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The Importance of Incorporating Religious, Cultural and Linguistic Evidence in UK Immigration Procedures: An Analysis of the Semiotic Codes of Asylum Seekers

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Abstract
Asylum seekers who claim asylum in the United Kingdom flee from a diverse range of threats of persecution, particularly in the MENA (Middle East & North African) region. These threats may comprise of war, tribal violence and trafficking to honour-killings, female genital mutilation and witchcraft. Some of these threats may be alien to Western immigration tribunals as they either do not occur in their respective countries or are not understood, particularly because of the intricate religious and cultural nature of the threat in question. For example, a single woman who has had sexual relations outside of marriage would be regarded as having insulted tribal and familial honour in some regions of MENA countries. Here, the word 'tribe', which in Arabic is *'qabilah'*, has a distinct historical, cultural and lexical meaning that lawyers, judges and policy-makers may not be aware of; the same may be said of *'nikah'* (marriage) or *'Voodoo'* (a type of witchcraft) and many other terminologies. These terminologies are intimately linked to the experiences of immigration applicants and asylum seekers who desire to express their fear of persecution to lawyers, judges and policymakers. Using two real-life case studies involving a Yemeni immigration applicant and Nigerian asylum seeker respectively and my practitioner experience as a country expert having written 140 reports, I will critically explore the value of a primary, semiotic understanding of key religious, cultural and linguistic dimensions in asylum claims (as opposed to secondary source evidence). I argue that the UK's immigration tribunal system should place more value on how language is embodied within the MENA regions. I do not wish to just highlight this issue but semiotically analyse immigration and asylum procedure, the arguments of the Home Office and tribunals in accepting or rejecting claims and suggest substantive reform by broadening the nature of evidence. Using Peirce's framework of semiotics, a sign (representamen) is the fundamental entry point to comprehend an object—an object being the referent of a sign. Once we understand a sign and its object, we arrive at the interpretant which is the sense or meaning derived from the object. This triad relationship of sign, object and interpretant constitutes semiois. Here, I argue that analysing the nature of a sign and what it purports to represent can provide us with a

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Keywords Asylum seeker · Country expert · Culture · Human rights · Immigration law · Language · Religion · Semiotics · United Kingdom

1 Introduction

Asylum seekers who claim asylum in the United Kingdom flee from a diverse range of threats of persecution, particularly in the MENA (Middle East & North African) region. These threats may comprise of war, tribal violence and trafficking to honour-killings, female genital mutilation and witchcraft. Some of these threats may be alien to Western immigration tribunals as they either do not occur in their respective countries or are not understood, particularly because of the intricate religious and cultural nature of the threat in question. For example, a single woman who has had sexual relations outside of marriage would be regarded as having insulted tribal and familial honour in some regions of MENA countries. Here, the word 'tribe', which in Arabic is *'qabilah'*, has a distinct historical, cultural and lexical meaning that lawyers, judges and policy-makers may not be aware of; the same may be said of *'nikah'* (marriage) or *'Voodoo'* (a type of witchcraft) and many other terminologies. These terminologies are intimately linked to the experiences of immigration applicants and asylum seekers who desire to express their fear of persecution to lawyers, judges and policymakers.

Using two real-life case studies involving a Yemeni immigration applicant and Nigerian asylum seeker respectively and my practitioner experience as a country expert having written 140 reports, I will critically explore the value of a primary, semiotic understanding of key religious, cultural and linguistic dimensions in asylum claims (as opposed to secondary source evidence). I argue that the UK's immigration tribunal system should place more value on how language is embodied within the MENA regions. I do not wish to just highlight this issue but semiotically analyse immigration and asylum procedure, the arguments of the Home Office and tribunals in accepting or rejecting claims and suggest substantive reform by broadening the nature of evidence.

Using Peirce's framework of semiotics, a sign (representamen) is the fundamental entry point to comprehend an object—an object being the referent of a sign. Once we understand a sign and its object, we arrive at the interpretant which is the sense or meaning derived from the object. This triad relationship of sign, object and interpretant constitutes semiosis. Here, I argue that analysing the nature of a sign and what it purports to represent can provide us with a theoretical basis by which to reformulate the mechanisms which judges and lawyers use to understand religious, cultural and linguistic evidence in asylum claims. It is through signs that we can

arrive at a deeper meaning and the larger picture of the intricate components of an asylum seeker's claim thereby accessing their semiotic code.

