Global Perspectives on Immigration and Multiculturalisation

Migration Governance in Asia
A Multi-level Analysis
Edited by Kazunari Sakai and Noemi Lanna

Can Human Rights and National Sovereignty Coexist?
Edited by Tetsu Sakurai and Mauro Zamboni

Can Human Rights and National Sovereignty Coexist?

Edited by Tetsu Sakurai and Mauro Zamboni

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2023
by Routledge
4 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
605 Third Avenue, New York, NY 10158

Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library

ISBN: 978-0-367-60965-8 (hbk)
ISBN: 978-0-367-60966-5 (pbk)
ISBN: 978-1-003-10271-7 (ebk)

DOI: 10.4324/9781003102717

Typeset in Galliard
by SPi Technologies India Pvt Ltd (Straive)

Contents

List of contributors ix
Acknowledgements x

Introduction 1
TETSU SAKURAI

PART I
Tension between national sovereignty and rights of immigrants **15**

1 Human rights to asylum and *non-refoulement*: rights of *expulsi* and suppliants in the system of natural and volitional law formulated by Hugo Grotius 17
RAINER KEIL

2 Self-determination and immigration control: a critique 54
KEVIN IP

3 International borders, immigration, and nondomination 73
JOSHUA J. KASSNER

PART II
State legislation and the statuses of immigrants **95**

4 Law-making to face the migration crisis: developing legislative policy (analysing the Swedish case) 97
MAURO ZAMBONI

5 Can the law create discrimination? Migration, territorial sovereignty, and the search for equality 133
VALERIA MARZOCCO

6 The gap between constitutional rights and human rights: the status of 'foreigners' in constitutional law and international human rights law 149
AKIKO EJIMA

PART III
Human rights and border control **169**

7 From formalist circumvention to substantive fulfilment: taking human and fundamental rights seriously in European migration policy 171
FREDERIK VON HARBOU

8 Does international human rights protection trigger a Copernican revolution for immigration law? 186
STEFAN SCHLEGEL

9 Migration, neighbourliness, and belonging 216
STEVEN SCALET

10 Reflective inclusiveness as a bridge between human rights and nationalistic attachment 244
TETSU SAKURAI

Conclusion 269
MAURO ZAMBONI

Index 274

Contributors

Akiko Ejima, Professor at School of Law, Meiji University

Frederik von Harbou, Professor at the University of Applied Sciences Jena

Kevin Ip, Assistant Professor at Government and International Studies, Hong Kong Baptist University

Joshua J. Kassner, Professor of Philosophy in the Yale Gordon College of Arts and Sciences, University of Baltimore

Rainer Keil, Lecturer at Faculty of Law, University of Heidelberg

Valeria Marzocco, Professor at Law Department, University of Naples Federico II

Tetsu Sakurai, Professor at School of Intercultural Studies, Kobe University

Steven Scalet, Professor of Philosophy in the Yale Gordon College of Arts and Sciences, University of Baltimore

Stefan Schlegel, Postdoc at Faculty of Law, University of Bern

Mauro Zamboni, Professor at Faculty of Law, Stockholm University

Warnling-Nerep, Wiweka. 2010. 'Juridiska personer som bärare av mänskliga rättigheter: Ett möte mellan näringsrätt och förvaltningsrätt.' *Juridisk Publikation* 1: 85–97.
Weber, Max. 1949. *The Methodology of Social Sciences*. Edited by Edward A. Shils and Henry A. Finch. New York: Free Press.
Weber, Max. 1962. 'Bureaucracy.' In *Essays in Sociology*, 196–244. Oxford: Oxford University Press.
Wenander, Henrik. 2016. 'The Recognition of Foreign Administrative Decisions in Sweden.' In *Recognition of Foreign Administrative Acts*, edited by Jaime Rodríguez-Arana Muñoz, 305–317. Cham: Springer.
Werksäll, Fredrik. 2014. 'En offensiv Högsta domstol. Några reflektioner kring HD:s rättsbildning.' *Svensk Juristtidning* 2014: 1–8.
Westerman, C. Pauline. 2013. 'Breaking the Circle: Goal-Legislation and the Need for Empirical Research.' *The Theory and Practice of Legislation* 1: 395–414.
Xanthaki, Helen. 2014. *Drafting Legislation: Art and Technology of Rules for Regulation*. Oxford: Hart Publishing.
Zamboni, Mauro. 2019. 'The Positioning of the Supreme Courts in Sweden: A Democratic Oddity?.' *European Constitutional Law Review* 15: 668–690.
Zolberg, R. Aristide. 2008. *A Nation by Design: Immigration Policy in the Fashioning of America*. Cambridge: Harvard University Press.

5 Can the law create discrimination?

Migration, territorial sovereignty, and the search for equality

Valeria Marzocco

Introduction: a conditional right—the two faces of the right to migrate

Although ours is often described as the 'age of migration' (Castles and Miller 1993), the phenomenon itself is by no means without precedent. Studies in population genetics have shown that our species is undoubtedly the result of successful selection throughout history. However, it is also originally—and above all else—the product of a history of mass migrations that began around 200,000 years ago in a region of East Africa and subsequently spread across the planet (Cavalli Sforza and Bodmer 1999). It is no simplification to say that today, as in the past, what drives humans to migrate has remained substantially unchanged throughout the millennia. The specific reasons may vary throughout history, but the main factor is the search for improved living conditions and the necessity to satisfy material needs, both as individuals and as a community.

This premise, which may appear somewhat peripheral to the questions posed by migration as a matter subject to legal classification, is actually an integral part of the debate, which is centred on the right to migrate and its status in law. Within this debate, the issue of classifying the right to migrate emerges in far from unequivocal terms. This is especially so if we consider the problems related to reconstructing it from the viewpoint of a comprehensive subjective claim, from which to derive a shared regulatory regime concerning the exercise of territorial sovereignty by states.

