Is There a Right to Have Rights? The Case of the Right of Asylum

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Abstract In dialogue with the political philosophy of Hannah Arendt and Seyla Benhabib the author draws on the idea of a right to have rights and raises the question under which political conditions asylum can be a subjective right for political refugees. He argues that mere spontaneous acts of humanitarianism will not suffice to define the institutional commitments of liberal democracies in refugee policy. At the same time, no duty for any particular state to take up refugees can be derived from a right to have rights. The quest for institutional solutions for a timely migration and asylum policy will rather enhance the discourses on the self-understanding of liberal democracies. With a critical eye on German asylum legislation and legal practice, the author contends that it will be a task of any co-ordinated European right of asylum to define political persecution in relation to the first dimension of human rights in order to differentiate the right of asylum from immigration legislation.

Keywords Asylum · Human rights · Liberal democracy · Migration · Political ethics · Political refugees · Right of asylum · Subjective rights

1 Framing the Question

In her 2002 Seeley lectures on “The rights of others”, Seyla Benhabib says that contemporary migratory movements challenge politics “to develop an international regime which decouples the right to have rights from one’s nationality status” (Benhabib 2004, p. 68). Benhabib draws on Hannah Arendt’s phrase of the right to have rights and claims that the right to have rights today means “the recognition of the universal status of personhood of each and every human being independently of their national citizenship” (Benhabib 2004, p. 68). In the light of the discussion about the end of the nation-state, Benhabib observes that transformations in the institution of citizenship emerge to the effect of what she calls a “disaggregation of citizenship” (Benhabib 2004, p. 154 and 171f).
Benhabib therefore pleads for porous borders, and advocates both admission rights of refugees and the right of democracies to control admission. While such a balanced position is widely acclaimed among political theorists, Benhabib does not give details of how a positive right of refugees to attain political membership rights should look like in a given legal context. The question remains to be answered how porous borders of democracies should be, or as Michael Walzer responds to Benhabib: “How far [does] she really want to go, how far should any of us want to go” (Walzer 2001). This indeed seems to be the question at stake when it comes to discussing admission procedures for migrants to given legal communities. In this essay I will ask, however, whether there is a category of migrants in whose case it seems less adequate for democracies to ask how far they want to go, but how far they should go. This is not just a difference in terms of a moral point of view, as if the question at stake was that of mutuality, but of the self-understanding of politics in liberal democracies, and of the relationship between procedural and substantive accounts of justice. I will discuss whether political refugees can be seen as a category of migrants who challenge democratic states firstly with the question of how far it belongs to their res publica to grant a subjective right to citizenship for those who are persecuted for political reasons in their countries of origin, and secondly how far it belongs to democratic institutions to host a shared life with the other. This will adopt a ‘strong’ understanding of democratic institutions as places in which people are invited to turn towards each other to find out what they share in the political sense, to cooperate, but also to articulate their experiences and their hopes (Barber 1984). I am well aware that much of what I will say remains controversial. No duty for any particular state to take up refugees can be derived from a right to have rights. But mere spontaneous acts of humanitarianism will not suffice to define the institutional commitments of liberal democracies in refugee policy. Raising the question under which political conditions asylum can be a subjective right for political refugees can be helpful both to find institutional solutions for a timely migration policy – especially when it comes to find joint European asylum procedures – and to enhance the discourses on the self-understanding of liberal democracies.

2 Towards a Subjective Right of Asylum for Political Refugees

Michael Walzer argues that “the fundamental human right of refugees is not to be admitted here or there but simply to be helped” (Walzer 2001). Although Walzer has a point in the simple fact that refugees need help, he seemingly underestimates how far help depends on legal procedures. Help should not only depend on spontaneous acts of mercy, but must at the same time be located in an institutional setting. As Seyla Benhabib has claimed: “Certainly, identification and solidarity are not unimportant, but they need to be leavened through democratic attachments and constitutional norms” (Benhabib 2004, p. 220).