In light of the British government's recent law, the Illegal Migration Act 2023,[1] which is used to remove asylum seekers who have arrived illegally in the UK back to their home country or a safe third country [1], access to justice for asylum seekers is more important now than ever—particularly as this law has been met with fierce criticism [2]. This criticism is due to the extensive powers the UK Secretary of State has to remove 'illegal' immigrants as soon as is reasonably practicable and that their protection and certain human rights claims are deemed inadmissible.[2] Asylum seekers risk their lives fleeing their own countries because of persecution they face which could be anything from war, tribal violence and trafficking to honour-killings, female genital mutilation and witchcraft. In the UK, however, 50% of asylum claims are rejected by the Home Office [3]. A key reason for this is that decision-makers, judges and lawyers do not always consider the religious, cultural, and linguistic aspects of asylum claims even though these features are central in demonstrating the threat of persecution asylum seekers face from their respective countries. Campbell concisely summarises this on-going problem in the machinery and operation of immigrations laws:

> I am not arguing that the evidence of country experts should be seen as more valuable or objective than statistical data. However, it should be clear that IJs [immigration judges] lack the training to adequately assess/test testimonial, qualitative and statistical evidence. The problem is that they do not realize their limitations and end up preferring evidence which they assume is more objective or scientific while setting aside cultural evidence on language, culture, kinship and the importance of social relations and social networks. [4]

As a result of the aforementioned lack of training and/or awareness by immigration judges and policy makers (even though this may be unintended), many asylum claims are refused owing to an apparent lack of evidence. A second argument has also been advanced by de Vries and Spijkerboer and other critical race theorists who argue that the impact of colonialism upon conceptions of the law renders the jurisprudential worldview and language of the majority as sacred over other minority worldviews [5]. As a result, religious and cultural evidence that contribute to one's understanding of persecution may be ignored and secondary evidence is used

[1] Section 1(1) specifically states, "the purpose of this Act is to prevent and deter unlawful migration, and in particular migration by unsafe and illegal routes, by requiring the removal from the United Kingdom of certain persons who enter or arrive in the United Kingdom in breach of immigration control": https://www.legislation.gov.uk/ukpga/2023/37/enacted.

[2] Section 2 (a) – (c) highlights this power: "(2)To advance that purpose, this Act—

(a)places a duty on the Secretary of State to make arrangements for the removal of certain persons who enter or arrive in the United Kingdom in breach of immigration control as soon as is reasonably practicable after their entry or arrival, subject only to the exceptions specified by or under this Act;

(b)provides for protection claims and certain human rights claims made by persons who meet the conditions for removal under this Act to be inadmissible;

(c)provides for the detention of persons who are subject to removal under this Act;": https://www.legislation.gov.uk/ukpga/2023/37/enacted.

instead to understand these terms which may be inaccurate, bias[3] or generalised [6]. It is here that a semiotic enquiry in how asylum seekers' cases within immigration law are understood by policy decision-makers, judges, lawyers and politicians becomes beneficial. This is because semiosis (according to Peirce) is, "an action, or influence, which is, or involves, a co-operation of three subjects, such as a sign, its object, and its interpretant, this tri-relative influence not being in any way resolvable into actions between pairs" [7]. By understanding the signs of asylum seekers and immigration applicants that are used in their claims, we can more accurately understand their semiotic codes which are attempting to capture their experiences of persecution and more broadly, their reasons in wanting to come to the UK.

Cunningham provides a useful analysis of the tri-relative relationship between sign, object and interpretant. He states that, "a sign, according to Peirce is 'something which stands to somebody for something in some respect or capacity'…the sign stands for something, the object, by linking it to an interpretant, an additional sign that stands for some aspect of the object. All three elements, sign, object, and interpretant, are necessary for sign process to occur and are not decomposable into dyads. Thus, Peirce's conception of the sign includes both its sense and its reference, but not as separate components. A sign is only an incomplete representation of the object or referent. Only certain aspects of the object are represented, and it is these aspects that come to define the interpretant, the sense of the sign process. Different signs may represent different aspects of the object and thereby produce different senses" [8].

Cunningham, through the lens of semiosis, sums up the quandary that can occur when a sign is misunderstood. A sign is only an "incomplete representation of the object of referent" and "different signs may represent different aspects of the object and thereby produce different senses"; this is precisely the core problem in understanding asylum and immigration claims—specific terminologies have multi-faceted contextual dimensions and are connected to varying experiences of asylum seekers which also differ from region to region.

2 Key Terminologies

It is important to define the terminologies I am using in this article for clarity. Firstly, refugees are defined and protected in international law. Under the *1951 Refugee Convention*, a refugee is,

[3] Secondary evidence comprises of country guidance and information policy notes which use international organisations to form a picture of the kind of issues, problems, trends and demographics a country is undergoing. Whilst this information is useful, it cannot be considered as definitive as it generally does not use primary source information on the ground nor research or media organisations inside the country in question (which would be in a different language) and may be influenced by government policies, a Eurocentric worldview and political and economic interests (there is no UK country guidance and information note on Saudi Arabia, Israel and all Western & European countries). As an example of the United Kingdom's country guidance and policy on Yemen, see: https://www.gov.uk/government/publications/yemen-country-policy-and-information-notes.

> someone who is unable or unwilling to return to their country of origin owing to a 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. [9]

In contrast, asylum seekers, are "people [who] flee their own country and seek sanctuary in another country, they apply for asylum—the right to be recognized as a refugee and receive legal protection and material assistance. An asylum seeker must demonstrate that his or her fear of persecution in his or her home country is well-founded" [10].