If the nature of the faculty to migrate as a human right is anything but clear cut, unlike in the past, this may be partly explained by the framework in which this issue is naturally situated: that of the link, or rather, the tension between migration and territorial sovereignty.

This link is deeply rooted in the history of the classification of the right to migrate. Its importance is rooted in the legal standpoint and its dilemmatic establishment as a universalist claim from the moment doctrines of modern natural law constructed their first definitions in this regard. The legal classification of the migrant is similarly tied in with statehood. Their specific status differs from that of the mere 'foreigner' in virtue of the very purpose of migration: the migrant (unlike the foreigner 'who comes today and goes

DOI: 10.4324/9781003102717-8

tomorrow') is 'the person who comes today and stays tomorrow' (Simmel 1950, 401–408). Defining the right to migrate thus implies acknowledging the demand of migrants vis-à-vis the host political community: to be permitted to establish themselves in that community and, above all, to enjoy some, if not all, the prerogatives of citizenship.

It is evident from these premises that the right to migrate simply presupposes, by its very definition and aims, the entire imagery on which the modern state has been built (i.e. borders, territory, citizenship). This reveals a conflict with the equally crucial prerogative of political communities to control and govern their political space. Nevertheless, in light of the above, the nature of this right, which is frequently a specific topic of legal scholarship, cannot be understood without addressing the different aspects through which the relationship between migration and sovereignty is interpreted. Its history as a concept unequivocally demonstrates that the right to migrate is conditional; it is subordinate to the sovereignty of states, which establishes the forms and modalities of its effectiveness. Conversely, the regime that a state can exercise its power over the different forms of migration also differs in relation to the distinct phenomena of ***immigration*** and ***emigration***. The centrality of these arguments is set out descriptively in migration law, and its importance allows for two distinct interpretations: either that the faculty to migrate is a human right that can only be a universal right, definable in terms of freedom of movement across borders (Pécoud and de Guchteneire 2007) or conversely that it is not because it is subject to a different regime in which the critical aspects concerning the link between migration and sovereignty relate to the right to immigrate itself.

Due to its legal nature, the bidirectional nature of migration has led to inequalities in the enforcement of the right to migrate, a disparity that arises from an assessment made from the perspective of territorial sovereignty. While the right to ***emigrate*** is unrestricted, with a few historical exceptions, this is not the case for ***immigration***, as the latter calls into question the concept of sovereignty as the domination of political space and the prerogatives that derive from it.

Thus, if there is a fundamental right to migrate, it clearly does not have the same degree of effectiveness in both aspects: it is a ***full*** right because states cannot curtail it, as they cannot prevent individuals from freely exercising it. This right is restricted in relation to ***immigration***, given the different effects that crossing borders from one political community to another produces in domestic law.

These are the two faces of the right to migrate and the different legal regimes that arise from them. They pose crucial questions precisely because it is legitimate to ask whether migration is a universal human right. The premise for an affirmative answer can only be implicit because it takes a normative stance on the universality of this right, regardless of the terms of its relationship to state communities. However, if the nature of the entitlement to migrate is recognised as a single overarching universal human right, we may ask whether this can guarantee its effectiveness within the framework of

current immigration law and further, in terms of the aim of inclusion for the enjoyment of the rights that it aspires to.

This chapter discusses whether the right to migrate is underpinned by the demand for equality. If this is not so, it will surely be condemned to remain a chimaera—as a concept whose ultimate aim is inclusion and participation in the host political community. Before pursuing this line of thought, it may be helpful to take a closer look at the link between territorial sovereignty and migration. Its traces may be found in the conceptual history of ***ius migrandi*** in modern theorisations.

In this process, migration and sovereignty may lie at the heart of structural references and reciprocal contradictions, just as they did in the past.

5.1 *Ius migrandi*: theory and ideology

The recognition of the right to emigrate has a solid foundation in contemporary constitutionalism, as testified by the post-war constitutions, international treaties and conventions that led to contemporary constitutionalism (Article 13 Universal Declaration of Human Rights 1948; Article 12.2 International Covenant on Civil and Political Rights 1966; Article 2.2. European Convention for the Protection of Human Rights and Fundamental Freedoms). All these documents confirm a long history, dating back to the Magna Carta of 1215 (Article 42) or further. Its elements tended to reappear in the French Constitution of 1791 and the US Expatriation Act of 1868. Emigration is undoubtedly considered a fundamental right, especially in post-Westphalian regimes; however, this is not true for the right to immigrate, over which states exercise their control. For some scholars, this dichotomy is to be interpreted as an expression of a crucial aspect of territorial sovereignty, namely, the self-government of a political community (Walzer 1983, 40–41; Rawls 1999; Miller 1995, 128–129).

This perspective is not supported by political theory alone. We may recall that the system of international protection—outlining the circumstances in which the right to asylum may be granted—establishes no fundamental (or human) right to immigrate (Miller 2016, 11–31). Case law on the European Court of Human Rights seems to lead to the same conclusion: the Court has repeatedly confirmed that border control by states is a consolidated principle among the sources of international law (*Omoregie and Others v. Norway*, Appl. No. 265/07, Council of Europe: European Court of Human Rights, 31 July 2008; Saadi v Italy, Application No. 37201/06 [2008] ECtHR). Unlike migration, which is seen as a phenomenon intrinsic to the very history of the human species, the recognition of a right to migrate seems to be torn into two regulatory regimes reflecting the varying nature of the claims that individuals and groups may bring. Critical issues of this kind are deeply rooted in the conceptual history of the right to migrate, which developed in parallel with its earliest formulations in modern scholarship. Despite the complexity of the topic, which is set within the framework of significantly heterogeneous theories quite often, ***ius migrandi*** is ingrained

in Western legal culture, conveying instances and ideologies that must be considered if we are to infer useful elements from them and single out considerations on the problems mentioned here, regarding the legal nature of the right to migrate.

