Should International Law Continue to Start from a Presumption of the Sovereignty of States in Relation to Immigration Policy?

Petr Kocina
University of Leicester, Leicester Law School, UK

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Migration has certainly become an important, divisive, and emotionally saturated topic. The following text offers a brief and readable analysis of the pivotal issue of sovereignty in relation to immigration policy. It questions a presumption that had passed as unquestionable for many years. Should the international law continue to start from a presumption of the sovereignty of states in relation to immigration policy, or should we now, facing unprecedented human suffering of countless human beings on the move, fugitives and economic migrants alike, recognize the time for fundamental paradigm shift? This argumentative essay confronts two distinct visions for international migration law before reaching the final conclusions.

Key words: International Migration Law – Sovereignty – Migration – Human Rights

Introduction

Sovereignty and immigration are politically delicate and interrelated subjects. Immigration policy today is profoundly embedded in the question of state sovereignty and the inter-state system (Sassen 1999). Vast literature in political sciences and legal theory therefore deals with the intricate relationship from different ideological angels. This essay briefly analyses the concept of sovereignty, its historical development and relationship with control over the territory. The major arguments to support the paradigm shift in relation to immigration policy are then summoned before the final conclusions are reached.

The Sovereignty of States in Relation to Immigration Policy

Current concept of sovereignty is a result of a long and intricate development reaching back to the very origins of Western thought. At the same time, the very concept itself as an explicit topic of jurisprudential thought is surprisingly recent. In fact, most researchers date the first discussions of it, in its distinctly modern form, to Jean Bodin and Thomas Hobbes, sixteen and seventeenth century authors (Hill 2006, 17). The doctrine of state sovereignty, as we know it, emerged suddenly into prominence with the rise of the modern state (Shaw 2014, 15). This inauguration of the European state presumably began by the signing of The Peace of Westphalia in 1648 (Alston – Goodman 2013, 148). Sovereignty was understood since as the supreme autonomy over a territory (Perruchoud 2012, 123). This notion of exclusive political authority of the government over territory and people derived originally from idea of monarchical sovereignty. However, truly unqualified claims to political authority by and on behalf of monarchs were not customary in Europe at that point. These claims were usually limited by an array of formal duties to subjects, vassals, the law, the Church and ultimately to God (Hill 2006, 17). Even Bodin in his monumental work 'Six Livres de la République' (1576) declared that although a sovereign cannot be bound by the law he instituted, he was nevertheless subject to the laws of nature and to God (Shaw 2014, 15). Yet, as feudal monarchs progressively consolidated power in Europe their claims to legitimate authority expanded. At the height of this process absolute claims emerged, declaring that since all political and legal order comes from the sovereign, the very idea that anything in turn should bind and limit the monarch is conceptually incoherent, because in that case the agency that binds the monarch would be the true monarch (Hill 2006, 17). This concept of supreme legislator was slowly transmuted into the principle which gave the state supreme power and the notion formed an intellectual basis of the line of thought generally known as positivism (Shaw 2014, 15).

Although the literature on sovereignty often starts with definitions, the difficulties of pining down the exact meaning of sovereignty are widely acknowledged. According to Perruchoud, there are three major separate aspects to sovereignty: external, internal and territorial. By territorial, he means: "the authority that state exercises over all persons and things found within its territory, as well as over its national abroad" (Perruchoud 2012, 123). Definitions typically comprehend the idea of independence related to external sovereignty and self-determination concerning mostly internal sovereignty. Yet, sovereignty has neither fixed, nor definite content (Kosenniemi 1989). It is often controversial and sometimes understood as rather fluid (Chalmers et al. 1997, 183). Nevertheless, the concept normally comprises the power to exercise authority over individuals living within the territory of the State and act on behalf of those individuals. It conse-