Asylum seekers, therefore, argue for the right to be recognised as a refugee by applying for asylum. They must demonstrate to the Home Office that they have a fear of persecution in their own country that is well-founded. Their submission involves their substantive interview record, legal representations and primary and/or secondary evidence[4] to support their claim. If their claim is successful, they acquire the status of a refugee.

The Home Office determination letter is the first evidence-based response that an asylum seeker receives as to whether he or she has been granted asylum. In the letter, the Home Office Presenting Officer (HOPO) outlines the reasons for his/her decision as to why asylum status has been granted or not. The letter is structured as follows: date the asylum claim was made, summary of how the asylum seeker entered the country, summary of the asylum seeker's claim, reasons as to why the asylum seeker's claim or parts of it are accepted or not accepted, his/her fear of persecution and most importantly, whether or not he/she satisfies the legal definition of being a refugee, conclusion of the HOPO and finally, the time the asylum seeker has to appeal the decision and the method by which he/she can do so [11].

Finally, a country expert is usually instructed by the solicitor to assess the plausibility of an asylum seeker's claim by specifically analysing the nature and threat of persecution he/she is facing from his/her country. Country experts usually submit a report to the Home Office and/or UK Immigration Tribunal for judges to use to assist them in their decision as to whether to grant the claim of asylum or not. Country experts are expert witnesses that owe a duty to the court, not to the asylum seeker and therefore they must remain objective in their findings [12]. Osborn has a clear definition what constitutes an expert witness,

> Expert witness. A person with special skill, technical knowledge or professional qualification whose opinion on any matter within his cognisance is admitted in evidence, contrary to the general rule that mere opinions are irrel-

[4] Evidence is defined as, "the means, exclusive of mere argument, which tend to prove or disprove any matter of fact the truth of which is submitted to judicial investigation": Woodley, Mick (ed) (2005). *Osborn's Concise Law Dictionary* (London: Thomson and Sweet & Maxwell 2005), 167.

> evant; e.g. a doctor or surgeon, a handwriting expert, a foreign lawyer. It is for the court to decide whether the witness is so qualified as to be considered an expert. In any case to be tried without a jury, the court may appoint an independent expert, called then "court expert", to inquire and report. [13]

Taken together, all of the aforementioned elements constitute the key legal elements in order to understand and decide on the veracity of an asylum seeker's claim.

3 The Theoretical Basis of a Sign and Its Potential to Reformulate Our Understanding of Evidence in Immigration and Asylum Claims

How does the semiotic relationship work? Within Peirce's model of semiosis, the traffic light sign for 'stop' would comprise of three components: a red light at a junction (the sign or representamen); secondly, vehicles stopping (the object) and finally, the notion that a red light indicates that vehicles must stop (the interpretant). As per this example, signs make take the form of *icons, indices* or *symbols* but such indications have no intrinsic meaning in themselves and become signs only when we invest them with meaning [7].

According to Peirce, an *icon* has a physical resemblance to the object, the thing being represented. For example, a photograph resembles whatever it depicts in reality and therefore there is a likeness between the icon and the object. An *index* shows evidence of what's being represented and there exists a factual link between the sign and its object; where a part is taken to represent a whole or a symptom to indicate an illness. An example is using an image of smoke to indicate fire. Finally, a *symbol* has no relationship between the sign and object—it can only be imputed. This is the result of a convention rather than nature such as a pair of scales as a symbol of justice—which is not arbitrary and cannot be immediately replaced by any other random symbol but only something similar to it that may represent or indicate upon justice. Other examples include numbers and alphabets. In all of these cases, the connection between the sign and object must be culturally and conventionally learned [14].

Within the aforementioned semiotic system, religious, cultural and linguistic evidence may take any one of the above forms. So a photograph depicting an asylum seeker's injuries, town or family constitutes an icon; medical notes that explain mental health symptoms such as depression, anxiety and/or sleeping problems constitutes an index that may indicate upon a deeper illness such as PTSD (post-traumatic stress disorder) and a logo of a political group or militia constitutes a symbol indicating upon its vision or values. Naturally, a sign could be a word as in the case of medical notes that are indices to indicate upon what is being represented. The sign is mediated between an object and its interpretant. The word is used so that its meaning (the interpretant) may stand for the object represented. Nowadays, scholars tend to use the word 'referent' (specifically referent of the object to which the sign refers) in order to analyse what thing or issue the sign is indicating upon [15].

It is at this point that we stumble upon a quandary within the understanding and usage of religious, cultural and linguistic evidence in asylum claims. Each of these

evidences which may take varying semiotic forms as above point to what Jackson argues as, "…larger units of discourse, the effect may be more than the simple accumulation of the atomic meanings of the individual sentences. The resultant discourse may have a 'meaning' of its own. That latter meaning is transmitted by a different 'code' than that of the language itself" [16]. The larger units of discourse result in a different but connected code or another semiotic system. For example, not everyone that understands English can read an English novel of piece of literature even though the words and sentences may be clear to the reader. What is required is for the reader to learn another sign-system or semiotic code which is may be termed the 'language of literature' [17].