The next theme to be addressed will be an outline of considerations on migration. It clarifies that the theory of *ius migrandi* stems, in one aspect, from the meaning of the right to expatriate (and not by mere coincidence), but the status of the claim to join a political community (which places the right to migrate in a condition of constant and structural equilibrium with the discretionary exercise of the duty of hospitality that states own) is quite another.

Modern natural law doctrine thematises this specific expression of the right to migrate through a somewhat ambiguous discussion on *ius migrandi*, which is derived from a discourse that, while theorising the value of the natural right of the individual, establishes that its exercise is 'conditioned' by the prerogatives of sovereignty.

This viewpoint was already implicit in late scholastic doctrines. It came to be systematised through the development of contractualist theories that were typical of the natural law scholarship of the later modern age. This was a framework in which a corollary of the legitimisation of state sovereignty, grounded in the pact between citizens and sovereign, was the prerogative to control the territory as the legal and symbolic space. A concrete instance of this would be the later argument that sought to distinguish between individual and group migrations. If the former (*discessio singulorum*) does not affect the *pactum* between the sovereign and citizens, without prejudice to exercising any state prerogatives, the latter is in clear opposition, as it is likely to violate their conditions (Grotius 1913).

Although balancing individual rights and public interest in relation to *ius migrandi* is a constant in the natural law tradition, there are also some instances of a more lenient attitude towards group migration. Even so, as in Pufendorf's case, it would seem unreasonable to deny the latter while granting individual freedom to migrate—'*si enim singulis licet pro arbitrio migrare, cur liceat pluribus, quibus sedem fortunarum eodem tempore transferre commodum est*? (if it is lawful for individuals to migrate at their own discretion, why should it be permissible for many, to whom it is advantageous to transfer the seat of fortunes at the same time?)' This argument, albeit useful to limit its scope, still relates to the risks involved in mass emigration. It is undoubtedly necessary to consider the risks inherent in the departure of groups of citizens from a territory—such as leaving cities bereft of their inhabitants—but this phenomenon was insufficient to loosen the bond with *societas civilis inter homines* (civil society between human beings), because the *corruptio* (degeneration) of a society is offset by the *generatio* (birth) of a new one, when a conception of societal and cosmopolitan civil coexistence that would not be absorbed into a state community prevails (Pufendorf 1688, 919).

It was within this contractual framework that later authors devised what might be defined as an initial classification of migrant status. For Barbeyrac, there are circumstances where the individual right to migrate may not be denied, such as flight from a tyrannical government, poverty and the impossibility or difficulty of ensuring sustenance for oneself and one's family through work (Barbeyrac 1724, 307).

Even from these initial observations, several interesting issues emerge regarding the relationship between migration and sovereignty. However, we should not underestimate the importance of doctrinal developments on these topics among the late scholastics from the mid-sixteenth century onwards.

This was the matrix from which an explicit theorisation of *ius migrandi* originated. Against this backdrop, the right to migrate was embedded in a legal discourse which—albeit not yet in mature terms—sought to lay the foundations of international law (*ius gentium*), superimposing it onto an ideal of communication and exchange between people (*ius societatis et communicationis*). This ideal would be understood as a vehicle for the 'natural' sociality of human beings, which comes about through communication with one's peers to build ties and overcome the divisions dictated by the territory and its borders (de Vitoria 1539). A set of rights, as the expression of a principle of cosmopolitan hospitality that includes *ius migrandi*, is firmly anchored within this framework as a universal but structurally limited right. It is asymmetrical and a human prerogative. For the scholarship of the time, *ius migrandi* was a natural right to which every individual was entitled to from birth.

It is appropriate here to note that an ideological tension pervades the premises, leading to the recognition of the right to migrate in a specific period of European history that contributes to legitimising—from legal and political viewpoints—the colonial conquest of non-European territories by the states who are most directly engaged in extending their dominions (Dummett 1992).

These aspects are explicit in the doctrine of Francisco de Vitoria, who postulates a theory where the significant elements of ambiguity emerge. *Ius migrandi* participates in the law of nature, which all of humanity must be subject to. It is a prerogative that contributes to the realisation of relations between people according to an ideal of cosmopolitanism based on a shared human identity. For De Vitoria, this connects *ius migrandi* as a 'natural right' to a complex of other freedoms. This also includes the right to free movement (*ius peregrinandi*), which is understood as the fundamental axiom of the law of nations (*ius gentium*) (de Vitoria 1539). In this discourse, however, an additional and substantive feature of *ius migrandi* emerged, one that De Vitoria deemed as possessing all the characteristics of an implicitly non-universal right and as a clear representation of the albeit undeclared affirmation of an asymmetry in the ownership of this prerogative (since its declared universality only regards Europeans, legitimising their right to expatriate). This does not address the legal significance of immigration, as it is not addressed to every recognisable political community. Furthermore, it endorses the principle of

the use of force against those who oppose it (*vim vi repellere licet*), thus formally justifying the imperialistic claims of sovereign states (Williams Jr 1990, 37).

The dual nature of *ius migrandi*—whose universality takes up an ideological stance for what migration should mean, justifying its legitimacy based on a conception whereby the only political community authorised to limit its exercise was the state—continued to be part of the tradition handed down from natural law to liberal schools of thought.

For Locke, of course, *ius migrandi* was firmly anchored in the migration/sovereignty binomial if we accept that the right to migrate is a function of the freedom to access the resources of the land, from which the title to individual property is formed. The same conception, granting legitimacy to its exercise, remained unchanged: the right to migrate was still the prerogative of all and served to guarantee the occupation of the territory, subtracted from the sovereignty of states. One example Locke provides is the occupation of 'the wild woods and uncultivated waste of America' through migration (Locke 1690, 294). Since it was uncultivated and uninhabited, Europeans could only imagine it. For Kant, however, a different order of discourse entered the scene, making explicit what had been a matter of mere ideology in previous theories of *ius migrandi*, thanks to the clear and decisive juridical connotation that he gave to the relationship between migration and territorial sovereignty.