The state of limbo between national law and international order in which contemporary policy finds itself actually calls for a right of asylum in the sense that Hannah Arendt has attributed to the only (remaining) human right: the right to have rights (Arendt 2003, p. 614). However, Arendt’s observation remains important that the right of asylum a nation-state may offer collapses in the very moment that whole populations of people are excluded from citizenship (Arendt 2003, pp. 583f). Similarly, she did not believe that the international

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1 In German and in some European Continental law, a ‘subjective right’ is a right that entitles a particular subject to demand performance (i.e. actions, things or recognition) in an objective legal order that grants this right.
legal order would ever be able to guarantee the right to have rights. Does this well-founded scepticism mean that there is no way to conceive of any legal codification of a right to have rights?

If we accept one of the central postulates of universalism, and bind politics to the principle that every human being shall have the right to be a citizen, we may come to interpret the right of asylum as a conditional right to have rights. For a subjective right of asylum to work, there need to be criteria in order to differentiate between categories of refugees. Hannah Arendt was right that the number of political refugees is crucial for any understanding of a right to have rights. Understood as a subjective right of political refugees, the right of asylum aims at reinstating civil rights on individuals or smaller social groups of persons who have lost citizenship in their countries of origin. It can thus be understood as a legal institution that serves to integrate persons who have lost their rights as citizens into political communities: a specific human right to have civil rights, not just anywhere, but in the given political body that grants this right for political refugees.

However, all attempts of human rights policy to work towards codifying the right of asylum as a subjective right in international and national law have failed, and for good reasons (Kimminich 1983, pp. 57–94). The question of how far human rights can be interpreted as subjective positive rights must always be accompanied by a discussion about the conditions under which liberal democracies can guarantee such rights. Despite the plurality of legal traditions in Western democracies, it can be regarded as consensus that negative rights have priority over positive rights, even if only for the simple reason that humane states would otherwise probably become overwhelmed by refugees and could no longer guarantee the rights of their citizens. Negative rights therefore constitute the legal setting to which any right of asylum must adapt.

Regarding the need created by political persecution today, and the challenges posed by migration, a public commitment to a subjective right of asylum in national and international law seems nonetheless indispensable. In order not to be rendered utopian and unrealistic, it needs to rest on a clear definition of political persecution to become distinguished from migration legislation as it may apply to labor-migration or to family unification. The question is whether a subjective right of asylum can be an instrument of articulate justice for the other without exceeding the responsibility that any community or state can bear. This is not simply an economic or cultural question, as seen in African countries that take up enormous amounts of political refugees. The reach of responsibility for political refugees is foremost a political question. It needs to be discussed in relation to the main tasks and individual interests of liberal democracies: to grant and protect political rights, to find and regain the res publica by means of open discourses, and to initiate different forms of justice.

With regard to the needs of political refugees, the legal certainty that comes from the just procedure of a subjective right of asylum brings an unsurpassable promise, for refugees as well as for the self-understanding, the constitutional commitments, and the political practices of democracies. It helps to base the right of political refugees to have rights on a more reliable foundation than, say, on humanitarianism, and could at the same time enhance the discourse on the tasks and practices of liberal democracies. Admission policy directly touches upon the shape of any given political community. It provokes the question: “What, and who, belong to our political life?” This question is not sufficiently answered by leaving the fate of political refugees entirely to spontaneous humanitarian acts. At the same

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2 For a ‘humanitarian approach’ to the right of asylum, see Gibney (2004). Gibney believes that ‘the principle of humanitarianism’ is “that states have an obligation to assist refugees when the costs of doing so are low” (p. 231).
time, it cannot amount to an unconditional understanding of the right of asylum as a subjective human right. Liberal democracies that concern themselves with substantial questions about their res publica must find a middle ground between those extremes.

