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Resolving the Liberal Paradox: Citizen Rights and Alien Rights in the United Kingdom.

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ABSTRACT

The liberal paradox has been instrumental in shaping the exclusionary provisions of municipal asylum law and policy. It refers to the theoretical contradictions between state sovereignty and human rights commitments, which become expressed in the paradoxical asylum procedures of liberal democracies. This paper attempts to weaken the paradox on several grounds. I will argue that there is no necessary tension between democracy and liberalism in the context of asylum; that state's sovereign right to control entry is quite compatible with its obligation to protect aliens within its territory; that British asylum policy is quite consistent and does not manifest the existence of the liberal paradox. The implications of undermining this paradox could be that governments might consider revising their restrictive schemes to accommodate the needs of forced migrants.

CONTENTS

1. INTRODUCTION

'To refuse all admission to the foreigner […] may earn a State a reputation for barbarism and inhumanity with the rest of the world; its citizens will be thought to be adopting the ill-sounding policy of 'exclusion of aliens' and developing a repulsive and intractable character' (bk. XII). – Plato

'To debar foreigners from enjoying the advantages of our cities is altogether contrary to the laws of humanity', (bk. III, ch. XI). – Cicero

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' (in Koslowski 1998:153). 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 lead to the formation of the 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?' It is the purpose of this paper to answer this question and in doing so attempt to weaken the liberal paradox.

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 asylum-seeker (alien) 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 (or resolving) 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.

In researching this topic I consulted various sources of information. For the part of the paper I looked at numerous newspaper articles, broadcast interviews with key officials and a wide range of literature on the origins of the liberal paradox. For the Section on political sovereignty and alien rights the most useful material included: books on democratic philosophy; political articles on liberal theory; and a collection of working papers presented at a United Nations seminar on the inter-relationship between democracy and human rights. For Section Three (on legal sovereignty) I utilised several international law articles; classic publications on legal philosophy; UN General Assembly Resolutions, conclusions, general comments, communications and declarations; judgements and opinions of judges in relevant Australian, American and European cases; a computer-assisted legal research service UK Westlaw; as well as conducting interviews with leading legal scholars and practitioners. For the final Section I made use of legal transcripts; the UN treaty collection; the Council of Europe treaty office; Case law archives of the European Court of Human Rights and the UK House of Lords; the chronology of British Parliamentary debates (Hansard); preparatory work to the European Human Rights Convention and the Refugee Convention; and attended a conference on asylum and citizenship.

This paper has several boundaries that need to be qualified. Firstly, for analytical purposes, I will examine only the clearest and the most comprehensive formulation of the liberal paradox. There are, however, numerous variations on this theme like the 'paradox of liberty' (Petersmann 2001:17) and the 'democratic dilemma', which touch on similar ideas. Second, in Section Two, this paper will work with one particular definition of democracy, presented by Beetham (2002), yet there are additional meanings of democracy that could perhaps challenge the conclusion that democracy and liberalism are compatible doctrines. For instance, David Held's theory of 'cosmopolitan democracy' (1995), Robert Dahl's argument on democratic institutions (1971), and Michael Walzer's discussions of democratic justice (1983) put forward interesting debates not covered in this paper. Thirdly, given the limited scope, I do not address the 'deportation puzzle' (Gibney & Hansen 2003), which raises some key questions relevant to this paper.

This paper will attempt to weaken the liberal paradox by challenging its theoretical and empirical foundations and I will endeavour to substantiate this argument in the following way. Section One will frame the liberal paradox of asylum; I will describe the two elements which form the apparent contradiction: (1) 'politics of restriction' (which consists of two forces); (2) and the 'law of inclusion' (Gibney 2001:2). The first element refers to the expression of (i) political sovereignty and (ii) legal sovereignty, in a liberal democracy. Sovereignty is primarily a political concept,

and in the context of asylum it is being exercised by citizens, using their democratic rights as voters to restrict the entrance of migrants into their state. Secondarily, sovereignty operates as a legal term, and its definitive attribute (in this context) is the inherent right to exclude all aliens. The second element of the liberal paradox refers to the legal expansion of human rights, which provide aliens with rights against the state's discretion to deport them (law of inclusion). When these two elements are placed next to each other – a tension arises, setting the liberal paradox in motion. To clarify the character of these developments I will then address their origins.

In Section Two, this paper focuses on the proclaimed conflict between the first part of the 'politics of restriction' – political sovereignty – and the 'law of inclusion' (extension of alien rights). I will try to challenge the theory that democracy (political sovereignty) is being curtailed by expansion of human rights (linked to alien rights), thus originating the liberal paradox. Three arguments will be made to prove this: (1) democracy should be defined primarily in terms of its regulative ideals (of popular control and political equality) and only secondarily in terms of its institutions; (2) the majority rule of democracy derives from the notion of political equality and ceases to be democratic as soon as it threatens that principle of equality; (3) judicial (human rights) constraint on state asylum activity does not constitute an erosion of its sovereignty but an essential element of its democratic existence. I will conclude that human rights cannot be impeding democracy (political sovereignty) because of their complementary relationship.

In Section Three, I will address the apparent tension between the second part of the 'politics of restriction' – legal sovereignty – and the 'law of inclusion'. This paper will attempt to contest with the claim that legal sovereignty is being constrained by human rights (related to aliens) and offer four points as evidence: (1) the principle of non-return (*non-refoulement*) of asylum seekers has evolved to become an indirect right of entry in some circumstances and assumed a status of customary law; (2) the authority relied upon to support the proposition that a state has an absolute right to exclude all aliens has been selectively used and misinterpreted; (3) despite the existence, in theory, of a sovereign right to exclude aliens absolutely, in practice, most states do admit some aliens. I will conclude that human rights may not be eroding the sovereign right under study because the state has a 'qualified duty to admit some aliens in some circumstances'.

Section Four will tackle the validity of empirical proof for the existence of the liberal paradox, and will look at the case study of the United Kingdom. It has been claimed by a number of theorists that the British asylum policy is contradictory because it reflects the tensions of the liberal paradox (within which it operates). This paper will challenge this claim and argue that British asylum strategy, in actuality, is relatively consistent. With the intention of proving this, I will firstly pose the question: Why would the UK accept sovereignty limitations by the Strasbourg human rights regime, over the matters of its asylum policy? Subsequently, this paper will argue that the most comprehensive way of answering this question is to take on the legalisation hypothesis, which offers a new way of looking at the tensions between state sovereignty and international legal obligations. Rather then seeing the interplay between these notions as an all-or-nothing contest, we should view it as a process of flexible trade-offs on behalf of the state, in search of the most cost-effective transaction. Operating within this framework, there will follow an examination of the

benefits, which the UK had to take into account at the time of joining the regime (over fifty years ago); these benefits being regional military stability and external socialisation.

Having shown why the state delegated authority in the beginning of the regime, this paper will try to explain why the UK continued accepting limitations imposed on its sovereignty after its discretion over asylum became increasingly challenged? The answer I will present is: because of 'progressive hardening of human rights' and 'unexpected sovereignty costs over time'. The empirical evidence for this development of unanticipated sovereignty costs over asylum issues, will be drawn from the pattern of British reservations to asylum-related human rights treaties. The scrutiny of the pattern will show that the UK has taken up a disproportional position where it is willing to accept human rights duties but explicitly avoids the obligations that safeguard alien rights.

However, these trends only partially answer the above question. British government can circumvent lesser commitments, like those of social assistance, but it cannot avoid its obligations to peremptory human rights, like that of a right to life. The authorities cannot execute their asylum procedures effectively if they do not exercise control over issues of deportation, which entail fundamental human rights issues. Thus, the next question I will pose is: why does the UK continue to tolerate restrictions over its autonomy pertaining to treatment of peremptory human rights of asylum seekers?

Employing this legalisation approach I will seek to explain that the prime purpose of the British asylum strategy is to deter (politics of restriction). The 'law of inclusion', which offers rejected asylum seekers additional appeal rights on a human rights basis, does not necessarily contradict this deterrence strategy because its main objective is the promotion of human rights of British residents and not aliens (they benefit only indirectly). Moreover, this paper will examine the options open to the UK if it chose to assume complete control over asylum and withdraw from its legal obligations (law of inclusion). The result of disavowing itself of human rights commitments would have a domino effect, where the government would be compelled to withdraw from a series of other significant contracts. Such an undertaking, I will argue, would eventually lead to greater political and economic costs then those of following the present asylum policy.