For Kant, the relationship between *ius migrandi* and state sovereign power is central to a discourse that brings out the viewpoint of sovereignty through the formulation of the 'universal duty of hospitality'. This is geared towards peaceful and lasting human coexistence and the object of a moral imperative (Kant 1795; Nussbaum 1997, 25–58). As Derrida puts it when commenting on *Perpetual Peace* (the short treatise where this theme is discussed), the roots of a lasting vision that would have a decisive impact on political and legal thought for years to come may already be found in this late eighteenth-century work (Derrida 1997).

Focusing his critique on the notion of 'world citizenship', the French philosopher sees Kant's legacy as looking to the present age in a paradox whereby the universal imperative of hospitality is conceived and manifested as a constraint. It is emptied of its alleged universality through a political definition of its conditions. According to the Third Definitive Article, the 'law of world citizenship shall be limited to conditions of universal hospitality' (Kant 1795, 1923, 443). Thus, Kant sees the duty of hospitality as intrinsically bound by a constraint (it is never unconditional) that restricts—for the first time in explicit terms—the perimeters of the right to migrate, whose universality can be expressed as a 'right of visitation' (*Besuchsrecht*) and not a 'right of residence' (*Gastrecht*) (Derrida 1997, 53–56). Despite forming the basis for the concrete ideals of cosmopolitanism, the universal duty of hospitality remains a moral imperative that is unable to override state-imposed limitations. This duty is distinct from the political dimension, despite being subjected to it. It materialises as an ethical imperative with no claim to any form of unconditionality. This is an exemplary circumstance, leading, as Derrida suggests, to a state-centric model of hospitality that is contingent on the territorial sovereignty of political subjects (Derrida 1999, 87).

5.2 The freedom of cross-border movement and its paradoxes

The doctrine of *ius migrandi* shows that the freedom to migrate has never been considered free of public interference, either in its natural law formulations or liberal positions. These terms fit into an ideological framework deeply rooted in modern Western history, an instance of tension that runs through legal and political reflections between (political) authorities and (individual) freedom.

If the right to migrate, as the historical excursus broadly outlined here has shown, has never been seen as a comprehensive universal right (at any rate, it has not yet been declared to be so in the sources of international and conventional law), we may well ask whether the tie between migration and sovereignty does not fall into a broader debate on the legal nature of universalist claims, whose effectiveness is still a matter for the political power of states.

Naturally, the dual aspects of the right to migrate not only raise the problem of different regulatory regimes governing the distinct actions of emigration and immigration but also raise the question of how to categorise this right, whose declared universality cannot extend to any specific case unless we accept that this universality exists on paper only.

If we argue that individuals or groups may claim the right to migrate, we must address the problem of its historical and positive connections with territorial sovereignty, even if this provides no easy solutions. One obstacle to this is the existence of different constructions that, starting from the same premise supporting the universality of the right to migrate, address the question of its legal nature in various, albeit largely compatible terms.

Eschewing the 'conditional' nature of *ius migrandi*, which prevents any universalist considerations, some scholars hold that the right to migrate would be better protected by recognising a claim that generally upholds the *freedom of cross-border movement*. Nevertheless, it is hard to deny that the freedom to move across borders creates the same problem that arises with human rights in general, namely their legal value and effectiveness. This critical issue is still a topic for debate. It constitutes a classic theme, as the existence of universal rights had previously been challenged by Jeremy Bentham, who famously defined such legal prerogatives as 'nonsense upon stilts' (Bentham 1987, 46–69). He objected to the paradoxical character of rights propagated according to a 'language of daggers', using formulas containing 'be' rather than 'ought to be', thus compromising their justiciability in the opinion of the English jurist and philosopher. Concerning this argument, the direction followed by human rights over the centuries has perhaps shown the limits of Bentham's prophecy. Indeed, supranational and international court rulings demonstrate that human rights often influence significantly on judges' decisions, even though they do not bind states, per se.

Within this framework, it is difficult to shield the argument supporting the right to migrate as a human right from certain all too easy objections. While acknowledging and striving to overcome the contradiction between migration and sovereignty, the discourse returns to the question of state sovereignty in terms of its effectiveness.

Alongside those who argue that migration should be considered a human right (a thesis accompanied unsurprisingly by a proposal to eliminate language that perpetuates the history of its limiting connection with sovereignty, in favour of the right to *free cross-border movement* over the *right to migrate*—Carens 1987; Cole 2011; Kukathas 2014) others have used various arguments to agree: imposing an obligation of reception on states and limiting the exercise of their power to control borders. As for this position, the mere formal assertion of the right to migrate, which can only be understood as a universal claim, is insufficient unless it is given full normative value, which implies the need to impose a negative obligation on states not to prevent its exercise (Ferrajoli 2007, 350; Oberman 2016).

In the context outlined above, the argument that the prerogative to migrate is a human right—albeit recognising and committed to overcoming the contradiction between migration and sovereignty—can be challenged on two fundamental grounds. On the one hand, the question ultimately comes back to the debate on the sovereignty of states in terms of effectiveness. On the other hand, it introduces (but does not discuss) citizenship and fundamental rights, which must unequivocally guarantee their implicit underlying normative basis, namely the reduction of unequal access to primary goods.

Seeking a solution within the framework of this constitutionalism of rights extends the traditional horizon of legal positivism into a global dimension. Conversely, the interpretation prevalent in the history of legal doctrines and in terms of a 'moral right' is closer to the simple assertion that the liberty to migrate is a human right.

This line of thought has not failed to attract various reasoned criticisms (Seglow 2005; Wellman 2008, 109), but it certainly deserves attention.

