



Towards a Symmetrical World: Migration and International Law

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Symmetry has always been a striking feature of the natural world, and the aesthetics of art and design have drawn on it with most human-made structures displaying it. In ethics, too, symmetry has a value. Moral consistency requires that we treat two or more cases in the same way unless there is some feature that makes a relevant difference. To go against this basic moral rule is to enter a world of arbitrariness, of unfairness, of immorality. However, when it comes to migration we live in an asymmetrical world. Emigration is a fundamental human right recognised in international law: all people have the right of exit. Immigration, however, is different: only citizens of a state have the right of both exit and entry. There is, therefore, a startling legal asymmetry between emigration and immigration. In this paper I argue that we must move to a symmetrical world of migration, where exit and entry are both fundamental human rights, held by all, regardless of national membership.

Article 13 of the Universal Declaration of Human Rights states that everyone has the right to freedom of movement and residence within the borders of each state [1]¹. However, at the international level the right to freedom of movement and residence loses its symmetry. Here, according to Article 13, everyone has the right to leave any country, and to return to their own country. The right of entry is therefore limited to the national member, while the right of exit is universal. This is reinforced in the International Covenant on Civil and Political Rights (ICCPR) which, in Article 12, states that: “Everyone shall be free to leave any country, including his own”².

¹ See the Universal Declaration of Human Rights, www.un.org/Overview/rights.html.

² See the International Covenant on Civil and Political Rights, www.unhchr.ch/html/menu3/b/a_ccpr.htm.

The asymmetry of migration is reflected, not only in international law, but within much liberal political theorising³. However, it is worth pointing out that this orthodoxy has a relatively short history. For example, Richard Mayo-Smith, in one of the most comprehensive studies of migration concerning the United States, wrote in 1890: “[W]e must disabuse ourselves of the notion that a freedom of migration rests upon any right of the individual. It is simply a privilege granted by the state, the product of circumstances, the result of expediency. The state, therefore, that conferred the liberty may also withdraw it. The state that feels a loss of strength by emigration may forbid its inhabitants leaving the country”⁴.

This was an illiberal symmetry, with the state having parallel powers over the rights of entry and exit. We now have our present more liberal asymmetry, but immigration remains subject to national control much on the grounds Mayo-Smith describes, “the product of circumstances, the result of expediency.” We must ask, then, what fundamental difference between immigration and emigration underlies their different legal status.

Elsewhere I have argued that it is extremely difficult to identify what the moral difference might be⁵. For example, it has been suggested to me that one difference is that immigration could alter the distinctive culture, political or otherwise, of a community, and this could count as a reason for controlling it, but mass emigration would not fundamentally change the community’s cultural make-up or political institutions⁶. However, there is no logical or conceptual reason why a mass emigration cannot have such an effect. If a political community is multicultural or multi-ethnic, and a significant cultural or ethnic group decides to leave en masse, this could have catastrophic consequences for the political and cultural character of that community⁷. A second reason, noted by Rainer Bauböck in his contribution to this issue of *Ethics and Economics*⁸, is that “the duty to let people emigrate is perfectly allocated to particular states (in whose territory the would-be emigrants reside), while the duty to let in immigrants is potentially addressed to all other states.” Also, the act of leaving a state only requires a negative liberty right of non-interference, while the act of entering a state requires a positive act by the receiving state. And as the person who wishes to leave a

³ Among the exceptions are J. Carens (1987), “Aliens and Citizens: The Case for Open Borders”, in W. Kymlicka (ed), *The Rights of Minority Cultures* (Oxford University Press, Oxford), T. Hayter (2000), *Open Borders: The Case against Immigration Controls* (Pluto Press, London), and A. Pécoud and P. de Guchteneire (2005), “Migration without borders: an investigation into the free movement of people”, *Global Migration Perspectives No. 27*, Global Commission on International Migration, Geneva, Switzerland (<http://www.gcim.org>).

⁴ R. Mayo-Smith (1890), *Emigration and Immigration: A Study in Social Science* (T. Fisher, London), pp. 290-1. See D. C. Hendrickson (1992), “Migration in Law and Ethics: A Realist Perspective”, in B. Barry and R. E. Goodin (eds), *Free Movement: Ethical Issues in the Transnational Migration of People and of Money* (Harvester Wheatsheaf, London and New York).