In conclusion I will sum up the arguments made and conjecture that, taking into account the presented analyses, a more accurate description of state asylum policy would be 'politics of qualified admission' rather than 'politics of restriction'. Likewise, a more comprehensible depiction of current legal developments in this area would be that of the 'advancement of human rights' rather than the 'law of inclusion'. When put adjacent to each other, these trends appear less conflicting. The terminology of this new discourse uncovers the contextual flexibility and dynamic nature of the asylum process, thus questioning the strength of the liberal paradox.

2. FRAMING THE LIBERAL PARADOX

In this Section I will explain the constituent parts of the liberal paradox and their origins. The liberal paradox refers to the existence of increasingly restrictive and deterrent asylum policy of the state alongside the extending of legal protection being granted to migrants within its territory. The first element is the 'politics of restriction', which refers to the expression of (i) political sovereignty and (ii) legal sovereignty. The second element is the 'law of inclusion'. Firstly, we must address the demonstration of political sovereignty (the first half of the 'politics of restriction').

Exercise of political sovereignty is the assertion of citizen rights through democracy. As a member of an international system the state has to 'define its competence *ratione personae*'; it 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' (des Places 2001:2). 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 '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 (Chimni 1998:350). However, all of these fail to persuade as they tend to focus on the effects rather then the causes, overlook political developments or exercise a historically selective approach (see Gibney 2001:3-5). 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 resriction of borders and the authorities could no longer ignore this discontent (2001:17). The origins of such attitudes have been traced to certain xenophobic feelings, lack of refugee representation, social, religious and economic animosity,[1] driven by the perception of 'overforeignisation'[2] (Ozmenek 2001:54).

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' (Joppke 1998a: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 (Choucri 2002:105). 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

[1] Although of great interest this theme of the root of British hostility towards aliens cannot be analysed in greater detail due to peripheral nature of the subject, which advances beyond the scope of this paper.
[2] *Uberfremdung* – a term used by extremist Austrian Parties to refer to a threat of influx of too many foreigners, break down of national social cohesion, religious identity and economic security.

democratisation of asylum has led to the assertion of citizen rights through democratic channels and an advancement towards a 'would-be zero immigration country' (Layton-Henry 1994). 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[3] (interpreted in conjunction with various US jurisprudence[4]); the interpretation of international law theorists (Vattell 1839; Grotius in Remec 1960; Holdsworth 1938) and consequent domestic legal thought (Lord Denning)[5] (in Nafziger 1983:804-25). 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 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'[6]. 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'[7] 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 (Macdonald & Blake 1995). 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.[8] Articles 3 of the DTA, 19 of the EUC and 3 of the

[3] *Musgrove* v *Chun Teeong Toy*, Privy Council (Australia) 18 March 1891
[4] See cases of *Nishimura Ekiu, Fong Ye Ting* (cited in Nafziger 1983) and the *Chinese Exclusion Case*, 130 US 581 (1889); the theme of sovereignty under international law and these cases will be addressed in greater detail in the Section on sovereignty.
[5] See Lord Denning 's opinion in *Schmidt* v Secretary of State for Home Affairs, [1969] 1 All E.R
[6] GA Res. 429(V)
[7] GA Res. 2312 (XXII) of 14 December 1967
[8] 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 […]. '

Convention Against Torture (CAT)[9] have reinforced and extended this right, making refugee law 'the unwanted child of the states' (Shacknove 1985:274).

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)[10], 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 firstly, Strasbourg jurisprudence[11], 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 (Gibney 2001:12). 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 (Tuitt 1996:10). 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 (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 Hollified's 'gap hypothesis' (1992:570). Such disparity has exposed the friction between the aims and objectives of international and national legal systems (Tuitt 1996:10), 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 (1996:20). The deportation puzzle refers to a similar tendency (Gibney & Hansen 2003:4). 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.

In order to obtain greater clarity regarding these tensions we must address their origins and consequently the genesis of the liberal paradox of asylum. There are a number of theories regarding this subject and I will address them next. 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

[9] G.A. Res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51, 1984]; *entered into force*: June 26, 1987

[10] Council of Europe (COE), ETS No:005

[11] See the 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 relevant case law will be addressed in greater detail in the Section on developments of refugee law.

‘manifests itself as a de-territorialised expansion of rights despite the territorialised closure of polities’ (Soysal 1996:24), 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 (Joppke 1998b:110). Gibney refers to this as ‘a gap between practical reality of membership-based rights and their universalistic mode of justification’ (2001:17).

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’ (1996:18). 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’ (1998b: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 and Hansen maintain that it is self-limited, rather then globally-limited sovereignty underpins the acceptance of unwanted immigration by liberal states (1998a:271; 2000).

Gibney offers his theory on the subject, insisting 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’ (2001:17). The principle of democracy, he writes, ‘mandates that the people have the sovereign right to deliberate together to fashion their collective future over time...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 (Gibney 2001:17). 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 distictions 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 (2001:12-15). 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 asylum.

3. POLITICAL SOVEREIGNTY AND ALIEN RIGHTS

The 'politics of restriction' stems from the exercise of sovereignty in the UK. Sovereignty is primarily a political concept. In a liberal democracy, it is defined as self-determination and autonomy (Sperling 2002:1), where citizens are the 'true sovereigns of the country […] and have non to govern but themselves' (Chisholm Exp v. Georgia).[12] Sovereignty is founded on the concept of democratic rule, where citizens can exercise their rights in choosing other members of a national polity. This function defines the relationship between citizen rights and alien rights in a democratic state (Nafziger 1983:816). However, the development of human rights has had a significant spill-over effect for asylum seekers and served to protect them, in a manner isolated from direct democratic control. Thus a tension between sovereignty and alien rights arose.

In this Section I will attempt to dispute the arguments that Gibney seems to be making: that the liberal paradox of asylum reflects a deeper tension between democratic and liberal values of the states. Democracy and human rights are said to express an inherent clash between sovereignty and liberalism in the context of asylum. However, I will argue that the two theories are not conflicting but complementary in relation to alien rights. Firstly, this paper will conjecture that democracy should be defined primarily in terms of its 'regulative ideals' such as popular control and political equality, and only secondarily, in terms of its political institutions, such as the majority rule.[13] Given such definition, this paper will then assert that the democratic character of political institutions (esp. majority rule) derives from their capacity to advance the regulative ideals of democracy and that these institutions cease to be democratic as soon as they begin to threaten these very ideals. Then I will insist that judicial restraint on state activity does not constitute an erosion of its sovereignty but an essential element of its democratic existence, providing a recent human rights case as an example. The crux of the issue is that the enjoyment of equal basic rights constitutes the foundation of democracy and hence it can not be undemocratic to give these rights legal protection, in a way that sets them beyond the reach of any particular majority decision.

The past decade has witnessed a structural and institutional convergence between human rights and democracy (Beetham 2002; Penna 1998; Garcia-Sayan 2002; Petrova 2002; Gutto 2002). These two doctrines should not be subsumed under one category, nor should they be disconnected entirely; they should be viewed as existing in mutual dependence and reinforcement or a *dialectical relationship* (Gutto 2002:16). Democracy provides the only political framework within which human rights can be guaranteed: the essential link between them is captured in articles 21 of the Universal Declaration on Human Rights and 25 of the International Covenant on Civil and Political Rights (ICCPR), which protect the right of political participation and define democracy itself as a universal human right. Equally, The Human Rights Commission (HRC) in its Resolution 1999/57, laid additional emphasis on the synthesis between democratic and human rights, maintaining that 'the realisation of all human rights […] are indispensable to human dignity and the full development of

[12] *Chisholm Exp* v. Georgia (US) 2 Dale 419, 454; I L Ed 440

[13] Although it must be noted that the definition put forward in this paper relies on the authority of David Beetham and is subject to much debate (see Held 1995)

human potential and are also integral to democratic society'[14]. The concepts of 'substantive democracy, 'inclusive democracy' and 'human rights-based democratisation' support this synthesis of two doctrines. Now I will go on to examine the precise form and character of this synthesis.

There are many conceptual variations of democracy: political analysts have put forward an array of different categories, including 'semi-democracy', 'formal democracy', 'electoral democracy', 'façade democracy', and 'pseudo-democracy', which now comprise the theoretical 'grey zone' (Petrova 2002:4). However, despite the incoherence of peripheries, the core of the doctrine stands clearly defined. Democracy is identified by certain key principles, and by a set of institutions and practices through which these principles are realised[15]. Its Archimedian point, in parallel to human rights, is the dignity of the individual person. However, democracy has a specific focus and a definitive angle – that of *popular control* and *political equality*, 'where citizens have a right to a controlling influence over public decisions and a right to be treated with equal respect in the context of such decisions' (Beetham 2002:2). These concepts were eloquently articulated by Pericles as the foundations of this hypothesis: 'Our constitution is called a democracy because power is in the hands not of a minority but of the whole people. Everyone is equal before the law […] we obey the laws, especially those which are for the protection of the oppressed'[16] (Pericles in Thucydides 460-400 AD/1954:117-9).