Considering the freedom to migrate as a 'moral right' has the clear advantage of preserving its comprehensive character, overcoming the contradictions illustrated above regarding content, and perpetuating the interpretation with a firm place in theoretical tradition. It is probably sufficient to recall that this right was already authoritatively recognised in the eighteenth century, in homage to the cosmopolitan ideals that are dear to Enlightenment thinkers, as well as the notion that 'great tenderness is shewn by our laws, not only to foreigners in distress (...) but with regard also to the admission of strangers who come spontaneously' (Blackstone 1765, 259). Nevertheless, the 'duties of humanity' that were meant to limit the rights of states to repel the needy were often connected with *droit interne* (of a moral nature) and were legally ill-suited to check any contrary decisions by sovereigns or deprived them of effectiveness (de Vattel 1758, 115).

Is there a common thread running through the positions outlined here other than the attempt to safeguard a comprehensive and universal definition

of the right to migrate? In reality, even among those who argue that the right to migrate cannot escape its limiting tie to territorial sovereignty (unchanged) and that it is better defined as the right to free cross-border movement—some even contemplating a 'conditional opening' of borders (Kymlicka 2001; Bader 1995)—the regulatory perspective they favour rests on the premise that binds the freedom to cross borders to a guaranteed fair and universal access to primary goods (Kukathas 2014). This freedom is a genuinely universal version of the right to migrate; thus, it is perceived as a right that aims to achieve the goal of full migration, namely emancipation from material inequality among human beings simply because they are citizens of different states (Cole 2011). Opening borders to migrants is, therefore, one objective of global justice. It can be considered as such only if it can guarantee true equality, overcoming the means of exclusion that citizenship represents.

While it is not difficult to recognise this normative reasoning in the argument for opening borders (i.e. that inequalities between citizens and non-citizens in the enjoyment of fundamental freedoms are unjust and should be eliminated), it remains to be seen how this objective can be pursued in practice. This stigmatises the concept of citizenship (which would be undermined more so in ideological rather than legal terms) while safeguarding the fundamental rights that stem from it and which, especially if we consider social rights, are theoretically those called upon directly to pursue the objective of equalising disparities for access to essential goods.

It is necessary to consider the hypothesis that, despite the compelling arguments, the positions in favour of opening borders to counter the ideologically connoted character of the right to migrate fails, by universalising it, to neutralise the model that initially bound it to the paradigm of state sovereignty.

5.3 The new face of the relationship between migration and sovereignty

In light of the link between migration and sovereignty that we explored from historical and theoretical perspectives, one may wonder whether defining the right to migrate is indeed the issue that must be addressed. Such a query is not only justified by the abovementioned criticisms but also invites further questions, especially if one adopts the realistic viewpoint of migration policies that have been adopted in recent years.

Representation of the migration crisis that intermittently weighs on Western countries has undoubtedly focused on the prospect of a conflict between the right to migrate and the sovereign power of states to control or limit entry onto their territory, but in a framework that has not remained unchanged. It has been affected by the transformations that the concept of sovereignty has undergone (Sassen 1996), as well as by the quantitative and governmental linguistic order of practices in which it is expressed (Butler 2004), where words such as 'flows' 'quotas' and 'reallocation' (Plender 1988, 320) prevail. The issue of the recognition of rights seems to arise only in the domain of national and supranational jurisdictions.

This confirms a paradox. On the one hand, the legal questions posed by migration in terms of international law remain anchored in the theme of recognising human or fundamental rights, as endorsed by the main Conventions and Declarations stemming from the aftermath of World War II. On the other hand, in the case of law produced by states or supranational bodies, regulating migration becomes a question of administrative practices that are apt to manage population flows. Here, the question of the categorisation of subjective conditions gives rise to a constant and sometimes unsuccessful dialectic with the quantitative and securitarian management of the phenomenon (Bigo 2002; Anderson 2013).

In this context, the issue ceases to be the recognition of the right of individuals to cross borders freely. The question instead relates to the authority to govern a mass phenomenon of the subjective conditions that have multiplied, according to the varying ability of incomers to integrate, with consideration for the social and economic needs of the host community. If this is only a matter of migrant access conditions, it is difficult not to recognise that documents and passports that used to be instruments that sovereign states utilised to ensure population control are losing ground to other mechanisms in current immigration law because of the internationalisation of migration policies (Aleinikoff 2014; Papadopoulos et al. 2008). Whether these practices suggest reconsideration on the transformation of sovereignty or its irreversible crisis is a question that has long since interested political and legal theorists; migration undoubtedly offers a challenging example.

This administrative approach to migration has prevailed in European policies for decades, within a framework that firmly maintains that states have control over their borders. The strategies of tightening the rules on entry to the continent are central to this position, to the point that jurists consider the notion of 'Fortress Europe' to have taken hold (Gammeltoft-Hansen et al. 2017; Hathaway 1992; Finotelli and Sciortino 2013), to an alarming degree, not least because these policies are in de facto conflict with established principles of European law, including the prohibition of 'non-refoulment' (Papastavridis 2018). Drawn into the context of these approaches, recognition of the right to migrate is subject to the conditions that determine its exercise through 'legal' channels of entry that ultimately deny its effectiveness, even—and especially—in cases that implement protection under international law.

European Union (EU) Regulation 2018/1806 of the European Parliament and the Council of 14 November 2018 is an essential document enshrining the visa requirement for third-country nationals, based on 'criteria relating, inter alia, to illegal immigration, public policy and security' (Article 1). It supplements the provision that criminalises facilitating the immigration of undocumented persons onto European territory, also extending sanctions to private organisations that aid their disembarkation (Directive 2001/51/EC; Directive 2002/90/EC). In light of these issues and despite the formal call to observe humanitarian obligations of reception intended to bind states, entry into Europe is in effect barred to citizens arriving from countries where

torture and inhuman and degrading treatment are perpetrated. As a result, the greater the restrictions on 'legal' channels of entry, the greater the migration flow that is deemed 'unlawful' in European law, even though it ought to be protected as a human right (Inda 2006).