In the same vein, asylum seekers are attempting to articulate a different, semiotic code which comprises of their experiences of persecution, the reasons they fled their country of origin and the evidences they are using to prove the veracity of their claim. They may use icons, indices and symbols to convey these aspects to judges and lawyers who try and understand their experiences. However, asylum seekers run into immediate problems in accurately conveying their intentions for several reasons. Firstly, the majority of asylum seekers come to the UK from the MENA region and English is not their first language.[5] Their witness statements, Home Office interviews and representation requires interpreters and translators and specific religious, cultural and linguistic terms may not be conveyed accurately in English. The problem of 'lost in translation' becomes more magnified due to the lengthy asylum procedure which involves many stages from arrival into the UK until the claim being heard in the immigration tribunal; specifically:

- After an asylum seeker arrives in to the UK and claims asylum, he/she attends a Home Office interview with an interpreter present;
- The Home Office interview record is sent to the solicitor who makes representations to the Home Office based on the asylum seeker's witness statement, relevant primary-source evidence such as photographs of injuries, arrest warrants, death threats and video footage and country guidance information;
- The Home Office decides on the asylum seeker's claim—accepting or rejecting it. If rejected, Home Office gives the asylum seeker the right of appeal to the First-tier tribunal (immigration and asylum) which if further rejected, may go to the Upper tribunal (immigration and asylum) [11].

[5] "There were 75,340 asylum applications (relating to 93,296 people) in the UK in the year ending September 2023, a 1% increase from the previous 12 months. The increase in applications is likely to be due to the continued global increase in the number of people displaced due to war and conflict. In the year ending September 2023, the top five countries of origin of people seeking asylum were Afghanistan, Iran, Albania, India and Iraq. In terms of the number of asylum applications per head of population, the UK ranks 20th highest in Europe"—see, 'Top facts from the latest statistics on refugees and people seeking asylum', Refugee Council: https://www.refugeecouncil.org.uk/information/refugee-asylum-facts/top-10-facts-about-refugees-and-people-seeking-asylum/#:~:text=In%20the%20year%20ending%20September%202023%2C%20the%20top%20five%20countries,ranks%2020th%20highest%20in%20Europe.

4 Case Study 1: A Yemeni Immigration Applicant and the Issue of Understanding Terminologies

A pertinent example of a specific religious-legal term in Arabic that was not translated, explained or understood from the start of the immigration application is 'nikah' which means marriage. However, the term itself within an Islamic jurisprudential context means a binding contract between a man and a woman that is performed verbally wherein the bride offers to marry the groom who accepts [18]. The recital of offer and acceptance, usually done in Arabic, is accompanied with a mahr (dower)—a sum of money or other property which becomes payable by the husband to the wife as an effect of marriage [19]. Moreover, both the husband and wife may also request wukala (representatives) who conduct the recital on their behalf. The term also has a religious and spiritual connotation as denoting the sunnah (normative practice) of Prophet Muhammad to the extent that one who marries has completed half of their religion [20].

In a case that I was instructed to write an expert report on in mid-2023, Mrs X (of Yemeni origin) was applying to the Home Office to allow her husband, Mr Y, to join her and her four children in the UK (names of parties not revealed for confidentiality purposes). Both were Muslims and had a verbal and civil marriage in Germany in 2016. However, the Home Office argued that Mrs X had not provided them with sufficient evidence of joint residency in the EEA (European Economic Area) state with a British citizen. Their records showed that she had been married before in Yemen and since marriage to two husbands is unlawful in the UK, her application for an Appendix EU (Family Permit) had been refused.

When I received evidence of Mrs X's previous marriage, I found that she had indeed been married to a Yemeni male national but in accordance with Islamic jurisprudential procedure which is recognised as an official civil marriage in Yemen itself. She was also, however, divorced in accordance with Islamic jurisprudential procedure—also recognised as a civil divorce within Yemen. This is precisely because the shari'ah (Islamic law) is the source of all legislation [21]. Moreover, in article 8 of Yemen's Republican Decree Law No. 20 of 1992 regarding personal status law, it explicitly states that "the [marital] contract is completed by verbal expression *(al-lafdh),* in writing *(al-kitabah)* and through the message *(al-risalah*) of one who is absent in the [contractual] sitting and the contract is valid from a silent or mute person by an intelligible sign" [22] and article 9 of the 1992 law states, "it is required that two just Muslim witnesses, or a man and two women, be present" [23]. What Mrs X described in her witness statement (an index) corresponded to the nikah procedure in Islam (the object).