The crux of the issue is that democracy should be defined primarily in terms of these 'regulative ideals' and only secondarily, in terms of its political institutions. To define democracy purely in institutional terms is – 'to elevate means into ends, and to concentrate on the form instead of the substance' (Beetham 2002:3). What makes an institution democratic is not the conventional recognition of it as such, but the contribution it makes to the underlying principles of democracy. Viewing democracy as a procedural-based, rather than an ideal-based doctrine, would involve abandoning any critical standpoint from which institutional arrangements may be judged as more or less democratic in their given context and a manner of working (Penna 1998). By that logic the international recognition of the UK as a democracy would mean that whatever institutions it possesses and whatever policies it pursues are necessarily democratic, which would be incorrect. Democracy is not an absolute thing but a *matter of a degree* (Beetham 2002:15), and a principle-focused approach is imperative to an objective assessment of political legitimacy of state action.

If on the one hand, the realisation of basic democratic principles requires the safeguard of fundamental human rights, then on the other hand, it needs a specific set of political institutions (elections, parties, independent judiciary, parliaments, etc.) to be effective. The democratic character of these institutions does not derive from the democratic status of the state in which they are practiced, but from historical evidence

[14] HRC, Res. E/CN.4./1999/57 adopted on 27th April 1999

[15] Robert Dahl defines democracy as 'extensive competition for power through regular free and fair elections; highly inclusive citizenship conferring rights of participation on virtually all adults and extensive political liberties to allow for pluralism of information and organization' as the minimum criteria for democracy (1971:20).

[16] Of course, the parallel cannot be drawn without a tangential point that despite the similarity of rhetoric between modern democracies and ancient Greece, the scope of the demos was radically different in the latter state. Women, for instance did not count as citizens.

of their pragmatic necessity to 'secure the continuing popular control and public accountability of government' (Beetham 2002:6). The majoritarian modus operandi (majority rule) to advance public interests in a liberal democracy is of particular relevance to this study. The concept of popular control has served as a theoretical hook on which Gibney hung the argument that – the public call for restrictive asylum policy is democratic because it is the expression of the majority will. However, despite the conventional view, majority rule is not a basic democratic principle, it is a 'second-best procedural device for settling disagreements when other methods have been exhausted' (Beetham 1999). The majoritarian procedure of counting heads derives from the notion of political equality, where 'everyone is to count for one and none for more than one'; but it becomes undemocratic as soon as it threatens the same principle of political equality. The British asylum problem brings this notion into sharp focus: when the British public are voting for increasing closure of frontiers and thus, potentially, calling for violation of aliens human rights, it is adopting *apparently democratic means* to achieve *actually undemocratic ends*. The majority rule is only valid in so far as it embodies and does not infringe on the principle of political equality.

Having addressed the concept of popular control, we must now focus on the notion of political equality, which gives it effective meaning and defines its respective scope. Human Rights constitute a regime of law, whose authority derives from the ideal of rule of law, not of persons, (and in the expertise and impartiality of the adjudicators). Democracy, on the other hand operates in the domain of politics, where its authority emanates from the citizens and remains accountable to them. These competing conceptions of legitimacy can conflict when the courts curtail government policies on a human rights basis. However, this does not mean that the latter tension reflects the relationship between the two doctrines under study. The rule of law in a democratic society has always been a prerequisite and the main vehicle for the protection of human rights (Petersmann 2001:19), and its operational practice presupposes the separation of the judiciary from the executive and the legislative branches of governance (see Locke; Paine; Adams; and Jefferson in Dunn 1995).

Historically, the rule of law was first developed in England as a tool to protect individuals and their property from the 'tyranny of majorities' (Wagner 1993), as a counter-balance to the democratic procedure. As Madison put it, 'democracies have ever been spectacles of turbulence and contention; and have ever been found incompatible with personal security or the rights of property' (in Petrova 2002:12). Montesquieu, under the concept of 'horizontal accountability', originally envisaged this democratic model, where the judiciary, the executive and the legislature capacitated to *check* and *balance* one another to ensure the legality of state action (in Laqueur & Rubin 1989:68-9). Likewise, Alexis de Tocqueville emphasised the role of the courts as correctors of the aberrations of democracy that limit its sphere of influence (1835/2000). This connection to human rights is confirmed under articles 14(1) of the ICCPR and 6 of the ECHR (*inter alia*, the right to a public hearing by an independent and impartial tribunal established by law) and the HRC Resolutions 2000/47 and 2002/46, where it reiterates that '… the essential elements of democracy include … the separation of powers [and] the independence of the judiciary' (cited in Garcia-Sayan 2002:6).

A judicial restraint on state activity does not constitute an erosion of its sovereignty but an essential element of its democratic existence. An independent judiciary is an integral element of a democratic state, which provides the framework for the guarantee of basic rights. The UK national bills, like international covenants, allow for limitations in specified circumstances. Moreover, all national legislation and the possibility of accession to international treaties have been subject to rigorous debate, close scrutiny, and endorsed by the legislature and in a popular referendum. Hence, any consequent limitation on the discretion of the state administration should be seen as a form of *democratic self-limitation*, where the protection of human rights is a 'constitutive principle of, not an external imposition on, liberal democracies' (Joppke 1998b:110). The national and international tribunals apply the liberal framework to test the degree of democratic 'reasonableness' of state policy and review its acceptability against impartial (human rights) criteria. These criteria were designed to sustain democratic objectives and were accepted by democratic means. Thus, (especially in the case of asylum) the judges can be argued to be 'enforcing the settled popular will against a temporary fit of public alarm or popular prejudice' (Beetham 2002:12).

The European Court case of *Refah Partisi* v. Turkey[17] brings this issue to the fore, where the relationship between democracy and human rights had to be considered.[18] In their verdict, the majority four judges ruled 'there can be no democracy, where the people of the state, even by a majority decision, waive their legislative and judicial powers in favour of an entity which is not responsible to the people it governs'. The Court considered that, when campaigning for constitutional changes, a political party would enjoy the protection of the ECHR if: (1) the means used to those ends were *lawful and democratic from all standpoints* and (2) if the proposed changes were *compatible with fundamental democratic principles*. This ruling, by implication holds that a political party, regardless of its majority support, cannot advance a policy that strikes an incorrect balance between democratic and human rights values. The enjoyment of equal basic rights constitutes the foundation of democracy and hence 'it can not be undemocratic to give these rights legal protection, in a way that sets them beyond the reach of any particular majority decision' (Beetham 2002:8).

In conclusion, what I have attempted to show is: (1) that democracy should be defined in terms of its basic principles and not the procedures which serve to promote these principles; (2) that political institutions are only democratic in so far as they serve to promote the foundational concepts of democracy (3) that impartial judiciary, independent of democratic control is an essential element of democracy, which ensures that its basic principles are advanced in a just way. Such arguments indicate that the claims regarding the clash between democracy and human rights (sovereignty and alien rights) in the context of asylum are misleading. If the democratic and liberal

[17] *Refah Partisi, Erbakan, Kazan and Tekdal* v. Turkey, ECHR [31.07.2001] No.41340/98 & 41342-4/98

[18] Refah Partisi (the Welfare Party, hereafter the '*RP'*) was a political party that had been founded on 19 July 1983. On 21 May 1997 the Principal State Counsel at the Court of Cassation brought proceedings in the Turkish Constitutional Court seeking the dissolution of the *RP*, which he accused of having become 'a centre of activities against the principle of secularism'. On 16 January 1998 the Constitutional Court made an order dissolving the *RP*. The applicants complained of a violation of their human rights, including Articles 9 (freedom of thought), 10 (freedom of expression) and 11 (freedom of association) of the ECHR.

values are complementary in this context then one has to question strength of the liberal paradox. If the restrictive practice of state sovereignty, justified by democratically expressed wishes of the citizens, is incompatible with democracy then such politics is undemocratic. If this 'politics of restriction' is undemocratic then the liberal paradox is founded on an undemocratic, and thus illegitimate, basis. The UK asylum dilemma provides a complex case study for debates about the degrees of compatibility, affinity and convergence between democracy and human rights. Given the British Westminster model of democracy, with its highly centralised state, first-past-the-post procedure and the lack of constitutional constraint upon the executive, the UK has the least appropriate system for the protection of asylum seekers rights.

