Huguenots had knowledge of industrial processes)

  2. Grant of asylum a valuable political tool – undermines sovereignty of persecuting state + provides way to assert own sovereignty
c. 1560 - 1700

3. Religious solidarity with protestant people (public, not Elizabeth I)

4. Little could be done to keep people out (England’s coast provided many small harbours where people could land)

6. No authority could legally or physically force England to extradite a fugitive/refugee as England was separate both physically and politically from other states

7. England had very little to gain from expending time, effort or money hunting down people who had not offended the Crown

• Grant of asylum was the gift of the sovereign, who alone had this right to decide

• Above factors show that refugee status was granted primarily on the basis of state’s (material) interests - not due to special duty to refugees or to safeguard a liberal political ideology
c. 1560 - 1700
Types of refugee from 1560 – 1700 (Refugee Week, 2012):

1560 – 1575: Dutch Protestants flee religious persecution in the Spanish Netherlands and settle in London and east England

1572: Huguenots (French Protestants) flee to England following St Bartholomew’s Day massacre

1665: Jews expelled from Spain and Portugal are allowed to settle in the UK provided they convert to Christianity (introduce fish and chips to the UK)

1685-1700: c. 100,000 Huguenots flee to Britain from persecution of Louis XIV (revocation of Edict of Nantes). Classed as non-political immigrants, Huguenots were prohibited from inheriting landed property and subject to double taxation and extra subsidies.
c. 1560 - 1700

• Peak of first wave of Huguenots occurs in 1590s (15,000 people)

• Port of Rye contacts Privy Council for advice on entry requirements. Privy Council advises that refugees could be permitted to stay if:

  “they be come out of their countrye for religion and for safeguard of their conscience, and that they be such as may be beneficial to that towne, and be also comprised within the nomber of straingers limited by the Queen’s Majestie to inhabite there” (Privy Council, 1883)

• Early indicator of modern asylum system. Takes account of persecution – however also public benefit and weight of numbers; Reflective of no widespread bursting tolerance for refugees; National interest still comes first (Stevens, 2004)
c. 1560 - 1700

• Second wave of Huguenots following 1685 received better welcome (referred to as réfugié – compassionate term rather than ‘alien’)

• Catholic James II resents refugees in private but lets Huguenots enter England without hindrance and does not persecute them in accordance with his Protestant subject’s expectations

• To appease the French (and show his true allegiance) James II commands the public burning of the popular book ‘The Complaints of the Protestants cruelly persecuted in the Kingdom of France’ + censorship of The London Gazette’s reporting on events in France

• Population supportive of Huguenot refugees. Factors for support: (a) frequent and detailed accounts in certain newsletters on French persecutions, (b) positive contribution of 1st Huguenots, (c) religious solidarity (Stevens, 2004)
c. 1560 - 1700

• Contrast with official and public sentiments towards poor agricultural German Palatines of 1693. Sent to America and forced to live in special camps. ‘Asylum came at a price’ (Stevens, 2004).

• Positive attitude to (Huguenot) refugees reflected in Hugo Grotius work ‘De Jure belli ac pacis’ (1625) which comes close to suggesting a right to asylum:

“A permanent residence ought not to be denied to foreigners who, expelled from their homes, are seeking a refuge, provided that they submit themselves to the established government and observe any regulations which are necessary to avoid strifes” (translation from Scott, 1964)

• Grotius’ right subject to the caveats that the individual had not committed offences which affect public order, were atrociously criminal or particularly injured the other state or its sovereign
**French Revolution (1789)**

- Initially Britain takes an indiscriminate approach to refugees (émigré) from France. First exodus Royalists, then those against whom the revolution had turned (clergy, militia). c. 150,000 in total.

- Pro-royalist line was adopted for political and economic reasons: due to crippling financial impact of American Revolution the British government was keen to avoid war and deemed peace was best preserved by restoring France’s monarchy (Cunningham, 1897).