A subjective right of asylum cannot be unconditional like negative rights, and requires clear admittance categories. These categories need to be defined on a political basis, and to be distinguished from economic and cultural conditions. Is it possible to draw such a distinction? I suggest that the right of asylum must be defined in relation to the first dimension of human rights (civil and political human rights), and removed from the discourse of immigration legislation, as this concerns itself primarily with rights related to the second dimension (economic, social and cultural human rights).3

This does not mean that I think this understanding of law should or could be extended to all possible legislative tasks of refugee-related legislation. Asylum issues touch questions that concern the practices and the self-understanding of political communities: What does it mean and what does it take for a society and its members to welcome political refugees and to live with them? Which kind of justice is required and practiced vis-à-vis the stranger? The focus on formal concepts of justice must be accompanied by an attentiveness to particular communities and human beings. Fair procedures enable questions of shared life and articulate justice – they do not necessarily exclude them. The legitimacy of laws, norms and regulations ultimately depends on whether they do justice to specific persons and groups in all their distinctiveness, both for legal communities as well as for political refugees.4

These questions presuppose that those who seek asylum on grounds of the violation of their political rights are actually permitted to enter a country and to participate in political procedures. The acceptance of political refugees is a political question, a vital question for democracies that understand themselves as strong political entities, and one that should largely be freed from cultural and financial issues. The ethical situation of living with strangers interrelates with and is safeguarded by legal procedures of equality and participation.5 Just legal institutions transcend those inclinations that societies or communities might or might not have in the face of strangers and may serve as a nucleus around which a life with strangers can crystallize. Without human-rights informed asylum procedures, issues of vis-à-vis justice remain out of play, and with them the question of the acceptance and integration of political refugees.6 Benhabib has pointed towards this by raising the issue of the decriminalization of border crossings (Benhabib2004, p.71f). The right of asylum could serve to at least partially decriminalize border movements by restricting it to political refugees whose civil and political human rights have been or are threatened to be violated. Thus the political need of the refugees and the political motivation of the persecuting state come into view.7 This will render the right of asylum one instrument among others, entailing the policy of acceptance and of care.8

3 For this distinction see Riedel (1986).
4 The question of how to interpret the right of asylum can thus be understood as a variation of the general discourse on the relation of justice vis-à-vis the other to proceduralized forms of justice. For explorations along and across the borders of procedural justice, see Honneth (2000a).
5 For the complex interdependencies of social work for the integration of migrants in Nürnberg with formal legal procedures, see the report of Kühl (2004).
6 See Charles Taylor (1992) for his description of the interrelationship between solidarity-based social politics and the acceptance of strangers and their life forms.
7 See Randelzhofer in: Maunz/Dürig, Komm. z. GG, Art. 16, Rdn. 21f. See also Marx (1980).
8 For the interrelation of an ethics of care and a Kantian ethics see Honneth (2000b).
Today, the right of asylum amounts to a paper tiger in national legal codifications, while proclaimed at the same time as an individual human right by the UN-declaration. If it were to be understood as a conditional admittance right of political refugees to temporary but full citizenship, political persecution would need to be defined with reference to civil law. I suggest a definition of political persecution as a breach of the rule of civil law that sends persons into the state of exception. This includes that a person qualifies as a political refugee not only when his or her government has actually violated his or her political rights (single out criterion), but also when the political rights of the group to which the asylum seeker belongs are generally violated. This inner-law definition of political persecution remains formal, and will not suffice in drawing a systematic line between economic and political reasons for migration. But it helps to establish categories for refugee legislation that would otherwise not do justice to the individual case. With a view to the interrelatedness of political and social human rights, the right of asylum aims to protect the political and civil rights of persons, which entails but does not presuppose legally softer economic, social and cultural rights.