4. LEGAL SOVEREIGNTY AND ALIEN RIGHTS

The 'politics of restriction' is justified on the basis of legal sovereignty. While being primarily a political concept, sovereignty also operates as a legal term within the domain of international law. In this Section I will look at sovereignty as a legal concept and analyse the claim that the state has an inherent right to control alien entry absolutely. The concept of a sovereign right of total exclusion has been instrumental in shaping restrictive provisions of municipal law and policy, and continues to be regarded as an axiom of international law. This conception conflicts with the increasing influence of the principle of *non-refoulement*, the scope of which has been expanded to prohibit rejection at the frontier. While this rule does not establish an affirmative right for persons seeking refuge to enter the territories of states, it does operate indirectly to grant a right of entry if it happens that the only choice which a state party has is admission or forced return (Yundt 1989:202). This feature of the latter norm has challenged the sovereign right of absolute control over alien admission, contributing to the formation of the liberal paradox.

I will atempt to prove that the conflict between the legal concept of sovereignty pertaining to asylum (right of total exclusion of aliens) and the indirect alien right of entry (*non-refoulement*) is not as convincing as it's been assummed. Firstly, I will look at the legal standing of the priciple of *non-refoulement* and show that it has reached a status of a customary rule, in order to demonstrate its strength within liberal democracies. Then this paper will examine the validity of the contention that a state has a sovereign right to exclude all aliens, arguing that the jurisprudential writing relied upon to support this claim does not endorse it absolutely, but places it under a requirement of legitimate reasons for exclusion. I will analyse the works of legal theorists, which have been cited as the authority in the precedent-setting Anglo-American cases, and point out the ways in which they were misinterpreted. Thereafter this paper will focus on the historical elements of the practice of legal sovereignty and show that the custom has been to admit some aliens despite the asserted right of total exclusion. In conclusion I maintain that the state does not possess an absolute right over alien exception, but a 'qualified duty to admit some aliens in some circumstances'. Thus, if the politics of restriction is founded on misconstrued sources, further questions arise regarding its legitimacy and strength as an element of the liberal paradox.

The safeguard of a right to life and the prohibition of torture codified under Articles 2 and 3 of the ECHR; articles 3 and 5 of the Universal Declaration on Human

Rights; articles 6(1) and 7 of the ICCPR; and article 3(1) of the CAT have served to embed and expand the principle of *non-refoulement* beyond the exception clause provided in the 1951 Convention. The conflation of this refugee principle with the peremptory human rights obligations has elevated it to a status of 'customary law' (Tuitt 1996:10) and some even claim – a rule of *jus cogens* (Allain 2001). Goodwin-Gill writes that 'there is substantial, if not conclusive authority that [*non-refoulement*] is binding on all states, independently of specific assent' (1996:167). Additionally, the European Commission on Human Rights has stated that: 'Under General international law a State has the right, in virtue of its sovereignty, to control the entry and exit of foreigners […] However, the State that signs and ratifies the ECHR must be understood as agreeing to restrict this right, to the extent and within the limits of the obligations which it has accepted under the Convention'.[19]

The entrenchment of *non-refoulement* can be observed in various legal and political developments such as the UNHCR EXCOM Conclusion No.55[20], where it was asserted that 'all States' were bound to refrain from *refoulement* on the basis that such acts were 'contrary to the fundamental prohibitions against these practices' and Conclusion No.79[21], which clearly determined that 'the principle is not subject to derogation'. Likewise, the jurisprudence of the Strasbourg human rights tribunal, in the milestone cases of *Soering* and *Chahal*, defined the strict parameters for the operation of asylum policies and established a clear junction between the possibility of aliens' persecution and state responsibility to offer protection (admission).

In the UK, these legal developments became absorbed in the Human Rights Act 1998, which has placed significant limitations on state sovereign rights, by assuring procedural outlets for applicants who were denied entry. This bill has been described as the biggest change to UK law since the 1688 bill of rights (Batty 2001) and constitutes an exceptional step in both European and common law contexts. It creates a general requirement that all legislation be read and implemented in a way, which is compatible with the Convention. 'In essence', argues Harris 'the Act is a transfer of residence […] it creates a superogatory citizenship that allows people to leave countries that do not work, and enter countries that do,' (2003:8). This legislation has already been utilised to check the powers of the Home Office in the cases of, *inter alia*, *Ahmadi*[22], *Kariharan*[23] and *Z*[24]. Thus the indirect right of alien entry has become increasingly influential in compelling states to accept unwanted migration.

In response to the above developments liberal democracies have relied on the concept of legal sovereignty to justify their highly restrictive and controversial asylum tactics. Sovereignty is claimed to be most absolute 'in matters of emigration, naturalisation, nationality and explusion (Arendt in Joppke 1998a:267) and its 'essence remains in the power to exclude' (Clad 1994:150). Similar views have been propagated by influential jurists, political scientists and public policy makers (see Widdecombe in Solomos & Schuster 1999:64; Freeman 1995; Joppke 1998a; Soysal

[19] Application No.434/58 (XV, Sweden), 28 ILR 242 (European HRC)
[20] EXCOM Conclusion No.55, (1989)
[21] EXCOM Conclusion No.79, (1996)
[22] R v. SSHD, *ex parte Ahmadi* [2002] EWHC 1897
[23] R v. SSHD, *ex parte Kariharan* [2002] EWCA Civ 1102
[24] R v. SSHD, *ex parte Z* [2002] EWCA 1113

1996; Gibney 2001; Storey 1994; Johnson 1980). However, I agree with those critics who believe this proposition to have little historical or jurisprudential foundation (Nafziger 1983:804-847; O'Connell 1970:696; Goodwin-Gill interview; Hathaway interview). Nafziger argues that the juristic opinions, which shaped current thought, are unconvincing as they often misinterpret authority, contradict contemporaneous statements of opinion, and rest on questionable, often racist presumptions. Despite the legal characterisation of the practice of alien admission as a self-imposed limit on the exercise of the right to exclude, in actuality it is as a 'qualified duty to admit some aliens in some circumstances' (1983:805). He convincingly sets out to re-examine the sources and legal authorities, which provided the legal footing for consequent case law precedents and the formation of the current approach.

Despite the relatively modern origin of the proposition, a 1972 opinion of the United States Supreme Court referred to 'ancient principles of the international law of states'[25] to uphold the power of the government to exclude all aliens if it so wanted. However, the ancient Greeks entertained a hospitable attitude towards aliens (Jones 1956:49): Pericles, Plato, and to a limited extent Aristotle, accentuated the admission of aliens as a qualified duty of the state, subject to specific conditions (Plato bk.VIII, XII; Aristotle in Baker 1959:294-300; Pericles in Nafziger 1983:809). Municipal Courts often ignore international law theory by according 'inherent powers' to the sovereign state, ignoring the classic publicists on the subject. However, Hugo Grotius, Francisco di Vitoria, Christian Wolff and Pufendorf, all advocated a right to free migration, temporary sojourn and a permanent residence for refugees expelled from their homes, so long as their reasons for seeking admission were lawful (in Nafziger 1983:810-12).

The modern rationale for exclusionary powers of the sovereign is derived from Vattel's work and his concept of self-preservation, by which a state may take all necessary measures to maintain national security (Gordon 1951:302). It was his highly selective writings, together with the socio-economic context of the time and the rise of legal positivism, which conditioned the US and UK judicial decisions to uphold the sovereign right to total exclusion of aliens. The Chinese exclusion case and the cases of Nishimura Ekiu, Musgrove and Fong Yue-Ting relied on Vattel, when they set the precedents, which drew out the judicial doctrine for the Anglo-American world. The Chinese Exclusion Case[26] judgement, referred to Vattel, when it held that the state is entitled to perform its 'highest duty', which is to 'preserve its independence, and give security against foreign aggression and encroachment, [whether]…it comes from the foreign nation acting in its national character or from vast hordes of its people crowding upon us' (in Nafziger 1983:817). Likewise, in the cases of Eku and Fong Yue-Ting, national security and self-preservation (highest duty) taken in conjunction with the concept of territorial jurisdiction, (defined by Chief Justice Marshal[27]), was understood to be sufficient to justify the exclusion. Similarly, the classic British opinion in Musgrove v Chun Teeong Toy, which gave legal expression to the exercise of the 'sovereign prerogative' in the instance of alien

[25] *Kleindienst* v *Mandel*, 408 US 753, 765 (1972)
[26] *Chinese Exclusion Case*, 130 US 581 (1889)
[27] 'The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would apply diminution of its sovereignty to the same extent in that power which could impose such restriction'. Chief Justice Marshal, Schooner Exchange v. McFaddon, 11 US (1812)

exclusion, relied on the same authority. These municipal decisions and derivative writings have shaped the proposition under analysis, placing asylum matters firmly under domestic jurisdiction and creating legal precedents, which set the framework for wider immigration law.