Her description of the divorce procedure also corresponded with the manner of 'talaq' (divorce) in Islam. Article 58 of the 1992 law states, "divorce *(al-talaq)* is a specific statement or that which is in its meaning that breaks the relationship between the spouses. It is clear and cannot be possible by other than it. Divorce takes place in the Arabic language and in another language for those who know its meaning, and in writing and gestures that are understood by those who are unable to speak" [24]. Mrs X's ex-husband was clear in his verbal statement of divorce to

her with three witnesses present. As a result, Mrs X had been married and divorced verbally with representatives and witnesses and therefore, was not married when she began her relationship with Mr Y or when she began her immigration application. The Home Office accepted her immigration application and she was successful in her claim. The sign of the verbal process is mediated by the object and its interpretant; the word nikah is used so that its meaning (the interpretant) may stand for the object represented.

The verbal process of marriage and divorce in Islam strikes at the heart of this case which unfortunately was not clarified at the start of Mrs X's application. Her application had reached the stage of refusal but had there been a collective ethos by the interpreter, lawyer and policy-maker at the start to enquire that there may be a need to intimately understand the 'semiotic code' that Mrs X was attempting to explain then a great deal of money, time and stress would have been saved within the immigration process. What the Home Office was looking for was a signed marriage and/or divorce certificate issued by a local registrar or council but the nature of nikah and talaq is by recital first and so one needs to examine the procedure and circumstances surrounding this process at the outset.

There are similar cases I have dealt with other, more complex terminologies (usually in Arabic) that have multi-faceted meanings such as *murtad* (apostate), *amr bi-al-ma'ruf wa al-nahy 'an al-munkar* (the enjoinment of good and prohibition of evil) and *hijab* (modest covering), amongst several others. These terminologies are understood and applied by asylum seekers not just in accordance with their linguistic but religious and cultural meanings. Moreover, these meanings may vary across different schools of thought, theologies and communal contexts so an apostate may be harmed and ostracised in certain MENA counties but not others and regardless of state law, a family or tribe may react more aggressively than other families and tribes in the same region. The same issue applies with hijab—those women that do not observe hijab in their own country may be mistreated in comparison to other MENA countries that adopt a more contextual interpretation of the shari'ah [25]. Even with the case study I have provided above in relation to nikah, there is some disagreement amongst the five schools of Islamic thought (Shafi'i, Hanafi, Hanbali, Maliki and Ja'fari) about the importance of having witnesses present as a necessary condition for a valid marital contract:

> The Shafi'i, the Hanafi and the Hanbali schools concur that the presence of witnesses is a necessary condition for a valid contract. The Hanafi school considers as sufficient the presence of two men or a man and two women. However, if all the witnesses are women, the contract is not valid. This school does not consider '*adalah*' (justice) as a condition for the acceptability of the witnesses. The Shafi'i and the Hanbali schools consider as necessary the presence of two male Muslim witnesses possessing the quality of '*adallah*'.

According to the Malikis, the presence of witnesses is not necessary at the time of the contract but their presence is necessary at the time when marriage is to be consummated. Therefore, if the contract is recited without the presence of witnesses, it is valid. But, when the groom intends to consummate the marriage it is incumbent upon him to have two witnesses. If the marriage is consummated without

the witnesses, the contract becomes void compulsorily, and this is considered as amounting to an irrevocable divorce. (*Bidayat al-mujtahid* by Ibn Rushd: *Maqsad al-nabih* by Ibn Jamii'ah al-Shafi'i).

The Imamiyyah do not consider the presence of witnesses as *wajib* [obligatory] but only *mustabab [recommended].* [26]

The central point I am illustrating here is that asylum seekers are attempting to explain their semiotic codes with their own signs. These signs, as per Peirce's methodology, may be in the form of icons, indices and symbols and therefore require an understanding of original linguistic meanings but also particular conventions to represent an immigration and asylum claim accurately. It would be unfair to expect any judge, lawyer or policy-maker to have an immediate and deep knowledge of specific term in another language. Rather what I am advocating within the UK immigration process is a *collective semiotic mindset* (expressed as a guideline or best practice) amongst all relevant legal parties to flag up and begin a deeper semiotic enquiry at the start of this process. This will ensure fair representation of the asylum claim rather than relying on an individual, whether he/she is a country expert or lawyer, to notice that a term or fact may not have been accurately understood in the first place.

5 Case Study 2: A Nigeria Asylum Seeker and the Issue of Understanding Her Experience of Persecution

The second problem asylum seekers face moves beyond language and into the domain of personal experiences of particular communal practices. Semiotic scholars have deliberated that Peirce's conception of an object may be taken in an extensional sense which relates it, "exclusively to extra-linguistic phenomena, normally empirical phenomena in the outside world; an 'intensional' view, on the other hand, would view the object as part of the though-system of language itself" [15]. What this means is that whilst a sign indicates on an object in reality, this object would normally be wide-ranging empirical phenomena; for example, injuries, rituals, mental health problems, communal practices such as female genital mutilation (FGM), honour-based violence and more that an individual uniquely experiences. These empirical phenomena may be identified objectively as norms or situations that exist for a group of individuals, a community or even a country; this is not controversial and may be proven by primary and secondary source data (for example, a report that investigates the prevalence of FGM, honour-based violence and mental health challenges in a country). The more controversial problem is how to understand and translate an individual's personal experience of the aforementioned situations as a genuine fear which puts him/her at risk of persecution if he/she were to remain in the country of origin.