The borders of liberal democracies should be as open as possible for those who have lost their civil rights in their countries of origin. This postulate does not exclude prudence from asylum policy. Democracies have a genuine task and interest in granting citizenship to political refugees. This does not mean that democracies have no obligations to those whose economical or cultural rights are violated in their countries of origin and who need specific political measures other than the right of asylum. In the case of guest workers and resident aliens, procedures should be found that put them on the road to full citizenship as quickly as possible, as Michael Walzer has argued (Walzer 1983, p. 60). The case of political refugees who apply for asylum is different. They should be admitted to full citizenship on a temporary basis during the time political persecution in their countries of origin persists.

The right of asylum can be regarded as a special example of the general principle of human rights policy that there shall be no human being who is not the subject of civil rights. In that sense the right of asylum can be understood as an exemplary human right insofar as it bridges the gap between human rights and civil rights. At the same time, its civil rights dimension rests on the presupposition of whether a state or community can grant such a right in the light of its imminent duties towards its citizens. Thus understood, the right of asylum can be an integral part of a global political practice with the objective that nobody shall live in the state of exception. It focuses on the political refugee who actually makes it to a given state’s border. In the case of internally displaced people, as in Sudan, the principle that nobody shall live in the state of exception calls for other legal measures, though still aimed at helping people acquire civil rights. In the context of human rights policy, the right of asylum assumes a key position, if understood as a conditional subjective right of political refugees to be reinstated into a political community.

3 The Example of the Right of Asylum in Germany

The example of the right of asylum in Germany has proven Hannah Arendt right that the right of asylum collapses if the number of asylum seekers becomes too large. Until 1992, Germany’s basic law granted a subjective right of asylum for everybody who claimed to be

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9 For the roots and implications of such an interpretation of the right of asylum, see Kimminich (1983).
persecuted for political reasons. Article 16,2.2 of German Basic Law simply read: “Persons persecuted for political reasons enjoy the right of asylum.” At the same time, the long term lack of any immigration legislation has caused the right of asylum to be used as the only steering instrument for immigration policy (Bosswick 1997). After the fall of the Iron Curtain, there were 438,000 applications for asylum for political persecution in 1992, leaving the federal office for the recognition of foreign refugees (BAFl) completely overtaxed. That year, only 4.25% of all applications for asylum were deemed legitimate on grounds of persecution for political reasons. The problem was not, as many have claimed, that these numbers of refugees could not have been absorbed, but that the asylum procedures could no longer bear these numbers of applicants, most of whom applied for economic reasons. They could only have been handled by some kind of immigration law. The specific – and limited – function of the right of asylum had been lost. But instead of establishing an immigration law, the growing need to cope with immigration issues led to an amendment of the right of asylum in 1993, almost amounting to its abrogation. The new article 16a (1) of the Basic Law grants asylum from political persecution in the old form of a subjective basic right. However, the constitution adds extremely restrictive exceptions that define under which circumstances political refugees are excluded from the right of asylum. One of those exceptions is the so-called ‘safe third country ruling’, which has become a paradigm for European asylum legislation, particularly as it tries to relate to the ‘non-refoulment principle’ (Geneva Convention, article 33). The ruling says that refugees who reach Germany via a third state where, in compliance with the Geneva Convention, they are supposed to be safe from political persecution, are not permitted to appeal for asylum, no matter whether or not the refugee would be entitled to enjoy asylum in Germany. Given that Germany is surrounded by countries that are all defined as safe third countries it has become almost impossible to be entitled to asylum when entering Germany other than by plane (Bosswick 1997, p. 66 and Renner 1994b, p. 211). The amendment does not clarify what legislation regards as ‘political reasons’ for persecution, but concerns itself with the migration route of asylum seekers. What has become decisive to gain asylum is no longer the actual loss or violation of political rights but the way refugees approach German borders. The third country ruling has introduced a non-political element into the right of asylum, namely the assumed situation of refugee protection in third countries. The amendment did not answer the question that was at stake: what does political persecution mean, and which legal conditions can respond to it?