⁵ See P. Cole (2000), *Philosophies of Exclusion: Liberal Political Theory and Immigration* (Edinburgh University Press, Edinburgh).

⁶ This objection was put to me in the extremely perceptive and helpful comments of *Ethics and Economics*’ anonymous referee.

⁷ See Cole (2000), pp.74-75.

⁸ And also by the anonymous referee.

state does not require the right to enter every state in the world, but only one other state, a universal right to emigration is compatible with limited freedom of movement.

Elsewhere I have argued that to maintain a universal right to emigration in the face of restricted rights of immigration is incoherent. As for the other points, the actual act of immigration is addressed to one particular state, not all states, and a universal right to immigration can be understood in terms of a negative liberty right. Or rather, if negative liberty is simply absence of interference, the right to cross a border involves two negative liberties and two duties of non-interference. The state you are exiting must not interfere to prevent you from leaving, and the state you are entering must not interfere to prevent you from arriving. The right to emigrate must be the right to cross a border, or else it is no right at all, and the right to cross the border imposes negative duties of non-interference on both the state of departure and the state of arrival. Bauböck seems to see the right to cross the border as involving an ‘opportunity’ right imposing a duty on the receiving state beyond non-interference, using the analogy of guards who open or refuse to open doors to adjacent rooms. The guards of the exit doors to the room you are already in have a duty to open them at your request, but the guards of the entry doors to the adjacent room have no such duty. But this is to assume that the ‘normal’ state of borders is to be closed and that it takes a positive act by the receiving state to open them. But if we see the normal state of borders as open, then the positive act taken by states is to close them⁹.

Of course, one could reply that we are not talking simply about border crossings, but access to citizenship, and that in a system of liberal welfare states entry does require a set of positive duties by the receiving state to admit the migrant to access to political and social rights. Here the argument begins to focus on the nature of liberal welfare states as voluntary associations, similar to clubs (Bauböck makes such an argument in his contribution). I critique arguments against symmetry based upon the nature of voluntary associations elsewhere¹⁰, and for sake of brevity I will not repeat those arguments here. Instead, I want to focus on arguments designed to show that immigration is importantly different from emigration which are based on consequences for the receiving state, as these feature heavily in political debate and the public media. According to such arguments, immigration has potentially serious consequences that emigration does not, and so while it is reasonable to take away state control over emigration, it remains unreasonable to remove control over immigration. The crudest version claims that immigration always imposes a cost on the state while emigration is cost-free. Although this is probably a view held by a great many people, no one who has studied migration to any extent would defend it -- immigration benefits the state where the immigrant settles, works and contributes taxes, while emigration costs the state where the emigrant is a highly-skilled professional, and the state also loses the taxes they would have paid in the future.

⁹ For a more detailed argument concerning the incoherence of maintaining that the universal right of emigration does not establish a universal right of immigration and for the other arguments here, see Cole (2000), pp. 48-58.

¹⁰ See Cole (2000), pp. 65-80.

A more sophisticated version acknowledges that immigration and emigration cannot simply be given positive or negative scores, and that under different circumstances either can be beneficial or costly for the state. Rather, it claims that a particular kind of immigration, a sudden mass influx of people, would impose an immense cost on most states under most circumstances. Therefore states have the right to protect themselves from this possibility by retaining control over immigration. However, this mass immigration is hypothetical, and the fact is that a sudden mass emigration would also impose an immense cost on the state. If the state derives its right to control immigration because of a hypothetical mass entry, why should it not also derive a right to control emigration because of a hypothetical mass exit? The argument gets us to the illiberal symmetry of Mayo-Smith.