quently also authorises the State to prevent other States and particularly inhabitants of other states from interfering with its territorial integrity (Perruchoud 2012, 124). The right of exclusion of non-nationals is therefore usually defended as an attribute of sovereignty and territoriality and described as an inherent power essential for the self-preservation of the state. If a sovereign State could no longer legally exclude aliens it would be to that extent noticeably a subject to the control of another power (Nafziger 1983). The principles of State sovereignty and territorial integrity have therefore led to the conclusion that the free movement of people across the borders is subject to state control. Regulation of international migration is repeatedly recognized as the last stronghold of the State sovereignty (Perruchoud 2012, 124), or 'last major redoubt of unfettered national sovereignty' (Martin 1989). Although universal prescriptions protect the rights of migrants to emigrate from their home country and allow them to return, the right to enter a foreign country is, however, not explicit (Schindlmayr 2003). Unless a treaty obligation requires otherwise, a state retains a right to exclude all aliens from its territory and this right seems to be widely recognized. This notion normally preambles any discussion on issues of immigration European quotas, expulsion and deportation of aliens. Further-more, it is usually accompanied by words as 'unquestionably', or 'of course' and phrases such as 'no longer open to serious question' (Nafziger 1983). The European Court of Human Rights in the Case of *N. v. The United Kingdom* stated:

> "It is the Court's settled case-law that as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control the entry, residence and removal of aliens." (N. v. UK App no 26565/05).

The authority of States to control their borders and to regulate entry and exit is not often disputed in legal theory and practice while the exceptions to the discretionary power of States are usually defined in treaties and case law (Perruchoud 2012, 150). So, why should not international law continue to start from a presumption of the sovereignty in the relation to migration law?

The Case for a Paradigm Shift

David Hume closed the section of the Treatise (Hume 2007) in which he argued against moral rationalism by essentially observing that no ought-judgment may ever be correctly deduced from any set of premises expressed merely in terms of 'is,' even though, the vulgar systems of morality, in his opinion, often commit this logical fallacy (Cohon 2010). So, just because the authority of States to control their borders and to regulate entry and exit 'is' such, or is generally perceived as

'conventional wisdom' (Nafziger 1983), it can be challenged in moral terms. And it is indeed a powerful discourse of fundamental rights, influenced by natural law theories, emphasising a close connection between law and morality that can challenge these institutional attitudes. Strong case for the re-considering of the 'unfettered national sovereignty' of states in relation to immigration policy can be based on emphasising universalism of the human rights, human condition and highlighting the arbitrariness of distinguishing between individuals on the grounds of nationality (Chalmers et al. 1997, 611). Furthermore, the rights of mobility are intertwined with other human rights and practically inseparable: 'The rights of entry, sojourn and exit are indivisible: the denial of anyone makes the assertion of the others a chimera rather than a reality' (Higgins 1973). The doctrine of human rights has already subverted a sovereign state system by introducing changes, adjustments and realignments to many political institutions (Cassese 1990). The growth of international organisations and development of the common heritage of humanitarianism are already a relevant factor (Shaw 2014, 353). It may also be no longer fully sufficient to simply affirm the sovereign role of the state in immigration policy design and implementation due to transformation of the environment in which it functions (Sassen 1999).

Instead of treating a state as the only possible arena in which serious political life can take place, we could perhaps move more vigorously towards the understanding of a state as only some kind of transient prelude to a universal community of humankind. Processes of internationalisation and globalisation may be advanced further with interdependence proclaimed the new fundamental advantage replacing traditional independence. The negative image of international community of sovereign states reduced to estranged bodies concerned only with their ecologically destructive forms of well-being and freedom of political manoeuvre, pursuing ruthlessly economic, political and military interests, while individuals do not count (Cassese 1990), could be particularly subversive to the notion of sovereignty on which the 'Kissinger's world' was build.