Even if the Commission has recently moved to mitigate this framework in response to a request from the European Parliament, inviting the Member States to distinguish between 'humanitarian assistance' and 'human trafficking' (European Commission C (2020) 6470 final, 1), the discretion of states in this sphere remains unchanged because the Commission's Communications are non-binding. Consequently, above all in the field of asylum and despite the case law of the European Court of Human Rights (*M. A. and others v. Lithuania*, Application No. 59793/17, Judgement of 11 December 2018; NT & ND v. Spain [GC], appeal nos. 8675/15 and 8697/15, Judgement of 13 February 2020), states continue to exercise their territorial sovereignty through discretionary control over the subjective conditions that authorise 'legal' entry into EU territory.

Recently, the European Commission again entrusted a document known as the 'New Pact on Migration and Asylum' (European Commission, 23 September 2020) with defining the objectives aimed to 'build a long-term migration policy that can translate European values into practical management'. Its goal is to promote a comprehensive approach to the issues that migration raises for the EU and its Member States, including the 'management of external borders' (p 2). The main objective of this pact is to promote secure 'legal pathways', allowing individuals who are seeking protection to enter EU territory. This issue has been on the Union's agenda since at least the early 2000s. It was already envisaged in the 2015 European Agenda on Migration. Nevertheless, resettlement (the practice of reallocating 'legal' migrants to one of the member countries) is still specified as the only means of safe access to Europe, as even today it is considered capable of offering protection to the most vulnerable refugees. This would be a step forward if the numerous problematic aspects of this model (e.g. the continued disparity between countries or the need to possess a document) were not in evident conflict with the system of refugee protection established in international law, which reduces the effectiveness of human rights, let alone the right to migrate.

In this framework, and despite shifting onto the level of the government's exercise of political power, the relationship between migration and sovereignty remains essentially intact. Indeed, concerning what has recently become the core EU policies and their unresolved critical issues, it is legitimate to ask whether it is still appropriate for states to exercise broad and discretionary power over the reception of migrants. Migration is ultimately a political issue that lends itself to exploitation on securitarian grounds, upon which leaders have sometimes built their consensus. Perhaps this is the reality that must be confronted to pick up the threads of the discourse that has unfolded thus far on the connection between migration and sovereignty. Furthermore, this is true in light of the *impasse* that entitlement to migrate

falls into as a human right with universal claims. Thus, there is a deadlock that condemns this claim to remain subject to the discretion of states under the impotent gaze of international law, no matter the theoretical construction.

Conclusion: the 'holiness of the cow' reconsidered

As Seyla Benhabib suggests, there can be no doubt that addressing the link between migration and territorial sovereignty means openness to widening one's perspective to grasp the 'series of internal contradictions between universal human rights and territorial sovereignty (...) built into the logic of the most comprehensive international law documents in our world' (Benhabib 2004, 11).

Some scholars claim that this is inseparable from the very genesis of liberal democracies, represented by the metaphor of its 'nocturnal body' (Mbembe 2019, 22). Western political systems are born and set up as 'societies of separation' between those included in the *sacred space* of citizenship and those who are excluded from it for any number of reasons. For those who cross the boundaries of the nation-state, the instrument of citizenship may be said to establish 'a regime of inequality at the planetary scale' (Mbembe 2019, 19), in which there are 'wasted lives' (Bauman 2004) that are condemned to segregation and expulsion.

Such hypotheses take root within a narrative of *irenical* rights-based global constitutionalism, revealing a darker side that is visible in the contradictions within the citizenship system. Refracted into a multiplicity of categories and extending well beyond the traditional distinction between citizens and non-citizens, citizenship would, from this perspective, be seen as a multiplier of hierarchies that are capable of endorsing the increasingly stratified and mobile perimeters of selection. These are geared more towards exclusion rather than inclusion. The various forms of hierarchisation that run through global constitutionalism appear to interpret the meaning of a 'border' as no longer communitarian but subjective since it is absorbed into a form of an *embodiment*, where practices that favour exclusion with shifting accents are produced (Mbembe 2019, 158–159). From this viewpoint, boarders are political concepts able to construct differences and inequalities building on the material needs of the *bodies* excluded from or included in their perimeter. This, on the one hand, asserts the ideological character that binds the construction of territorial sovereignty through the concept of the *border*, and stresses the migrant, on the other, as the vital and destabilising subject of liberal legal systems *par excellence*. Those who cross borders testify to a permanent and implicitly political conflict: a 'form of resistance' that can question and contradict 'the absoluteness of political borders and boundaries, challenging the holiness of the cow that citizenship, as a concept, is' (Samaddar 1999, 77). This is so by virtue of the political (even before the economic) claims that migration makes.

Although they doubtlessly interpret the governmental dynamics that currently impinge on the connection between migration and sovereignty, such analyses risk supporting the thesis whereby the protection of human rights and the objectives of global justice that seek to extend to the greatest freedom of access to primary goods must (and can) dispense with citizenship rights.

The limits that these positions project onto the complex theoretical and political problems posed by migration are, however, still evident when one considers the solution of certain scholars: within the framework of the same critical approach toward territorial sovereignty, these scholars believe that, in order to ensure the protection of equality, it is preferable a definition that shifts from the *right to migrate* to the *freedom to cross borders*. As the experience of European law depicts, freedom of movement, even when expressly sanctioned, cannot evade the discretionary power of states. This is evidenced by the fact that even within the European legal space itself, the rights of residence and access to work and welfare of citizens who come from Eastern countries are subject to disparities (van der Woude 2020).

While fighting discriminatory practices is one of the main objectives underpinning the process of harmonising European law, it is the pursuit of equal access to essential goods that appears to be the real issue. This is true not only in the field of migration. It should also be the focus of future reflections, adopting a realistic approach to the issue of rights: one that can withstand the changing practices through which contemporary sovereignty is expressed.