- However, as Plender (1988) notes, “...fears that Jacobin emissaries had infiltrated the ranks of the refugees led to an abandonment of the laissez-faire, laissez passer entrance policy”

- To protect against a domestic revolution, Britain introduces the *Aliens Act 1793* (remains in force until 1826), which:
1790s

1. Obliges ship masters to give details of any foreigners carried by them, or face fine
2. Allows customs officers to question any foreigner
3. Obliges all newly arrived foreigners to register
4. Sovereign maintains right to exclude/deport any foreigner with appeal rights

• Schuster (2002) notes how “the possibility that a deserting Frenchman might be in need of protection did not outweigh the danger that England, Prussia or Austria might become infected by this dangerous revolutionary fervour”

• However, French Revolution does broaden the idea of asylum beyond material state interests: Aliens Act 1793 seeks to exclude aliens who present an ideological threat to the Crown
1790s

- Change in attitude/remit of refugee status (from religious to political) also reflected in 1796 edition of the *Encyclopaedia Britannica*, which recognises that the term ‘refugee’ “had [now] been extended [from its original application to Huguenots] to all such as leave their country in times of distress, and hence, since the revolt of the British colonies in America, we have frequently heard of American refugees” (cited in Marrus, 1985)

- Growing acknowledgement of right to asylum reflected in preamble of the *Establishing Regulations Respecting Aliens Act 1798*, which refers to the terms ‘asylum’ + ‘refuge’ for those who “really seek refuge and asylum from oppression and tyranny”. No mention of these terms in *Aliens Act 1793*

- Stevens (2004) Asylum begins to develop into a uniform concept of international application, beyond religious persecution. Debate: political veil or humanitarianism
1800 – 1870s

- Prevailing ideals of the era - humanism, the rights of man, and free trade economic doctrine – are slowly reflected in UK asylum policy (Porter, 1979).

- 1793 – 1800: 436 aliens removed; 1801 – 1815: 218 aliens removed; 1816 – 1823: 17 aliens removed

- *Aliens Act 1793* repeatedly repealed and reintroduced in amended form until 1826 (finally repealed). Tory support v Whig opposition to Alien Acts

- Replaced by *Registration of Aliens Act 1826* which is similar to *Aliens 1793* but does not contain expulsion power. 1826 Act replaced by *Alien Registration Act 1836* (similar to predecessor – no deportation power), which remains in force till 1905
**1800 - 1870s**

- Antipathy towards any restrictive form of legislation on aliens is reflected in a House of Commons select committee report of 1843 (cited in Porter (1979)), which states:

  “it is desirable for every people to encourage the settlement of foreigners among them, since by such means they will be practically instructed in what it most concerns them to know, and enabled to avail themselves of whatever sagacity, ingenuity, or experience may have been produced in art and science which is most perfect.”

1800 – 1870s

- *Extradition Act 1870* provides for the non-extradition of fugitives who have committed an offence of a ‘political character’

Reasons behind laissez faire approach (Porter, 1979):

1. Need to replenish population due to large scale emigration
2. Industrial Revolution creates insatiable demand for workforce
3. Demonstration of strength and moral superiority to other countries (granting asylum was a cheap and economically beneficial way to do this as refugee status = non-extradition)
4. Difficult to track down individuals and force removal
5. Small numbers of refugees to Britain

- Open door policy, but little public passion to relieve refugee poverty (e.g. by raising money) – refugees considered same as non-alien poor
1880s - 1905

- From 1880 onwards change in Britain's laissez faire approach

- Persecution of Jews in Russia and eastern Europe leads to increasing numbers of ‘Ostjuden’ coming to Britain (c. 120,000 from 1880 – 1914 (Marrus, 1985)

- Vast numbers are impoverished and religiously orthodox – often not welcomed by Anglo-Jewry. Further, Victorian liberalism had not ended anti-Semitism (Schuster, 2002)

- Viewed as an “invasion” (Gainer, 1972) carrying disease and increasing crime and anti-social behaviour

- Exiles from eastern Europe start being viewed as security threat (belief that these people are anarchists) (Schuster, 2002)
1880s – 1905