The recent jurisprudence also refers to Vattel as part of the conventional logic. Judge North, in the Australian MV Tampa Case cited Lord Atkinson's ruling to support his judgement: 'the power to exclude or expel even a friendly alien is recognised by international law as an incident of sovereignty over territory. As Lord Atkinson, speaking for a strong Judicial Committee of the Privy Council, said in Attorney-General (Canada) v. Cain and Gilhula: 'One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests: Vattel, Law of Nations, bk.1 pp.231; bk.2 pp.125.'[28] Such reasoning can be further felt in the British Schmidt case, where Lord Denning insisted that 'no alien has the right to enter this country [UK] except by leave of the Crown: and the Crown can refuse leave without giving any reason'.

However, Nafziger persuasively argues, that Vattel's writings have been selectively used and, in fact, there are other parts of his treatise that compel the opposite conclusion. Indeed, the Swiss theorist clearly distinguished between internal law of nations, rooted in natural law, and external law, rooted in positivist discipline. Internal law establishes sovereign duties as a matter of conscience and principle, whereas external law establishes sovereign rights as a matter of will. It is Vattel's external law that is repeatedly cited by the authorities, while the internal law is unjustly ignored; the 'right of fugitives or exiles' taken in conjunction with the concept of 'sovereign duties' crafts a strong argument for the existence of limitations on the sovereign prerogative over alien admission. In fact, Vattel placed strict conditions on state capacity to exclude: 'no nation', he wrote – 'can, without good reason, refuse even perpetual residence to a man driven from his country' (1758/1839:107-08). Even if the sovereign state theoretically has the 'inherent right' to exclude aliens absolutely, it cannot do so in some instances because of the 'qualified duty to admit some foreigners' (Nafziger 1983:814). Thus it seems that in the standard-setting Anglo-American cases, the judges relied on the very authority (Vattel) that limited the right of alien omission, which the courts aimed to uphold absolutely.

Further, the analysis of the material elements of the custom cast the legality of the sovereign right to exclude into further doubt. 'The concept of sovereignty was misleading', argues Lowenfeld even when it was first announced by key theorists such as Hobbes and Hegel, who focused exclusively on the vertical structure of the state. With time, the meaning of the concept evolved to address the horizontal relationship between separate states, however the attitude remained static. Thus, when pursued in the current asylum context, sovereignty 'seems likely to lead to vertical concepts, where horizontal thinking is required; and to rigid rules, which bear no relation to reality' (1981:629). This dysfunctional approach is reflected in historical

[28] *Victorian Council for Civil Liberties* v. MIEA [2001] Australia, FCA 1297

practice, where most states including UK, do admit some aliens despite the existence in theory of a sovereign right of absolute exception (Turack 1978; Weiner 1994); hence there is a sharp inconsistency between reality and theory in this context (Oda 1968:471; Goodwin-Gill interview). The dissenting opinion of Justice Black, in the appeal to the Tampa case ruling,[29] addresses this illogicality. Citing Holdsworth, the judge maintained that the preponderance of opinion by the text writers 'supports the view that, by the end of the nineteenth century, in English jurisprudence, the power to exclude aliens in times of peace was not considered to be part of the prerogative' and 'there appear to be very few instances in which the Crown used its prerogative to exclude or to expel aliens' (Holdsworth 1938:396-7). If states in practice do not exercise whatever right they may have to exclude all aliens, then the proposition under study might seem inconsequential.

Hence, the duration, repetition, continuity and generality of state practice, which constitute the material elements of custom, help to refute the proposition that state may exclude all aliens. 'Taken in conjunction with a fairly strong psychological element; the *opinio juris*; the sense of obligation to admit aliens, and it follows that there is a custom of qualified alien admission' (Nafziger 1983:838-41). While admitting that current municipal law and policy towards asylum seekers needs refining, it is fair to conclude that the philosophical basis for that law is one of inclusion over exclusion. Provided that national security is not under an explicit threat and given the legal strength of the *non-refoulement* rule, the state, it seems, has a duty to admit some aliens and especially asylum seekers.

In conclusion, I have tried to demonstrate that: (1) the principle of *non-refoulement* has reached a status of customary law and has become, in some circumstances, an indirect right of entry; (2) the authority which conditioned the current notion that a state has a sovereign right to exclude all aliens has been misinterpreted; (3) historical practice confirms that states do admit some aliens despite the proposition that it can exclude them absolutely; (4) the state has a qualified duty to admit some aliens in some circumstances particularly asylum seekers. Provided such analyses are correct it might be fair to conclude that they weaken the liberal paradox. If the exercise of legal sovereignty *a propos* alien entry was constrained at the outset, then the extent to which British sovereignty is being curtailed now is less then it is claimed. Indeed, the 'politics of restriction' may be an inaccurate description of state asylum policy; given the arguments above, a more comprehensible depiction would be that of 'politics of qualified admission'.

[29] *Ruddock* v. *Valderadis*, [2001] Australia, FCA 1329

5. EXPLAINING THE GOVERNMENT ASYLUM POLICIES

It has been claimed that the contradictory nature of the British asylum policy is the practical expression of and the empirical evidence for the liberal paradox (Hansen 2000; Gibney 2001; Joppke 1998b). If the arguments put forward in Sections Two and Three are to hold, then this assertion must be addressed. I believe that the UK actions in this context might me more consistent then they first appear and therefore do not constitute the proof for the existence of the paradox.

In order to prove this I will firstly pose the question: Why does the UK tolerate limitations on its discretion over asylum, imposed upon it by the Strasbourg regime? This paper will argue that the best way of answering this question is by employing the the legalisation hypothesis, which offers a new way of looking at the tensions between state sovereignty and international legal obligations. Rather then seeing this relationship as a zero-sum game, we should view it as series of trade-offs between state discretion and legal commitments. This approach changes the above question into: What are the benefits of surrendering sovereignty, that the UK chose to accept in exchange for its autonomy costs? Looking through this new optic, I will strive to explain what were the original reasons for British entrance into the Stasbourg mechanism (over fifty years ago), namely military stability and external normative influence. Having answered the question – why the state joined at the time, the analysis will move on to tackle the next question that follows logically – why did the UK continue to tolerate restrictions to its sovereignty (over asylum), once the degree of these restrictions becane increasingly higher over time?

This paper will contend that this tolerance persisted for two reasons: 'progressive hardening of human rights' and 'unexpected sovereignty costs over time'. These developments have served to advance alien rights beyond the initial intentions of the contracting parties. In an endeavour to reassert its control over asylum, the UK became forced to adopt a specific pattern of human rights commitments and reservations, which shows that it is willing to accept human rights duties but explicitly avoids the obligations that safeguard alien rights.

This legal pattern only partially answers the question above. The UK has successfully expanded its ground for discretion over lesser human rights (social assistance, etc.), yet it it remains bound by the principle of *non-refoulement*, which relates to peremptory articles (right to life, etc.). Its continuing acceptance of this rule undermines its efforts to effectively conduct deportation (*refoulement*). Thus, the next logical question arises: why does the UK continue to accept limitations on its discretion over asylum, regarding the treatment of aliens' fundamental human rights?

This paper will then apply the legalisation framework to explain the logic behind British asylum policy: the purpose of the policy is to keep refugees out. To prove this point I will examine the legal developments, which are supposed to be contradicting this deterrence tactic ('law of inclusion'). The latter does indeed provide additional appeal rights to aliens, however that effect is merely an extension from the primary purpose of this law, which is to grant further appeal rights to British residents (not aliens).

This analysis will claim that UK is committed to promoting the human rights of its citizens, however this process necessarily affects asylum seekers within its jurisdiction. The authorities have expressed their wish to reduce their obligations to aliens (and thus to have greater freedom in this area) by placing reservations to some human rights articles. Yet, I will argue that such course of action will be unsuccessful because fundamental human rights exist within a web of other obligations: to withdraw from one such commitment would mean to withdraw from a whole network of commitments. If the UK pursues such policy it would have to pull out from several key conventions, which would result in numerous disadvantages such as the expulsion from the European Union. I will conclude that British asylum policy is not as irrational as it is drawn out to be; it continues to develop the 'law of inclusion' simply because the political and economic costs of not doing so would outweigh the costs of tolerating unwanted immigration. Hence, if British asylum strategy is not as contradictory as first thought, then the liberal paradox no longer has any practical evidence for its existence, perhaps becoming increasingly less convincing.

