POTENTIAL CONTRADICTIONS BETWEEN DEMOCRATIC AND HUMAN RIGHTS PROCESSES IN THE AREA OF MIGRATION AND ASYLUM

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Abstract

Understanding the relationship between alien rights and citizen rights is critical in an era of globalization and migration. State efforts to effectively manage asylum have repeatedly been frustrated by its commitments to international human rights regimes, such as the European Court of Human Rights. Over time, this tribunal has established an effective linkage between the human rights obligations of liberal democracies and their duties towards asylum seekers within their territory. This eventuation has led to the formation of the so called *liberal paradox of asylum*, reflected in the seemingly contradictory asylum policies of states. In one respect, the government is adopting schemes to deter and penalize migrants, while contrastingly it is embedding human rights, which provide asylum seekers with means to challenge the decision to expel them. This article explores and analyses this apparent contradiction, where increasingly restrictive measures seem to be developing side by side with growing human-rights-oriented inclusive legal practices.

Keywords: Alien rights, citizen rights, liberal democracies, liberal paradox of asylum

Understanding the relationship between alien rights and citizen rights is critical in an era of globalisation and migration. In 1992 the then British Foreign Secretary Douglas Hurd claimed that he and his European counterparts deemed migration *"among all the other problems we face – the most crucial"* [8, 153]. As liberal democracies moved closer to the end of the twentieth century, the issue of asylum has become increasingly important and problematic. With a constant flux of *jet age* asylum seekers it became more and more difficult for state authorities to maintain a grip on the volume and character of forced migration. State efforts to effectively manage asylum have repeatedly been frustrated by its commitments to international human rights regimes, such as the European Court of Human Rights. Over time, this tribunal has established an effective linkage between the human rights obligations of liberal democracies and their duties towards asylum seekers within their territory. This legal linkage has served to provide procedural outlets for rejected asylum seekers, limiting the capacity of the state to deport them.

This eventuation has led to the formation of the so called *liberal paradox of asylum*, reflected in the seemingly contradictory asylum policies of states. In one respect, the government is adopting schemes to deter and penalise migrants, while contrastingly it is embedding human rights, which provide asylum seekers with means to challenge the decision to expel them through domestic and international courts. Thus, increasingly restrictive measures seem to be developing side by side with growing inclusive legal practices. The existence of such circumstances begs the question: *"Why would any government commit itself to a human rights regime, the sole purpose of which is to constrain its domestic sovereignty over asylum matters?"*

The liberal paradox warrants scrutiny for numerous reasons. The widespread supposition that there is an inherent paradox within asylum policies of liberal democracies affects the way governments view the relationship between citizen rights and alien (non-citizen) rights. The elected authorities are accountable to their voters and derive their popularity from the promotion of citizens' interests; asylum seekers are perceived as negative agents by the residents and therefore have become undesirable for states. Looking through an optic of a liberal paradox, citizen and alien rights are juxtaposed against each other in an exclusive way, so the government can only expand one body of rights and not both. Thus the authorities presume that the relationship between the interests of these groups is defined in terms of a zero-sum game and consequently act in accordance with that presumption.

The outcome is increasingly restrictive, deterring and penalising legislation, which aims to satisfy the requests of citizens through the violation of migrants' human rights. Further, the liberal paradox conceals the wider contexts within which asylum seekers are located; the webs of legal constraints that surround alien rights; and the actual policy choices presented to national decision makers. The implications of weakening the liberal paradox would be the demythologisation of state's absolute sovereignty over asylum matters and a re-conceptualisation of the relationship between citizen and alien rights. The theoretical possibility of a more inclusive, flexible and consistent approach to asylum would uncover the prospect of a mutually-complementary existence, pointing to the necessity of international solidarity, mutual co-operation and burden sharing.