An asylum seeker's fear of persecution based on his/her experience is precisely what must be proved to gain refugee status according to the UN Refugee Convention 1951. Article 1(2) states that asylum seekers must demonstrate a "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" [27].

There is no universally accepted definition of persecution but in the context of UK law, it has been defined in broad terms in *R v Immigration Appeal Tribunal, ex p Jonah* (1985) where Nolan J adopted the two dictionary definitions of the word: 'to pursue, hunt, drive' and 'to pursue with malignancy or injurious action; especially to oppress for holding a heretical opinion or belief' [28]. Even if an asylum seeker is 'pursued or hunted' for a particular belief they hold, demonstrating their fear of persecution is a subjective state of mind. How do UK immigration tribunals deal with asylum seekers' varying experiences of persecution? The short answer is that there is huge inconsistency in their approach not just because of a lack of legislative guidance on the issue but also a lack of judicial methodology of how to classify situations and norms of a particular country that may be vastly different to that of the UK. I will illustrate this by way of another recent case in which I was instructed to write a country expert report for.

Mrs Z, aged 43, was born in Edo State, Nigeria and hailed from the Delta Igbo ethnic group. She arrived in the UK in 2008 and married her husband, a Nigerian national, who belonged to the Urhobo tribe. They have 4 children (three boys and one girl). Her husband's family practices Voodoo (also known as juju, a form of witchcraft). Mrs Z herself worshipped Ogun, a Voodoo spirit when she was younger and was subjected to FGM. Later in her life, she converted to Christianity. Mrs Z's fear of persecution was that her in-laws told her that she had to return to Nigeria and go through the Urhobo marriage initiation, which would involve her having to have the FGM done again. She was told that if she refuses to go through the initiation, she and her children would be cursed with an incurable disease if she returns to Nigeria. In 2017, Mrs Z claimed asylum in the UK fearing not only the curse and FGM being performed upon her but also upon her daughter, aged 1 year old. She further feared her own family and tribe who could collude to curse and initiate her and her daughter.

In 2021, Mrs Z's claim for asylum was refused by the Secretary of State of the UK. The material facts in relation to her asylum claim were accepted but the Secretary of State did not accept that her fear of persecution for a Convention reason was well-founded on the grounds that state protection was available. Alternatively, she could internally relocate in Nigeria.

Mrs Z appealed against the Secretary of State's decision but her appeal was dismissed in the First-tier tribunal. She then sought permission to appeal to the Upper Tribunal in 2023 which was granted on both asylum and human rights grounds. The arguments of the judge in the Upper Tribunal are intriguing and profound because they demonstrate the difficulty in understanding an asylum seeker's subjective experience of a fact. The judge argued that there is a further element to Mrs Z's fear (which was not duly considered by the First-tier Tribunal judge); this element is that she will be cursed if she does not submit to FGM. The First-tier Tribunal judge accepted that Mrs Z's beliefs about witchcraft and being cursed were genuinely held but that she failed to prove the "objective element"

and that her "belief" was not well founded. However, the Upper Tribunal judge stated that the First-tier Tribunal judge did not consider what the effects of her genuinely held belief are on the objectively well-founded fear of FGM. He did not make any findings on what the effects of those genuinely held beliefs are and how that may impact on her.

In contrast, the Upper Tribunal judge held that it was clear from the written and oral evidence of Mrs Z that her fear of return was due in significant part to her belief that she would be cursed if she were to set foot in Nigeria and not undergo FGM; specifically a fear of "actual bodily harm." The First-tier Tribunal judge did not consider this fear fully; rather his consideration was based on Mrs Z's belief in curses without making findings on what the effects of that belief would be [29].

What is striking about the judicial decisions in the aforementioned case is that the grounds for refusing asylum differed between the Home Office and First-tier Tribunal. The former focused more on state protection and internal relocation being available for Mrs Z (which could be refuted on objective grounds given the prevalence of witchcraft and FGM in Nigeria). The First-tier Tribunal, however, categorised Mrs Z's fear of being cursed and of FGM itself as subjective without having an objective basis. Finally, the Upper Tribunal, which allowed Mrs Z's appeal, construed a deeper argument leading to a different decision altogether; that her fear was related to an object in reality—actual bodily harm and secondly, how the effects of her fears of being cursed impacted her own well-being and safety. The Upper Tribunal, therefore, connected Mrs Z's subjective state of mind with the objective reality of witchcraft and FGM in Nigeria. The judge in this tribunal had attempted to understand her semiotic code by making the epistemological connection between the signs she was using to the objects being indicated upon. When I was instructed to write a country expert report for Mrs Z, my task was to comment on these objects i.e. the norms and nature of witchcraft and FGM in Nigeria.