Arrangements that adjudicate human rights internationally pose a fundamental challenge to the Westphalian ideal of state sovereignty that underlies the realist international relations theory and the liberal ideals of direct democratic legitimacy and self-determination (Moravcsik 2000:218). The post-war emergence of these arrangements has been rightly characterised as the 'most radical development in the whole history of international law' (Humphrey 1974:208). The European Court acts as an arbiter in this area and is considered to be the most advanced and effective international human rights regime. So, a question arises – why would the UK (and other liberal democracies) delegate their authority to an independent mechanism, which will hold them accountable for their domestic asylum policies?

Reasoning from such theoretical basis, we are compelled to view the interchange between state sovereignty (over asylum) and international regimes as a zero-sum game. By this logic, a consistent asylum policy would be that which is either under complete discretion of the state or under the control of an international legal mechanism. From this position British asylum management would be highly paradoxical. However, Abbot, Keohane, Slaughter and Snidal have put forward the legalisation hypothesis, which serves to weaken (or even resolve) this paradox. Legalisation is a specific form of institutionalisation, characterised by three components: obligation, precision, and delegation (OPD), where a fully legalised institution is one with high levels of obligation, precision, and delegation (Abbot et al. 2000:401). The latter has the capacity to help states resolve the commitment problems associated with human rights mechanisms, reduce transaction costs, and expand the grounds for compromise 'Hard' law agreements are framed in terms conveying high levels of obligation, precision, and delegation; and therefore require greater autonomy costs on behalf of the signatories; while 'soft' law contracts, allow for wider margins of state discretion due to the lower levels of OPD. Thus, 'under different conditions among actors, hard and soft law will imply different ratios of costs and benefits' (Goldstein et al. 2000: 394). Hence it should be possible, according to Abbott and Snidal, to account for variations in legalisation by identifying how institutional arrangements, involving greater or lesser degrees of OPD, generate particular patterns of costs and benefits (2000:425).

This approach can be deployed to explain the British government's behaviour towards human rights and refugee law by focusing on the transaction expenses involved in the consideration of ratifying these legislations. Within the legalisation framework, the relationship between international human rights law and state sovereignty is not a zero-sum game but a series of tradeoffs, (Abbot & Snidal 2000:455). Thus, the question: 'Why does the UK accept the sovereignty limitations imposed upon it by the European human rights regime?' becomes transformed into: 'What are the benefits of delegating authority to the European regime, which outweigh the autonomy costs that the UK is choosing to trade-off?' Such formulation of the liberal paradox appears less contradictory. This variability in legalisation provides for a more context-sensitive framing of international legal obligations and a more dynamic explanation of the liberal paradox, allowing for change in hierarchy of state preferences through time (Keohane & Hoffmann 1991).

Having changed the frame of analysis, let us pursue the newly rephrased question above. The UK first joined the Strasbourg tribunal over fifty years ago. So in order to find a convincing theory regarding the benefits of surrendering sovereignty (over asylum), we must firstly address the incentives that the UK had to consider at the time of entering the regime. There are a number of theories that address this issue. Firstly, the Realist theories of origins of human rights hold that great powers externalise their ideology and coerce lesser powers to accept them (a prediction that follows from hegemonic stability theory). Morgenthau (1960), Carr (1946) and other classic realists, maintain that governments employ liberal ideology, including support for human rights, to justify the pursuit of geo-political interest. Secondly, the Ideational explanations emphasise the importance of moral force of post-Holocaust Europe to describe the emergence of human rights regimes and the principled power of normative ideas. Contra Realists, Idealists reject all choice-theoretic foundations and coercive strategies; they stress the transformative power of moral discourse, trans-national socialisation and the 'logic of appropriateness' (Finnemore & Sikkink 1998).

Moravscik rejects both of the conventional theories and proposes an alternative perspective of Republican liberalism, which holds that primary proponents of binding human rights commitments were the newly established democracies (2000:220). From a republican liberal perspective, the theoretical starting point is the 'instrumental calculation of domestic politics' while the creation of an independent judicial body is a 'tactic used by governments to 'lock in' democratic institutions, thereby enhancing their credibility and stability vis-à-vis non-democratic political threats' (Moravcsik 2000:220). A rational decision to delegate to an independent judicial body requires for the government to weigh up two considerations: restricting sovereignty and reducing political uncertainty; and the authorities opt for joining when benefits of reducing future political uncertainty outweigh the 'sovereignty costs' of membership. At the time of the establishment of the regime, the UK was a stable democracy, thus it had no obvious incentive to become a member. However, there was one inducement to enter the agreement: regional military balance. Despite the risk of future pressure to deepen the commitment, there was a political rationale to sustain 'democratic peace' in the region by instituting human rights in newly emerging democracies (Russet 1993). Due to a prevalent fear of past fascism and future communism in Europe, the UK was compelled to contribute to the establishment of the Court, which had the potential to provide a 'system of collective security against tyranny and oppression' (Fyfe in Moravcsik 2000:238). However, the

primacy of domestic sovereignty over collective defence of democratic peace remained unchallenged and paramount in the minds of the British officials.

In response, Simmons argues that Moravscik has overlooked an important motivating aspect, apart from military balance: external socialisation, supported by the 'normative diffusion theory' (Simmons 2000:25). The set of international legal rules surrounding human rights practices, argues Simmons, have an undeniably normative genesis. Indeed, some scholars argue that 'human rights have become a part of the post-war calculus of political legitimacy' (Donnelly 1998:20) and others point to the role of 'norm entrepreneurs' and NGOs, who influence the drafting process and institutional arrangements that create human rights regimes (Tolley 1989; Finnemore & Sikkink 1998; Chinkin 2000). In the case of UK, argues Simmons, there is evidence of external socialisation, where pressures from other states and private 'norm entrepreneurs' are associated with stronger international human rights commitments. Furthermore, normative pressures can build as an increasing number of states make more serious commitments and 'especially as states within one's own region begin to do so' (Simmons 2000:14). According to the theory of normative diffusion – governments are socialised to do what their regional peers tend to do (Simmons 2000:25). Moreover, countries that do accept limits on their human rights policies are likely to be subject to some kind of implicit or explicit linkage politics that raises the cost to those remaining outside the regime (Forsythe 1989; Krasner 1999). Indeed the ultimate reason for British commitment, given by the British Representative, was because 'the alternative, namely the refusal to become party to the convention, acceptable nearly to all of the remaining states, would appear to be almost indefensible' (Beckett in Moravcsik 2000:242). Hence, there is evidence of social and normative concerns.

Moravscik and Simmons have convincingly pinpointed how the UK was driven by both interest-based (military security) and norm-based (socialisation) processes, which accrued to a human rights regime (tribunal). These motivational factors serve to explain why the government chose to join at the time, but not why it remained a signatory once its discretion regarding asylum measures became increasingly challenged. This phenomenon can be explained by two elements associated with legalisation: 'progressive hardening' of human rights (and *non-refoulement*) and 'unanticipated sovereignty costs over time'. Finnemore and Sikkink conjecture that the increasingly deeper entrenchment of human rights occurred due to the 'crystallisation of state expectations' and a dynamic process of 'hardening' of legal norms over time (1998). Thus the originally drafted human rights articles have expanded over time beyond their intended scope, tapping into wider contexts including that of asylum. Such process of legalisation can lead to further, often unanticipated 'sovereignty costs over time'. Even if rules are written precisely to narrow their range, or are softened by inclusion of escape clauses and limits to delegation, states cannot anticipate or limit all of their possible effects.

Delegation provides the greatest source of unanticipated sovereignty costs, because a grant of 'authority always becomes to a degree uncontrollable' (Lindblom in Abbot & Snidal 2000:438). The best examples are the Human Rights Tribunal and the European Court of Justice (ECJ). The ECJ rulings transformed the preliminary

ruling procedure (Article 177 of the Treaty of Rome[30]) from a check on supranational power into a device through which private litigants can challenge national policies as inconsistent with European law (Alter 2000:489-95). Similarly, the Strasbourg Court has constructed an effective linkage between refugee and human rights law, which allows asylum seekers to exert their independence in ways that go beyond the initial intentions and anticipations of the contracting parties. The unforeseeable development of this human rights spill-over is confirmed by the government's willingness to delegate authority over human rights issues but not asylum issues. It is evident that there is simply no *volonté politique* or readiness among the liberal states to underwrite an unlimited obligation to the EC for granting asylum to refugees or to abdicate their sovereignty over these matters (Coles in Jaeger 1981:52).