Exercise of political sovereignty is the assertion of citizen rights through democracy. As a member of an international system the state must institute a judicial standard, which separates nationals from non-nationals. In

a liberal democracy that standard is citizenship: from a legal perspective it represents *"the capacity of a national to participate in the nation decision-making"* [3, 2]. This participation in statehood acquires meaning through the exercise of political sovereignty where citizens have the right to choose all other members of the polity. The scope and extent of this right has become subject to much debate as states are relying on their sovereign prerogatives to violate alien's human rights, through the so called *"politics of restriction."*

There have been a number of theories regarding the origins of politics of restriction in liberal democracies. The causes of this phenomenon have been attributed to: (1) the rise in asylum applications; (2) the character of the elites and party ideologies; (3) the end of the Cold War and the loss of refugee's geopolitical value [1, 350). However, all of these fail to persuade as they tend to focus on the effects rather than the causes, overlook political developments or exercise a historically selective approach [4, 3-5]. The most convincing theory, put forward by Gibney, is that of 'democratisation of asylum'. It holds that the West has experienced a shift of decision power from state discretion and High politics (matters of national security) to the populace and Low politics (matters of day to day electoral politics), where political popularity became contingent on public opinion. The demos had called for increasingly greater restriction of borders and the authorities could no longer ignore this discontent [4, 17]. The origins of such attitudes have been traced to certain xenophobic feelings, lack of refugee representation; social, religious and economic animosity, driven by the perception of *overforeignisation* [11].

The UK brings this development into sharp focus: *"British immigration policy has never known an active phase of recruitment; it has been from the start a negative control policy to keep immigrants out"* [7, 288]. Even during the period of refugee acceptance, designed as a vehicle for

ideological triumph over the communist states, the process was static and the public remained sceptical [2, 105]. The *demos* views the state as something that exists to advance their interests as individuals and citizens in contrast to those of aliens. Thus, the process of democratisation of asylum has led to the assertion of citizen rights through democratic channels and an advancement towards a would-be zero immigration country. This assertion of political sovereignty represents the first half of the politics of restriction.

The second half of politics of restriction is the concept of legal sovereignty, which, in this context, refers to a state's absolute right to exclude all aliens if it so wishes. This proposition originates from the judicial opinions of the 1891 precedent-setting case of Musgrove[13]; the interpretation of international law theorists [15] and consequent domestic legal thought [10]. Additionally, post-9/11 security considerations have served to amplify refugee-related anxieties and forced the concept of sovereignty pertaining to the question of alien admission, back into the discourse of statecraft. The exercise of this concept of sovereignty (legal) constitutes the second half of restrictive asylum strategy. Taken together, political and legal sovereignty comprise the first element of the liberal paradox of asylum: politics of restriction.

The second element of the paradox is the "*law of inclusion"*, which refers to the expanding levels of protection being granted to asylum seekers within the jurisdiction of liberal democracies. The process of progressive embedding of human rights has led to the formation of an effective connection of human rights with refugee law; due to this connection aliens have acquired a package of entitlements beyond the powers of the state. Article 1(2) of the 1951 Convention Relating to the Status of Refugees (1951

[13] *Musgrove* v *Chun Teeong Toy*, Privy Council (Australia) 18 March 1891

Convention) defines a refugee as someone who "*owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group of political opinion, is outside his country of origin and is unable or [...] unwilling to return to it*"[14]. Taken in conjunction with the Declaration on Territorial Asylum (DTA), which holds that "*everyone has the right to seek and to enjoy in other countries asylum from persecution"*[15] and Article 18 of the EU Charter of Fundamental Rights (EUC), which reinforces the right to seek asylum, it guarantees aliens the right to seek asylum. However, it does not challenge any signatory state's discretionary right to grant asylum, thus under international law it remains an optional right of each state to grant or refuse asylum [9]. The only obligation expressed in the 1951 Convention is under Article 33, which expressly forbids states to return (*refouler*) an asylum-seeker to a territory where they may face persecution, subject to certain specified conditions.[16] Articles 3 of the DTA, 19 of the EUC and 3 of the Convention Against Torture (CAT)[17] have reinforced and extended this right, making refugee law *"the unwanted child of the states"* [12, 274).

The expansion of the principle of *non-refoulement* occurred primarily due to its conflation with non-derogatory human rights articles codified under the European Convention on Human Rights (ECHR), most significant of which are Articles 2 (right to life) and 3 (freedom from torture). This convergence, labelled as the *judicialisation of asylum*, was brought about by

[14] GA Res. 429(V)

[15] GA Res. 2312 (XXII) of 14 December 1967

[16] Article 33 of the 1951 Convention reads: '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 […]. '

[17] G.A. Res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51, 1984]

firstly, Strasbourg jurisprudence[18], which set a number of radical precedents, secondly, the incorporation of the 1951 Convention into domestic laws, and thirdly, the emergence of new legal protections against refoulment, complementary to the 1951 Convention [4, 12]. Due to these developments the principle of *non-refoulement*, which is the key article of refugee law, had evolved into an indirect right of entry in specific circumstances, and assumed a status of a customary rule [14, 10]. Within the UK these happenings became articulated under the 1998 Human Rights Act, which offers additional appeal rights to failed asylum seekers. These phenomena comprise the second element of the liberal paradox – the law of inclusion.