It has been noted that the third country ruling in many cases violates the non-refoulment principle of the Geneva convention (Zimmermann 1994 and Renner 1994a). The deportation of asylum seekers to third states will take place regardless of the question of whether the third country has itself a third country ruling that will lead to a chain deportation and eventually to the return of the refugee to his country of origin. These changes have led to a reduction of the number of asylum-seekers in Germany to a level of 50,500 in the year 2003. In 2002, only 1.83% of all applications for asylum were accepted.

Regarding immigration policy, few would dispute that political communities like nation-states have the privilege to decide which and how many immigrants may enter their territory, e.g. when responding to the requirements of the national job market. This applies to decisions on economic and cultural issues touched upon by immigration (Hailbronner 1980). Even in the process of European unification, the nation states will for

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11 For these and all following figures see the website of the “Federal Office for Migration and Refugees”: http://www.bamf.de/.
12 For a different opinion see Joseph Carens (1988, 2000).
some time to come remain the subjects of rights related to these issues (Beckmann 2001). However, the occurrence of extremely large groups, even whole populations of refugees, make the need for a joint international asylum and human rights policy evident. At the same time, greater severity in the field of immigration policy has tended to immediately affect the right of asylum, both in the German and in the European context. The Amsterdam treaty of 1999 also follows a third country ruling (Hailbronner and Thiery 1998). What has been regarded as growing immigration pressure has caused European governments to gradually tighten their immigration policies (Groenendijk 1994). The right of asylum, which has widely been subsumed amongst the tools for controlling immigration, has suffered from this development. This tendency has increased in the wake of September 11th, 2001. Today, European right of asylum policy is far from an efficient legal instrument for the protection of political refugees, nor does it foster discourse about Europe’s political integration.

4 Conditions for the Codification of a Subjective Right of Asylum

The interpretation of the right of asylum as subjective right, however desirable it may be for political refugees who could become citizens elsewhere, and however small the steps are that may be taken in its direction, is questioned by many factors. The foremost of these is that there is no international (or even national) consensus about the understanding of politics, power, and the concept of sovereignty that would support such an interpretation of the right of asylum. How far asylum policy depends on the sovereignty of nation states remains a controversial question (Heckmann and Tomei 1999). Does the codification of a conditional subjective right of asylum reduce or enhance the sovereignty of the nation state? On the basis of a Weberian paradigm of politics, most would hold that such a positive right undermines the sovereign decision of communities whom they want to grant admission. Understood as the right to have civil rights, the right of asylum originates in a universal human right beyond any given constitutional law (Marx 1984, pp. 151ff). However, if we understand power in the sense of cooperation, participation, and the protection of equal rights, a state that grants a subjective right of asylum to political refugees follows its genuine political mandate. A politics bound to the principle that every human being shall have the right to have rights, which keeps up a subjective right of asylum and fosters human rights policy as well as efficient immigration policy, is based on a concept of power that does not draw on property, assets and unilateral abilities, but on multilateral political cooperation. In this sense of politics, the constitutional state would not lose but gain sovereignty by granting a subjective right of asylum to political refugees. The right of asylum thereby becomes a test case for whether politics follows Kant or Carl Schmitt, as Habermas has put it (Habermas 2004, pp. 187ff). Granting political asylum can hence be understood as a part of what it takes for a state to be a modern liberal democracy at all – to be a political body and not just a unit of economic interests or cultural conformities. Codified as a conditional, subjective right of political refugees, the right of asylum confronts political communities with the question of whether they keep track of justice for the other, thereby fulfilling a genuine mandate of ‘strong’ democracies. The definition of ‘political persecution’ remains crucial to any such understanding of the right of asylum. It can best be defined by reference to the democratic state as it is bound to

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the standards of civil and political human rights. The legal question concerning political persecution is whether the refugee’s country of origin has followed the rule of law in his case – a law formed and challenged by contextual legal traditions and by the universalism of international human rights conventions. The right of asylum should hence be codified as a subjective right to citizenship for every person whose civil rights are lost or violated, and for every person who is not granted equal civil rights in his or her country of origin. I propose that within the civil human rights dimension, a definition of political persecution should be qualified in relation to the following international conventions, that together form a legal horizon of international civil and political human rights.