What is useful about the aforementioned case is that despite the reoccurring problem of understanding a specific term such as Voodoo from the outset and varying approaches to understand Mrs Z's fear, we have a concrete example of a semiotic code being uncovered in the Upper Tribunal. The substantive implication of the Upper Tribunal's argumentation is that we should be careful of viewing classifications of ordinary language as natural. Classifications of natural objects are constructed by human beings through conventions and different groups of human beings may classify objects differently. For example, tomato is a vegetable in the English language but botanists classify it as a fruit. Moreover, for other objects such as cannabis, lawyers may classify this according to its legal meaning as defined by the legal system which is different to how it is defined in nature [30]. Similarly, witchcraft may be classified under spirituality, religion, theology, mythology, literature or culture or a combination of all of these. It may also be recognised as a legitimate practice in one community but illegitimate and even non-existent in another.

My argument here is that there needs to be a reformulation of how one classifies an asylum seeker's experience of objective elements. It is not merely about accepting the subjective state of mind of an asylum seeker and then analysing whether or not this state of mind or fear connects to actual situations in the country of persecution. Rather, as per the Upper Tribunal in Mrs Z's case, one should also consider the

real effects of that very fear on the asylum seeker himself/herself in relation to actual harm, well-being and the ability to return home and live there. I term this an *effects-oriented approach* to understanding person experience, in addition to the existing objective-oriented approach present in both international law and the general methodological approach of judges in immigration tribunals.

6 Substantive Implications and Suggestions for Reform

In light of the two case studies I have cited above, I submit that a lacuna exists in the operation of UK immigration laws to recognise the religious, cultural and linguistic aspects of asylum seekers' claims. "A lacuna is a 'missing rule', a rule which is expected but not found in the law" [31] but it has been argued that the meaning of lacuna is anything but clear [32]. Hence, a lacuna can be interpreted in several ways, from a missing piece of legislation for a particular case or a legal principle, norm and/or mechanism that results in a deficiency in the derivation and operation of law. My focus is on the latter—what mechanism exists in UK immigration law that allows for a greater awareness by judges, lawyers and policy decision-makers to be more cognisant of these dimensions? So far, the explication of these dimensions depends on a country expert who may or may not delve into the relevant primary sources to shed light on specific terms, beliefs, customs and traditions pertaining to asylum seekers. This is a risk as the quality of evidence from country experts can vary significantly as per Thomas' comment:

> In practice, the type of people who act as country experts in asylum appeals ranges very broadly. At one extreme, there are those individuals with particular expertise in the relevant country; at the other extreme, are those who could not reasonably be said to possess any such expertise. [33]

Moreover, Ward makes a psychological argument that we rely on experts to "make our cognitive lives easier",

> The temptation to trust the expert excessively—that is, to a degree that spares the prosecution the need to prove an essential element of its case—arises from the reason we generally trust experts: to make our cognitive lives easier and our decisions less time-consuming (Mieg, 2001). [34]

I would therefore like to propose complimentary theoretical and practical reform in the methodological approach of judges, lawyers and policymakers to understand the semiotic codes of asylum seekers. As I have argued above, the current methodology within asylum and immigration law is based more on logically equating an asylum seeker's subjective experience of fear with the objective fact of persecution through secondary-source based evidence. In contrast, my suggestion for reform is including and explicating primary-source based evidence from the very start of the immigration process in order capture the experiences and fears of persecution of asylum seekers. This reform does not negate existing judicial methodologies or immigration procedures but rather, intends to add value to them. My suggestion is based on the

ideas of the notable American jurist, judge and legal realist, Oliver Wendell Holmes Jr (d. 1935). His jurisprudence radically suggests that law is not based on logic but experience. As per his famous quote, he argued that, "the life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed" [35].

In unravelling this statement, Holmes argued that there is a paradox of form and substance in the law, in which legal doctrines, as they developed, simultaneously responded to contemporary notions of policy but were also masked by formal adherence to precedent. Legal rules changed because their previous formulations had become inexpedient; changes in legal rules occurred due to evolving social phenomena and different social policies. However, the form of legal rules is designed to conceal this change in order to create a sense of stability and continuity in the legal system in question [36]. The forms of law that remained despite social change are called 'survivals' which have lost the capacity to resonate with contemporary notions of good sense and are therefore more open to critique and re-examination [37]. The example that Holmes gives is a contract under seal that may now be antiquated and technical as opposed to a contract without but both are formal and meet the objective requirements of a binding legal relationship [38].