Bibliography

Abizadeh, Arash. 'Democratic Legitimacy and State Coercion: A Reply to David Miller.' *Political Theory* 38, no. 1 (2010): 121–130.

Abizadeh, Arash. 'Democratic Theory and Border Coercion: No right to Unilaterally Control to Our Own Borders.' *Political Theory* 36, no. 1 (2008): 37–65.

Aleinikoff, Alexander T. 'International Legal Norms On Migration: Substance Without Architecture.' In *International Migration Law. Developing Paradigms and Key Challenges*, edited by Ryszard Cholewinski and Euan Macdonald and Richard Perruchoud, 467–479. The Hague: Asser Press, 2014.

Anderson, Bridget. *Us and Them? The Dangerous Politics of Immigration Control.* Oxford: Oxford University Press, 2013.

Anghie, Anthony. *Imperialism, Sovereignty and the Making of International Law.* Cambridge and New York: Cambridge University Press, 2005.

Bader, Veit. 1995. 'Citizenship and Exclusion.' *Political Theory* 23, no. 2 (1995): 211–246.

Barbeyrac, Jean. 'Introduction à H. Grotius, Le droit de la guerre et de la paix.' In *Le droit de la guerre et de la paix*, edited by Hugo Grotius, 1724. Amsterdam: Pierre de Coup.

Bauman, Zygmunt. *Wasted Lives: Modernity and its Outcasts.* Cambridge, MA: Blackwell, 2004.

Benhabib, Seyla. *The Rights of Others: Aliens, Residents and Citizens.* Cambridge, MA: Cambridge University Press, 2004.

Bentham, Jeremy. 'Anarchical Fallacies.' (1791/1795) In *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man*, edited by Jeremy Waldron, 46–69. London: Methuen, 1987.

Bigo, Didier. 'Security and Immigration. Toward a Critique of the Governmentality of Unease.' *Alternatives* 27, no. 1 (2002): 63–92.
Blackstone, William. *Commentaries on the Laws of England in Four Books.* (1765) Boston and Philadelphia: Wait and Sons, 1818.
Butler, Judith. *Precarious Life: The Powers of Mourning and Violence.* London: Verso, 2004.
Carens, Joseph H. 'Nationalism and Exclusion of Immigrants: Lessons from the Australian Immigration Policy.' In *Open Borders? Closed Societies? The Ethical and Political Issues*, edited by Mark Gibney, 41–60. Westport, CT: Greenwood Press, 1988.
Carens, Joseph H. 'Aliens and Citizens: The Case for Open Borders.' *Review of Politics* 49, no. 2 (1987): 250–273.
Carens, Joseph H. 'Migration and Morality: A Liberal Egalitarian Perspective.' In *Free Movement: Ethical Issues in the Transnational Migration of People and Money*, edited by Brian Barry and Robert E. Goodin, 25–47. Park, PA: Pennsylvania State University Press, 1992.
Castles, Stephen and Miller, Mark J. *The Age of Migration. International Population Movements in the Modern World.* Basingstoke and London: MacMillan, 1993.
Cavalli, Sforza Luigi and Bodmer, Walter F. *The Genetics of Human Populations.* Dover: New York, 1999.
Cole, Philip. 'Open Borders: An Ethical Defense.' In *Debating the Ethics of Immigration*, edited by Christopher Health and Philip Cole, 158–213. Oxford: Oxford University Press, 2011.
De Vattel, Emer. *Le droits de gens ou principes de la loi naturelle.* Neuchâtel: Abraham Droz, 1758.
de Vitoria, Francisco. 'On the American Indians.' (1539) In *Political Writings*, edited by Anthony Pagden and Jeremy Lawrance. Cambridge: Cambridge University Press, 1991.
Derrida, Jacques. 'Cosmopolites de tous le pays, encore une effort!' (1997) In *On Cosmopolitanism and Forgiveness*, 1–24. London: Routledge, 2001.
Derrida, Jacques. *Adieu to Emmanuel Levinas* (1997). Stanford, CA: Stanford University Press, 1999.
Dummett, Ann. 'The Transnational Migration of People seen from within a Natural Law Tradition.' In *Free Movement: Ethical Issues in the Transnational Migration of People and Money*, edited by Brian Barry and Robert E. Goodin, 169–180. Park, PA: Pennsylvania State University Press, 1992.
Ferrajoli, Luigi. *Principia iuris. I. Una teoria del diritto e della democrazia.* Roma-Bari: Laterza, 2007.
Finotelli, Claudia and Sciortino, Giuseppe. 'Through the Gates of the Fortress: European Visa Policies and the Limits of Immigration Control.' *Perspectives on European Politics and Society*, 1 (2013): 80–101.
Gammeltoft-Hansen, Thomas and Tan, Nikolas F. 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy.' *Journal of Migration and Human Security*, 5, no. 1 (2017): 28–56.
Grotius, Hugo. *De iure belli ac pacis libri tres* (1625). Washington, DC: Carnegie Institution of Washington, 1913.
Hathaway, James C. 'The Emerging Politics of Non-Entrée.' *Refugees* 91 (1992): 40–41.
Inda, Jonath X. *Targeting Immigrants. Government, Technology, and Ethics.* Oxford: Blackwell, 2006.