Although feudal documents reveal numerous examples of the lord's power to exclude from his dominion named individuals or defined groups of foreigners, the exercise of this power was rather exceptional (Plender 1988, 62). And it is 'highly disputable' whether the sovereign power to exclude aliens was really the earliest prerogative of modern states, since free movement across borders had long been the rule rather than the exception. The ascent of the nation-state characterised by territorial sovereignty did not coincide with the introduction of border controls, at least not from the 16th to the end of the 18th centuries (Chetail 2017). The full twinning of migration control and state sovereignty is therefore a relatively new phenomenon in the evolution of nation States. 'It was not until early in the twentieth century that the world was fully and firmly settled into a migration control system where passports and visas became the norm for crossing international

borders' (Dauvergne 2014). So, should the international law continue to start from a presumption of the sovereignty of states in relation to immigration policy, or should we now, facing unprecedented human suffering of countless human beings on the move, fugitives and economic migrants alike, finally recognize the time for fundamental paradigm shift?

The Case for a Continuity of Status Quo

The authority of states to control movement of persons within and across their borders should never be exercised to the detriment of individual human beings (Perruchoud 2012, 123). However, any attempt to take ultimate control over immigration policy from the states, which are perceived by citizens as protecting the safety and security of inhabitants, may not be prudent. Qualified limitations to immigration would probably continue to be justifiable under any realistic arrangement. The practical impact of this paradigm shift could be, therefore, rather limited in terms of direct benefits for migrants, while an increased anxiety over the issue would be truly hazardous in many countries. The perception of lost control over the issue directly related to security may produce unnecessary panic reaction and eventually a powerful blowback through the boosted far-right movements.

Whatever we believe the relationship between the law and morality is, or should be, every attempt to unite these normative systems in a rigorous way proved to be disputable, occasionally even odious enterprise. Furthermore, the moral ideals of international unity, equality and solidarity alongside with the need-driven distributive justice have no universally accepted interpretation, nor are they, in fact, extensively practised. It is still an essentially political project in progress. Universalism of the human rights may be officially declared, yet people still happily buy luxury goods while children having rights equal to their own die in thousands from clearly preventable causes around the world. The obvious fact of arbitrariness in distinguishing between individuals on the grounds of nationality or country of origin does not seem to have profoundly affected the social practice yet, although, a lot has been done to prevent suffering in the world. Some people are incredibly generous, compassionate, and truly hospitable. However, the potential of international law to induce these virtues by force should be seriously doubted.

The patronising aim of preserving state may indeed be often less persuasive explanation of much of the exclusionary legislation than racially saturated nativism fuelled by either disproportionate or frankly irrational 'fears that aliens will displace local workers, contribute to social tensions, or impose an economic burden on the state' (Nafziger 1983). Nevertheless, who should be the judge in what

counts as a threat to the country if not the demos – people, the actual sovereign in true democracy? It may be argued that handing power to an international court or some quasi-judicial body 'is not anti-democratic but a prudent pre-commitment of majority anxious to guard against its own weaknesses, for example panic overreaction to supposed threat such as of the terrorism' (Alder 2007, 443). Yet, any judge or unelected official should be cautious telling people that they have no longer the power to prevent the influx of aliens to their country, if they feel threatened or simply do not wish to welcome anybody. Francisco de Vitoria, applying the Roman jus gentium, could have reasoned luminously that a freedom to migrate freely had been established 'from the beginning of the world' (Nafziger 1983). Yet, many people see the right of Spaniards to travel and sojourn freely in the New World much more in the light of the disastrous consequences for native population and fail to recognize the splendour of his learned interpretation of the ancient law.

Conclusions

While the dialectic between sovereignty and hospitality is likely to uncover innovative ways for rethinking the movement of persons across borders in future (Chetail 2017), Perruchoud is probably right that redrafting of migration law clauses today would almost certainly produce 'explicitly stated' absence of right to immigrate, while emphasis would be placed heavily on national security and the fight against terrorism (Perruchoud 2012, 150). Any move in other direction, including the proposed paradigm shift, could be, therefore, seen as either irresponsible form of judicial activism or an ideological stunt, unless the project gains truly extensive support. However, no ought-judgment may ever be correctly deduced from any set of premises expressed merely in terms of "is". In other words, there is always a place for dreams and aspirations.

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Petr Kocina, Ph.D.
University of Leicester
Leicester Law School
University Road
Leicester, LE1 7RH
United Kingdom
pk240@student.le.ac.uk