• In addition, British capitalism enters period of decline – economic crisis, high unemployment, poverty and overcrowding. Migrants become easy target to blame for these factors + economic factors lead to diminishing demand for foreign labour (Stevens, 2004)

• These economic, political and social factors overcome demands for unrestricted entry and 1903 Royal Commission on Alien Immigration recommends the repeal of the Alien Registration Act 1836

• Royal Commission recommends new legislation which would create an Immigration Department to examine all immigrants on arrival to establish whether they are desirable or not. Undesirables are classified as “criminals, prostitutes, idiots, lunatics, persons of notoriously bad character, or likely to become a charge on public funds”
1905

- Royal Commission does not mention plight of refugees – issue is seen as one of immigration and not asylum

- Aliens Act 1905 is introduced which incorporates Royal Commissions proposals. To assuage the Liberal Party, Aliens Act 1905 includes exempting provision on religious and political grounds (Gainer, 1972). The exempting provision reads:

“[…] in the case of an immigrant who proves that he is seeking admission to this country solely to avoid persecution or punishment on religious or political grounds or for an offence of a political character, or persecution, involving the danger of imprisonment or danger to life or limb, on account of religious belief, leave to land shall not be refused on the ground merely of want of means, or the probability of his becoming a charge on the rates[...]”
1905

• Stevens (2004) “for the first time in British history, the asylum applicant now had to prove his or her status as a refugee. Yet the statute itself did not speak of the ‘refugee’; as was explicit in the exemption, anyone who succeeded in proving persecution was still perceived as an ‘immigrant’, albeit one accorded special treatment”

• Aliens Act 1905 ends liberal immigration policy and introduces distinct process for refugees with appeals process. Birth of modern asylum system (Schuster, 2002).

• New Liberal Government of 1906 instructs immigration officers to exercise benefit of doubt in favour of persecution where doubt over this exists (Home Office, 1906)

• Legacies of Immigration Act 1905: (a) 1905 Act is the only statute to legislate for asylum until statutory incorp. of Refugee Convention in 1993; (b) 1905 Act creates legislative and cultural link between immigration and asylum (Stevens, 2004).
3. Conclusions

• Long tradition of refugee status in Europe stretching back to 8th Century BC. Therefore, the idea of refugee status has deep roots in the consciousness of our modern society. However, our history has dark moments and there are still problems. We should be mindful of this when examining, presenting and implementing regimes for protection in other cultures. Developing refugee status takes time!

• From at least 43 AD – 1623 temple/church asylum provided important internal protection for persecuted people. Protection was provided according to a spiritual/secular divide. In the UK this divide is now exclusively territorial. However, would Church asylum be breached in modern UK? Church asylum is not breached in Germany (Asyl in Der Kirche, 2014).

• Over the entire period under discussion the driving motive for granting refugee status was political or economic, rather than humanitarian
Conclusions

• Therefore, the popular claim that the UK has a long-standing moral tradition of UK refugee protection is fragile (Stevens, 2004)

• Perhaps PM Arthur Balfour was more accurate when he remarked in 1905:

“\textit{The truth [is] that the only immemorial right of asylum given by this country was to allow aliens in with whom the country agreed}” (Hansard, 1905)

• However, there are also dangers in presenting refugee status as an act of liberal charity (e.g. public perception that refugees are burdens (Schuster, 2002))

• The labelling of those seeking refuge has influenced their political and public treatment (e.g. alien (negative) vs réfugié & émigré (positive))
4. Further Research

• Nature of refugee status in the UK from 1914 – 1954

• Nature of refugee status while Refugee Convention was not incorporated in domestic law 1954 – 1993

• ECHR and EU law influences – subsidiary protection

• Temple/church asylum – historic and present day. Germany and Canada have a strong tradition of Church asylum. Presently 151 individuals with Church asylum status in Germany (71 Dublin cases) (Asyl in Der Kirche, 2014)

• Detailed historic analysis of Jewish and Irish refugees in the UK
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