The UK had experienced a deepening of its human rights commitments and the formation of new obligations to asylum sekers, which were not envisaged at the time the treaty was drafted. In an attempt to regain control over asylum, the authorities have embarked on a course of action where they are ratifying human rights contracts, but placing reservations to clauses with asylum implications. The empirical proof for this assertion can be seen in the variations of legalisation, where British attempts to soften legal commitments towards asylum seekers are juxtaposed against attempts to harden obligations towards human rights. If one examines the position the UK has taken up in respect of the major European human rights conventions, it would become apparent that 'there has been a singular concern to avoid the few obligations that expressly safeguard immigration rights' (Storey 1994:117). This disproportional attitude is reflected in the pattern of legal commitments.

The legal (empirical) reality confirms this imbalance. The UK is party to numerous human rights related agreements including the ICCPR; however it has placed a significant reservation in relation to Art.12, holding that: 'the UK reserves the right to continue to apply such immigration legislation governing entry into, stay in and departure from the United Kingdom as they may deem necessary […]'. Likewise, it still has not ratified the Optional Protocol[31] to the ICCPR (right of appeal against a state to the HRC). Further, the UK is a signatory of the European Human Rights Convention; yet to this day it has not ratified Protocols No.4[32] (liberty of movement and prohibition of collective expulsion of aliens) and No.7[33] (tight procedural safeguards relating to expulsion of aliens). In addition, it has recently issued a declaration[34] reserving the possibility of detention on national security grounds (in some cases not in accordance with the Strasbourg *Chahal* ruling), citing the derogation clause under Article 15 in support of the decision.

In the area of nationality and asylum, the United Kingdom has signed and ratified the Convention on the Reduction of Statelessness (CRS),[35] but entered an important reservation, where it holds back the right to deprive a naturalised person of

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1.1. [30] Treaty establishing the European Community as Amended by Subsequent Treaties, Rome, 25 March 1957

[31] G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, UN Doc.A/6316 (1966)
[32] COE, Treaty Office, ETS No46
[33] COE, ETS No.117
[34] Declaration contained in a *Note Verbale* of the UK, registered [18 December 2001], COE
[35] UN Treaty Series, vol.989, pp.175

his nationality on the grounds of national security. It has not signed the Protocol to the European Convention on Consular Functions concerning the Protection of Refugees[36] and very recently suspended its membership of the European Agreement on the Abolition of Visas for Refugees[37] (visa-free entrance for refugees).

On the subject of child rights, the UK is party to the Convention on the Rights of the Child;[38] however with an exception clause, where it maintains the 'right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the UK of those who do not have the right […] to enter and remain in the UK […]'.

Pertaining to women's rights, it has accepted the duties of the Convention on the Elimination of all forms of Discrimination against Women[39], yet again with a secured right to continue to apply such immigration legislation governing entry into, stay in, and departure from, the UK as it may deem necessary'. The UK has not ratified the Convention on the Nationality of Married Women, which has numerous immigration implications[40].

In relation to migrant workers, it has signed and ratified the ILO Convention (No.97) concerning Migrant Workers[41]; it has not, however, ratified the International Convention on the Protection of the Rights of all Migrant Workers and members of their Families[42]. Moreover, the UK has not signed the European Convention on the Legal Status of Migrant Workers[43] or the European Agreement on Regulations Governing the Movement of Persons between Member States of the Council of Europe[44].

In the sphere of social security, the UK is a signatory to the European Convention on Social and Medical Assistance (CSMA)[45] (the Protocol of which extends medical rights to refugees); however it reserves the right to free itself of the obligation of assistance to refugees in case they refuse to be repatriated. Furthermore, it has signed and ratified the European Code of Social Security (ECSS)[46]; yet with a condition, which renders article 73 of the agreement (provision of social security to non-nationals) non-binding. The UK has signed and ratified the Supplementary Agreement for the application of the European Convention on Social Security[47], but not the Convention itself[48]. It has placed a further reservation to the European Social Charter[49], freeing itself from the duties under Article 73 (extension of social security to foreigners). The British State has not ratified the Additional Protocol to the

[36] COE, ETS No.61A
[37] COE, ETS No.31
[38] UN G.A. Res.44/25
[39] G.A. Res.34/180, UN Doc.A/34/46; entry into force: 3 September 1981
[40] UNTS, vol.309, pp.65
[41] UNTS, vol.120. pp.71
[42] UN G.A. Res. 45/158; not in force
[43] COE, ETS No.93
[44] COE, ETS No.25
[45] COE, ETS No.14
[46] COE, ETS No.48
[47] COE, ETS No.78
[48] COE, ETS No.78
[49] COE, ETS No.35

European Social Charter[50] (extension of the rights of foreigners, stateless persons and refugees in matters of employment) and the Protocol to the European Code of Social Security[51], (extension of social assistance to aliens). Thus there appears to be a pattern where the government is promoting human rights, while trying to maintain a grip on asylum seekers rights.

Now let us return to the question posed at the outset – why does the UK accept limitations over its sovereignty by the human rights regime? Having adopted the legalisation hypothesis we have moved from a mutually exclusive approach to a more compromising cost-benefit analysis, where the focus has shifted towards the evaluation of benefits involved in abdicating autonomy. It seems that originally the government delegated its sovereignty (over human rights) to the tribunal for the reasons of military balance and normative socialisation. Over time it experienced a process of 'progressive hardening of human rights', which resulted in 'unexpected sovereignty costs' in relation to asylum control. These developments forced the authorities to accept human rights obligations while trying to maintain control over asylum matters, by ratifying human rights treaties but entering reservations to articles which safeguard alien rights.

However, despite the numerous reservations and declarations, the UK cannot derogate from the fundamental human rights, which apply to aliens within its territory. It has successfully diminished the social (Hathaway's hierarchy – 3rd and 4th tier) rights, but remains ineffective in migrant ejection (which pertains to fundamental 1st and 2nd tier rights) (Hathaway 1991:108-111). Thus we have only partially answered the question; we still need to explain why the UK continues to accept external coercion over its asylum policy, regarding fundamental alien rights? In order to answer this question, let us assess the ways in which the government could avoid its international obligations in relation to aliens' fundamental human rights and regain complete control over asylum matters.

Throughout the 1990s the UK pursued a consistent politics of restriction, which was expressed in a highly deterrent asylum policy[52]. On the other hand there have been two significant advancements which have resulted in inclusive legal practices (law of inclusion), thus undermining the deterrent strategy: (1) the 1998 Human Rights Act; (2) and Strasbourg jurisprudence. Firstly, the Human Rights Act does indeed obstruct the removal of failed asylum seekers through its conferral of

[50] COE, Strasbourg, [5.V.1988]
[51] COE, ETS No.48
[52] The 1993 Asylum and Immigration Appeals Act was introduced for one purpose: deterrence. It commissioned a number of highly restrictive procedures, including the curtailment of appeal rights, diminishing of social security entitlements, extensive detention, fast tracking procedure of manifestly unfounded cases and the 'safe third country rule'. The 1996 legislation followed the same pattern: it placed further limitation on rights of appeal, increased the powers of immigration officers, further curtailed social benefits, created new employment offences and introduced the notorious 'white list'. Likewise, the 1999 Act placed further penalties for carrying clandestine entrants and introduced the 'one stop appeal' procedure (Her Majesty's Statutory Office). Continuing the trend, the 2003 Nationality, Immigration and Asylum Act removed the concession to work, re-introduced the 'white list' and withdrew housing support from applicants who do not make a claim for asylum 'as soon as reasonably practicable after arrival'. The Parliament's Joint Committee on Human Rights identified 22 possible breaches of human rights. Thus there is a clear determination among the authorities to deter migrants outside of its territory and penalise those within it (Goodwin-Gill interview).

additional appellate rights onto forced migrants. However this asylum-directed effect of the bill must be viewed within the scope and context of its intended application. The main purpose of this Act was not to extend the appeal rights of aliens but to allow residents of the UK the opportunity to enforce their rights in British courts without the delay of going to Strasbourg: it is '… to give further effect to the rights and freedoms guaranteed under the ECHR […]' (Lord Chancellor, Hansard). If we place this enactment within the legalisation (and *paracommunitarian*) context, it seems that the UK considers the benefits of endorsing human rights of British residents to outweigh the detriments of offering further appeal rights to asylum seekers. The main purpose of the 'law of inclusion' is the entrenchment of human rights; the inclusive characteristic of this practice is only a subsidiary effect. In fact a more explicable description of this process would be the 'advancement of human rights' (rather then the 'law of inclusion').