In the context of UK asylum and immigration law, legal rules and procedures become survivals when they do not resonate with evolving social phenomena. So the current process of an asylum seeker attending a Home Office interview and the Home Office itself relying on country guidance information to make a decision on the veracity of an asylum claim could be re-examined in the place of a more accurate procedure that captures the experiences of asylum seekers. As with the case study of the Yemeni wife whose nikah was not fully understood by the Home Office, the inclusion of religious, cultural and linguistic evidence at the start of the immigration process may assist judges and policymakers in grasping the semiotic code being conveyed. Reliance on one country expert or country guidance information may become survivals since particularly the latter is largely secondary-sourced based and does not capture the social phenomena in the MENA region; this is also why the Upper Tribunal attempted to delve deeper into the effects of witchcraft on Mrs Z herself in order to understand the signs she was using in her case. There is also a continual concern by judges about the way in which country experts use evidence and make arguments in their reports to assess the plausibility of risk of persecution. As a result, even if there is merit in the religious, cultural and linguistic evidence being explored by the expert, it may not figure as important in the deliberations of judges if they have a perception that the expert is inaccurate, unclear or bias. Campbell neatly summarises this on-going challenge with country experts:

> The SIJs also chastised the expert. For instance, they claimed that he had become 'too personally involved in the DFFM controversy' and that 'the language employed in his critique... [was] untypical' of his past reports because he failed to reference certain material and because there was 'an element of

> one-sidedness' in his treatment of certain NGO sources. A more fundamental critique was that there were 'some significant shortcomings in his patterns of research' and carelessness in how he sourced his material, and the SIJs 'did not always find it easy to follow how he reached certain of his key conclusions'. Indeed, under cross-examination, he was forced to retract some of his evidence and qualify certain conclusions and evidence contained in his written reports. [39]

In order to avoid the aforementioned issues in only relying on a country expert's report as well as the need to facilitate the inclusion of primary-source based evidence, I propose that the notion of evidence within immigration law needs to not only be broadened but categorised in accordance with its probative value. Evidence is defined as, "the means, exclusive of mere argument, which tend to prove or disprove any matter of fact the truth of which is submitted to judicial investigation" [40]. Evidence may be oral, documentary, conclusive, direct, circumstantial, real, extrinsic, hearsay, indirect, original, derivative, parol, prime facie, primary and secondary [41]. It is clear that the concept of evidence in law is already broad and includes both primary and secondary sources. In immigration tribunals, a solicitor and barrister may present a range of the above evidences to support the claim of the asylum seeker to show he is telling the truth. However, despite these numerous categories of evidence within law, immigration tribunals generally do not place great weight on 'original' evidence which has an independent probative force of its own and 'derivative' evidence which derives its forces from some other sources such as scripture, theology, culture and language. Moreover, since the definitions of original and derivative evidences are somewhat vague, they are generally not utilised effectively in immigration tribunals, court bundles and barristers' submissions [42]. In the two case studies I summarised above, the terms nikah' and 'Voodoo' required not only the use of primary sources (for example, scripture, narrations and jurisprudential books in Arabic or Voodoo manuals in the languages of Hausa, Yoruba and/or Igbo) but also the explication of these terms in relation to the experience of the asylum seeker. A collective enquiry as to the meaning of such terms by all representatives and decision-makers (including experts) as well as access to relevant primary evidence may reduce any inaccuracies or vagueness perceived in a country expert's report.

In conclusion, the wealth of primary source information available to us through the Internet and now, artificial intelligence applications means we all have less knowledge barriers to understand each other's religion, culture, history and language. Just as law has evolved into specialist branches, courts, lawyers and experts, so has our notion and usage of evidence with, for example, mobile phone pictures, recordings, videos and CCTV footage, which enable us to understand the facts of cases in a more accurate manner. The next evolution within both the concept and machinery of law is to include definitions and mechanisms that allow us to understand asylum seekers' and minorities' worldviews, laws, customs and ultimately, way of life which are not always recognised by decision-makers,

> Navigating the complex UK asylum system can leave many people feeling lost, isolated and that they have little control over their lives or their futures. Often,

> refugee and asylum seeker voices are not heard, and their skills and knowledge go unrecognised. [43]

This will help ensure that justice is not only done but seen to be done as per the words of Lord Hewart, "It is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done" [44]. Ultimately, a collective critical self-reflection is needed into how our intellectual past and present has been formed to see if the current legal worldview we have created of the 'Other' is just and fair. Only then can we overcome our epistemological limitations through self-realisation. This is arguably Hegel's (d. 1831) understanding of the process of history which is based on the idea of a subject–object identity; in history, humankind confronts itself and is constantly writing its own autobiography through struggle and self-consciousness:

> Intellectual reflection bounces thought, as it were, off its object and back into the self. A consciousness caught in this interaction is thereby released from fixity and implicated in a process of mediation and movement. In particular, it is provided with a ladder to higher levels of self-consciousness. For the reflective interaction with its object is at the same time a distancing from the self, a bringing of it under scrutiny from a new vantage point and, thereby, a means of transcending the self-conception with which the process started. [45]

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