Firstly, article 1 of the 1951 Geneva Convention on Refugees defines the term ‘refugee’ as follows: “The term ‘refugee’ shall apply to any person who...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

A broad and appropriate interpretation of Art.1 A No.2 of the Geneva Convention on Refugees may cover all possible cases of political persecution. In order to reach an appropriate and applicable interpretation beyond national constitutional law, however, and with regard to the open ratification of a judicable European constitution, the definition of the Geneva convention should be interpreted, secondly, with a view to the 1948 Universal Declaration of Human Rights, and thirdly, with a view to the 1966 International Covenant of Civil and Political Rights, and fourthly, with a view to the 1950 European Convention on Human Rights.

From these conventions, we can identify a number of civil and political human rights, the violation of which defines the term ‘political persecution.’ These are, with no claim to exhaustiveness: the right to citizenship; the right to life and physical integrity; the right to liberty and security of the person; the right to equal protection before the law; the right to freedom of assembly and association; the rights to be free from torture; the right to freedom of expression; occupational freedom; freedom from discrimination; access to the judicial system; participation in political life; freedom of religion, faith and conscience; access to information; property rights; and freedom of movement.

Thus, in accordance with the Geneva Convention on Refugees, the term political persecution is bound to the violation of civil rights of an individual or of groups of people. Somebody can be regarded as a political refugee whose state of origin expels or excludes him or her from civil rights, or, as in the case of persecution by other individuals, tolerates such persecution. If we accept that citizenship cannot be divided (Walzer 1983, p. 61f), it follows that refugees who are permitted asylum from political persecution should be entitled to enjoy full civil and political rights in their host country until the objective legal element of persecution and the subjective fear of persecution come to an end (Marx 1980, p.197f).

14 For the full text of the convention see the website of the UNHCR: http://www.unhchr.ch/html/menu3/b/o_e_ref.htm.
15 See the jurisdiction of the German Federal Administrative Court as reported by Randelzhofer (1999, Rdn. 21–23).
16 It signifies the controversial character of the right of asylum that it is not mentioned in both the 1966 International covenant of civil and political rights and the 1950 European convention on human rights.
Such an interpretation of political persecution remains highly controversial. In Germany, both the Federal Constitutional Court and the Federal Administrative Court have tended towards a broad definition of political persecution, especially with regard to the right to life, physical integrity, and liberty of the person.\(^{17}\) For all other fundamental rights that can be included in a broad definition of personal freedom, such as freedom of faith and of conscience or of occupational freedom, legal practice has focussed on the intensity and duration of the violation of civil rights, especially with regard to the principle of human dignity.\(^{18}\) However, a controversial issue in the current discourse on the right of asylum is to what extent the criterion of violation of civil rights should not only entail negative rights such as the right to physical integrity, but also positive civil rights such as freedom of expression. It can be said, though, that both types of rights interrelate strongly (Herzog 1992 Rdn. 10a.), and that negative rights are the \textit{conditio sine qua non} for the existence and legal practice of positive rights (Pogge 2002). In relation to all negative civil rights, the definition of political persecution is rendered extremely broad. The pragmatics of asylum policy can only be safeguarded, then, if civil rights can be sufficiently distinguished from cultural, social and economic rights. This distinction lies at the core of any contemporary right of asylum discourse. It will be the task of any European right of asylum to define political persecution in relation to law, to the violation of law, and to the equal rights of citizens, in order to keep the right of asylum both limited and an effective instrument for the protection of political refugees.

References


\(^{17}\) For references see Marx (1980, 195–199).

\(^{18}\) For an overview on the discussion in German jurisdiction and legal publications see von Pollern (1980, pp. 200–217).


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