Secondly, numerous critics have depicted Strasbourg jurisprudence, pertaining to embedding of *non-refoulement*, as a contradictory force to the British management of asylum. This judicial development is claimed to be at the heart of the liberal paradox frustrating national attempts to combat unwanted migration. Operating within the legalisation frame of analysis (and ignoring for now the arguments put forward in Sections Two and Three), let us consider the options open to the UK, which would allow for greater exercise of discretion in the asylum sphere and the sovereignty (politico-economic) costs involved. Firstly, the UK could withdraw from the 1951 Convention and re-enter with a reservation to Article 33 (principle of *non-refoulement*). Yet, such a course of action would fail to achieve its objective for three reasons: (1) Article 42 of the 1951 Convention explicitly prohibits reservation to Article 33; (2) Article 19(c) of the Vienna Convention on the Law on Treaties[53] forbids reservations, which may negate the essential content and purpose of the treaty; (3) Once a state has become a signatory party to a treaty it cannot enter anymore reservations (Goodwin-Gill interview).

Secondly, the UK could withdraw from the 1951 Convention altogether. Nevertheless this manoeuvre would not solve the problem of *non-refoulement* either. Even if the UK was no longer under an obligation not to deport migrants under the 1951 Convention, it would still be committed to respect Articles 2 (right to life) and 3 (prohibition of torture) of the ECHR, which bar any removal to territories of potential danger to the deportee. Article 3(1) of the CAT explicitly forbids *refoulement* and ICCPR articles 6(1) (right to life) and 7 (prohibition of torture) also limit powers of deportation.

The UK could, as Tony Blair (and Oliver Letwin) have already suggested[54], withdraw from the ECHR and then re-ratify with a reservation regarding Article 3. There is a strong argument that the Convention does not permit a Contracting State to use the power of denunciation as a device to secure reservation. Firstly, Articles 15 and 57(1) of the ECHR prohibits reservation to Article 3; secondly, Articles 26 and 31(1) of the Vienna Convention on the Law of Treaties presses States to interpret treaties in their context and in the light of its objects and purpose; and thirdly, there is

[53] Adopted on May 22, 1969, entered into force on January 1, 1980
[54] The BBC1 'Frost Programme' 26 January 2003

a high probability that the validity of the reservation will be challenged at the European Court, as it has been in the Swiss cases of *Belilos*[55] and *Temeltasch*[56].

Thus the only way the UK could expand the ground for discretion in the asylum domain would be to retreat from the binding contracts of the 1951 Convention, ECHR, CAT and ICCPR. However, such an undertaking would entail most serious consequences: (1) regardless of cancelling its duties under the above covenants, the government would still be bound by the customary rule of *non-refoulement*, which continues to apply irrespective of participation in treaty regimes; (2) UK would cease to be a part of the Council of Europe, the membership of which is contingent on being signatory to the ECHR; (3) for the same reason it would be excluded from the European Union; (4) UK would suffer a puncture of its 'legal sovereignty', risking the loss of recognition as a member in good standing of the international community (Abbot & Snidal 2000:437) and acquire a reputation for being 'some sort of a Fascist State' (Goodwin-Gill interview). Thus, the reservation pertaining to the principle of *non-refoulement* would have a domino effect with most severe consequences; the state would have to cope with greater economic and political costs than if it chose to endure the restrictions on its asylum policies.

In this Section it was attempted to prove that British asylum policy does not necessarily reflect the liberal paradox. I tried to show six things: (1) that British asylum policy is perhaps best explained from a legalisation perspective, where the relationship between state sovereignty and external legal commitments is not a zero-sum game but a continuing process of transactions. Thus the focus must shift from reasons for accepting sovereignty limitations, to benefits involved in trading off degrees of sovereignty; (2) that the original advantages for abdicating autonomy were regional military balance and external socialisation (and normative diffusion); (3) that despite increasing limitations imposed on UK, it continued its membership of the regime due to the 'progressive hardening of human rights' and 'unanticipated sovereignty costs over time'; (4) that due to these processes the UK found itself in a position where it has to advance human rights for its citizens, while circumventing the obligations to asylum seekers that necessarily arise from this process; (5) that the principal purpose of human rights laws, which happened to have beneficial consequences for aliens, is to provide additional appeal rights to British residents and not asylum seekers; (6) and that UK asylum policy is relatively consistent in its aim to deter aliens; and the reason the authorities adopt mechanisms that appear to contradict this goal is because they would face greater burdens if they didn't. If these arguments succeed as plausible ideas then one has to acknowledge that the liberal paradox may have lost its empirical footing, and perhaps its strength as an accurate explanation of current conditions.

[55] *Belilos* v Switzerland, [1988] 10 EHRR 466, 483 at par. 50 (European HRC)
[56] *Temeltasch* v Switzerland, [1983] 5 EHRR 417, 430-431 at par.59-67 (European HRC)

6. CONCLUSION

In conclusion, I believe that the strength of the liberal paradox is questionable and highly debatable. As has been pointed out it consists of two developments: the politics of restriction and the law of inclusion. The politics of restriction is based on the expression of two concepts of sovereignty: (1) political sovereignty, where the citizens practise their democratic rights to determine the character of their society, even if it includes breaching asylum seekers' human rights; (2) and legal sovereignty; a doctrine that the state possesses an inherent right to exclude all aliens if it so wishes. On the other hand, the law of inclusion is the process of legal expansion of human rights, which connects to refugee law, thus making asylum seekers the indirect beneficiaries. The simultaneous developments of these contradictory phenomena, is said to reveal the existence of the liberal paradox.

This paper attempted to weaken this paradox by putting forward three main arguments: (1) Democracy (political sovereignty) and human rights may not be contradictory but actually complementary doctrines in the context of asylum; (2) Legal sovereignty and alien right of indirect entry (in some conditions) are not necessarily conflicting concepts; (3) British asylum policy, which has been cited as the practical manifestation of the paradox, in actuality, is not as inconsistent as its been claimed.

I tried to substantiate each argument in the following manner. Section One framed the liberal paradox and addressed its origins. In Section Two it contended that human rights cannot be curtailing the practice of democracy because: (1) democracy should be defined primarily in terms of its basic principles and only secondarily in terms of its procedures; (2) the majority rule of democracy derives from the notion of political equality and ceases to be democratic as soon as it threatens that principle of equality; (3) judicial (human rights) constraint on state asylum activity does not constitute an erosion of its sovereignty, but acts as a necessary counter-balance to the 'aberrations of democracy'.

In Section Three, I argued that there is no necessary friction between the alien right of indirect entry (*non-refoulement*) and the state right to control alien admission, because: (1) the authority relied upon to support the proposition that a state has an absolute right to exclude all aliens has been selectively used and misinterpreted; (2) despite the existence, in theory, of a sovereign right to exclude aliens absolutely, in practice, most states do admit some aliens; (3) the state has a 'qualified duty to admit some aliens in some circumstances'.

In Section Four, this paper maintained that British asylum policy is fairly logical. This argument is supported by three points: (1) the liberal paradox is misleading, because it is framed in such a way that it implies the government has to consider identical costs between deterring and extending protection. We should not place state sovereignty and international law obligations on the diametrically opposite ends of an axis, thus making the interaction between them a tug-of-war phenomenon. Adversly, we should look at the interchange between these concepts as a balancing exercise, where the state opts for the most cost-effective trade-off; (2) the 'law of inclusion' is designed to enhance the human rights of British residents, not the asylum

seekers; the latter benefit only indirectly; (3) the UK government chooses to tolerate constraints on its discretion (in the asylum domain) because the economic and political costs involved in doing so, are less, then the costs involved in following an opposite course of action.

Thus if we bring together the conclusions of the three main arguments, it follows that (1) there is no strong tension between democracy (political sovereignty) and liberalism (human rights); (2) no clear-cut conflict between legal sovereignty (right of absolute exclusion) and an indirect right of alien entry (*non-refoulement*); (3) and no convincing empirical proof of the liberal paradox (at least in the UK). Furthermore, in Section Two this paper tried to show that a more comprehensible description of the British asylum tactics would be 'politcs of qualified admission', rather than 'politics of restriction'. Likewise, in Section Four, I strove to demonstrate that a more accurate account of legal developments would be the 'advancement of human rights' rather then the 'law of inclusion'. When placed adjacent to each other, these new narratives no longer stand in a contradictory arrangement. Hence, it may be fair to conclude that the liberal paradox is weakened once its constituent elements are analysed and situated within wider political and legal contexts.

Once asylum issues are released from the dubious proposition of the liberal paradox, some space opens up for a more complementary migration regime with greater emphasis on state responsibilities towards asylum seekers. What needs to be done is to make this responsibility more concrete and specific. Liberal democracies may therefore begin to negotiate and formulate new agreements to govern the general admission of aliens and their treatment within their territory. If the liberal paradox is undermined, then there is room for law and policy, which respect the needs and dignity of both citizens and asylum seekers.

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