Kant, Immanuel. 'Perpetual Peace.' (1795) In *Political Writings*, edited with an Introduction and Notes by Hans Reiss, 99–115. Cambridge, MA, and London: Cambridge University Press, 1991.
Kukathas, Chandran. 'The Case of Open Immigration.' *Journal of Libertarian Studies* 22, no. 1 (2014): 35–52.
Kymlicka, Will. 'Territorial Boundaries: A Liberal Egalitarian Perspective.' In *Boundaries and Justice. Diverse Ethical Perspectives*, edited by David Miller and Sohail H. Hashmi, 249–275. Princeton and Oxford: Princeton University Press, 2001.
Locke, John. *Two Treatises of Government* (1690). II. Cambridge and New York: Cambridge University Press, 2003.
Mbembe, Achille. *Necropolitics.* Durham, NC: Duke University Press, 2019.
Miller, David. 'Is There a Human Right to Immigrate?.' In *Migration in political Theory. The Ethics of Movement and Membership*, edited by Sarah Fine and Lea Ypi, 11–56. Oxford: Oxford University Press, 2016.
Miller, David. 'Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh.' *Political Theory* 28 (2010): 111–120.
Miller, David. *On Nationality.* Oxford: Clarendon Press, 1995.
Nussbaum, Martha. 'Kant and Cosmopolitanism.' In *Perpetual Peace. Essays on Kant's Cosmopolitan Ideal*, edited by James Bohman and Matthias Lutz-Bachmann, 25–56. Cambridge, MA, and London: The MIT Press, 1997.
Oberman, Kleran. 'Immigration as a Human Right.' In *Migration in political Theory. The Ethics of Movement and Membership*, edited by Sarah Fine and Lea Ypi, 32–57. Oxford: Oxford University Press, 2016.
Orchard, Phill. *A Right to Flee: Refugees, States, and the Construction of International Cooperation.* Cambridge: Cambridge University Press, 2014.
Papadopoulos, Dimitris, Stephenson, Niamh, and Tsianos, Vassilis (eds.). *Escape Routes. Control and Subversion in the Twenty-First Century.* London: Pluto Press, 2008.
Papastavridis, Efthymios. 'Recent "Non-Entré" Policies in the Central Mediterranean and Their Legality: A New Form of "Refoulement"?.' *Diritti umani e diritto internazionale* 3 (2018): 493–510.
Pécoud, Antoine and de Guchteneire, Paul (eds.). *Migration without borders. Essay on the Free Movement of People.* Paris: Unesco Publishing, 2007.
Plender, Richard. *International Migration Law.* Dortrecht: Martinus Nijhoff, 1988.
Rawls, John. *The Law of Peoples with 'The Idea of Public Reason Revisited.'* Cambridge, MA, and London: Harvard University Press, 1999.
Samaddar, Ranabir. *The Marginal Nation: Transborder Migration from Bangladesh to West Bengal.* London: Sage Publishing, 1999.
Sassen, Saskia. *Losing Control? Sovereignty in an Age of Globalization.* New York: Columbia University Press, 1996.
Seglow, Jonathan. 'The Ethics of Immigration.' *Political Studies Review* 3, no. 3 (2005): 317–334.
Simmel, Georg. 'The Stranger.' (1908) In *The Sociology of Georg Simmel*, edited by Kurt H. Wolff, 401–408. Glenco: The Free Press, 1950.
Stilz, Anna. 'Is There an Unqualified Right to Leave?.' In *Migration in Political Theory. The Ethics of Movement and Membership*, edited by Sarah Fine and Lea Ypi, 57–79. Oxford: Oxford University Press, 2016.
van der Woude, Maartje. 'Euroskepticism, Nationalism, and the Securitization of Migration in the Netherlands.' In *Crimmigrant Nations: Resurgent Nationalism*

and the Closing of Borders, edited by Robert Koulish and Maartje van der Woude, 227–248. New York: Fordham University Press, 2020.
von Pufendorf, Samuel. *De iure naturae et gentium libri octo* (1688). Oxford: Clarendon Press, 1934.
Walzer, Michael. *Spheres of Justice: A Defence of Pluralism and Equality*. New York: Basic Books, 1983.
Wellman, Christopher H. 'Immigration and Freedom of Association.' *Ethics* 119 (2008): 109–141.
Williams Jr, Robert. *The American Indian in Western Legal Thought: The Discourses of Conquest*. Oxford: Oxford University Press, 1990.

6 The gap between constitutional rights and human rights

The status of 'foreigners' in constitutional law and international human rights law

Akiko Ejima

Introduction: demystifying 'no immigration'

When the 2015 refugee crisis received global attention, Prime Minister Shinzo Abe emphasised in his UN General Assembly speech that it would be the biggest theme of the year (Abe 2015). However, when a journalist subsequently asked him about the possibility of accepting refugees, he replied,

> It is an issue that must be tackled in cooperation with the international community. In terms of the population problem, before accepting immigrants, we need to work on women's activities, the activities of the elderly, and to raise the birth rate, there are still steps that need to be taken. At the same time, Japan would like to fulfil its responsibility in this refugee issue, and Japan would like to contribute to changing the very soil that creates refugees.

To understand the questioner's intention, it is helpful to note how many refugees Japan has accepted so far. The country only accepted 11 refugees in 2014 and 27 in 2015, when other developed countries accepted thousands or even more, and the neighbouring countries of the home countries of refugees accepted millions (Immigration Services Agency of Japan 2020, 72; UNHCR 2021). This extremely reluctant attitude of the Japanese government has been criticised both at home and abroad. Nevertheless, it remains unchanged till today as the country accepted a mere 28 refugees in 2016, 20 in 2017, 42 in 2018, 44 in 2019, and 47 in 2020 (Immigration Services Agency of Japan 2020, 72).

The Prime Minister's answer is in line with the government's policy: Japan does not accept immigrants and, therefore, does not have or need to have an immigration policy. This policy is also clear from official government documents. For example, the annual white paper (Immigration Services Agency of Japan 2020) or the Basic Plan for Immigration Control and Residency Management (Ministry of Japan, 2019) does not use the terms 'immigration' (移民) or 'immigration policy' (移民政策). The English translation of the name of this agency, the Immigration Services Agency of Japan (ISA), may even be misleading. The verbatim translation of the agency's official

DOI: 10.4324/9781003102717-9