When the two examined elements are juxtaposed against each other, an apparent tension emerges: on the one hand, citizen rights are influencing restrictive entry policies, and on the other, self-imposed human rights obligations are restricting state discretion regarding deportation of non-citizens. This tension is exacerbated through a growing gap between restrictionist policy intent and expansionist immigration reality, as identified in Hollifield's *gap hypothesis* [5, 570]. Such disparity has exposed the friction between the aims and objectives of international and national legal systems [14, 10], which ostensibly stem from the existence of the liberal paradox. Further, Soysal cites the ECHR as a leading regime, which has developed to protect alien rights undermining national sovereignty and domestic order of distributing rights [13, 20]. Soysal argues that there is a paradox reflected in post-war international migration; where there is a process of 'nationalist' narrative of polity closure and border restriction at the same time as a constant migration flux and the extension of rights to aliens.

[18] See European Court cases of *inter alia*, *Chahal* v UK (1997) 23 E.H.R.R. 413 and *Soering* v UK (1989) 11 E.H.R.R. 439

The liberal paradox of asylum is said to originate from the two normative principles of the global system: national sovereignty and human rights. The former seeks to promote specifically-defined citizen rights, while the latter espouses a universal application of entitlements. Human rights, by definition, move beyond the national frame of reference, however, the exercise of these rights is still tied to specific states and their institutions. Such features of this legal corpus set the framework for potential normative conflict, which, in practice, finds paradoxical expression.

This paradox *"manifests itself as a de-territorialised expansion of rights despite the territorialised closure of polities"* [13, 24], or as a contradiction between the universalistic rights dimension and the particularistic rights dimension of liberal democratic states, which becomes activated in the context of asylum [7, 110]. Gibney refers to this as *"a gap between practical reality of membership-based rights and their universalistic mode of justification"* [4, 17]. Jacobson argues that what necessitates the liberal paradox is the separation of the two components of citizenship: identity and rights, in the post-war era. Identity has remained territorially-bounded and specific, *"while rights have become increasingly abstract, and defined and legitimated at the trans-national level"* [6, 18]. The former author cites various post-war developments, which have created an institutional and normative shift of citizen rights to a supra-national level and thus necessitated the formation of the liberal paradox. Joppke affirms the liberal paradox but points to the weakness in recent analyses of human rights internationalism, which he claims have drawn a misleading dualism between nation states and an external human rights regime: *"the protection of human rights is a constitutive principle of, not an external imposition on, liberal nation states"* [7, 110]. The constraints on state discretion over refugee issues, he writes, are internal rather than external: *"asylum policy is a*

domestic conflict over competing principles of liberal states; to promote the rights of the demos while fulfilling their human rights mandate" (1998b:139). Joppke maintains that it is self-limited, rather than globally-limited sovereignty underpins the acceptance of unwanted immigration by liberal states [7, 271].

Gibney insists that *"the tension between the law of inclusion and the politics of restriction is best understood as reflecting a deeper conflict between liberal and democratic values in a liberal democratic state"* [4, 18]. The principle of democracy, he writes, mandates that the people have the sovereign right to deliberate together to fashion their collective future over time. And this means the right to elect representatives of their choice. Such a system of democratic citizenship forms structural incentives for political leaders to focus on national sentiments. Given the democratisation process of asylum policy and the shift of decision power to the *demos*, the governments found their popularity depending on the will of the people, which favoured a highly restrictive asylum regime. The principle of electoral democracy, notes Gibney, is thus implicated in the rise and maintenance of restrictive asylum policy. On the other hand, the judicialisation process of asylum has served to check the advance of anti-immigrant strategies, where domestic and European tribunals have undermined legal distinctions between citizens and aliens on a human rights footing. This development has led to institutionalisation of the law of inclusion, which extended British duties under article 33 of the 1951 Convention [4, 12-15]. Thus, all three of the presented theories accentuate the existence of a contradiction between democracy (political sovereignty) and human rights law in the context of migration and asylum.

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