A third version of the argument drops the threat of a hypothetical mass immigration and instead argues that certain states face a very real threat of mass immigration. If they did not keep control over immigration, developed states would be 'flooded' by a mass of poor migrants from the developing world, and therefore these states have the right to protect themselves. There is no equivalent threat of mass emigration from these states, and so no need for an illiberal symmetry of state control over all border movements. However, this argument, too, takes us to the illiberal symmetry. Firstly, it allows that if these states did face real danger of mass emigration they would have the right to control it, so that the universal human right to leave a state is once more based on expediency and circumstance, not ethics or law. Secondly, there are states that are currently threatened by mass emigration, for example the mass exit of health care professionals from developing nations to work in developed world's health care systems¹¹. If developed states have the right to protect themselves from the real threat of mass immigration, why do developing states not have the right to protect themselves from the real threat of mass emigration?

One interesting move here is to simply bite the bullet and argue that most moral rights are provisional rather than absolute, and can be limited in extreme circumstances. There is nothing incoherent in saying that people have the right to do something unless too many of them want to do it. If too many people did want to emigrate then the right could be limited. However, notice that this is to accept the symmetry between the ethical status of immigration and emigration. If there is a moral right to emigration which can be limited if too many people want to do it, why not understand immigration in the same way -- there is a moral right to immigration and it has the same *prima facie* status as the right of emigration.

The problem, however, is that establishing moral equivalence between immigration and emigration in the present political climate takes us towards the illiberal symmetry. This is because of what Bas Schotel, in his contribution, describes as the sovereignty thesis: "states have the legal power inherent in sovereignty to admit or exclude aliens as they deem fit...". If the state has the power to control movement across its borders simply on grounds of expediency and circumstance, then indeed our symmetry is illiberal. Even if we hold that the state should only limit freedom of movement if there is some serious threat to its stability, the sovereignty thesis allows that it is for the state in question to identify what is to count as

¹¹ See J. de Mesquita and M. Gordon (2005), "The international migration of health workers: a human rights analysis", Medact, London, United Kingdom (<http://www.medact.org>).

a serious threat. But if we say not only that the grounds have to be extremely serious before the state can limit anybody's right of entry or exit, but also that it is for international law and treaty to establish what will count as a serious threat, we move towards a world of symmetrical freedom of international movement. It is not that we bring emigration under the same kind of legal regime as immigration, but that we move in the opposite direction: immigration is brought under the same legal framework as emigration, a universal human right embodied in a framework of international law and subject to internationally agreed procedures, criteria and standards.

One immediate objection is that this is not a legal framework at all, it is the absence of one. Emigration is subject to no legal restrictions, and in our proposed new world neither would immigration, and this would bring about a damaging anarchy. Rather than choose an illiberal symmetry or a liberal anarchy, we make do with a half-liberal asymmetry. Our choice is between state control over immigration which brings order and stability for everyone, and a lawless world without borders cursed by disorder and instability in which everyone would be worse off. But this is a false contrast. Firstly, the current global order is not one of order and stability for everyone: the current migration regime imposes serious costs on much of the world's population¹². Secondly, the alternative is not a world without law. Whether or not universal mobility would actually bring chaos and disaster for everybody throughout the globe is not a question I address here¹³. Putting aside consequentialist considerations for now, my concern is how to address freedom of movement in terms of international law and human rights. However, a consequentialist approach would not necessarily get us to different conclusions, as Raffaele Marchetti argues in his contribution. What will matter is whether we take a global/cosmopolitan consequentialist perspective or a local/nationalist one.

For the purposes of my argument here, the point is that emigration is subject to an international legal framework which can be coherently and consistently applied to immigration. The right of emigration is a prima facie right which states can limit in times of extreme emergency. Article 4 of the ICCPR states that in times of public emergency which threaten the life of the nation, states "may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin"¹⁴. Some rights cannot be derogated by states under any circumstances, for example the articles forbidding torture and slavery. But Article 12 on freedom of movement is not one of these, and therefore it can be limited.

While Article 12 states that everyone is free to leave any country, it also states that this freedom can be subject to restrictions "which are provided by law, are necessary to protect national security, public order (ordre publique), public health or morals or the rights and

¹² See A. H. Richmond (1994), *Global Apartheid: Refugees, Racism, and the New World Order* (Oxford University Press, Toronto, New York and London).

¹³ See A. Pécoud and P. de Guchteneire (2005).

¹⁴ See the International Covenant on Civil and Political Rights, www.unhchr.ch/html/menu3/b/a_ccpr.htm.

freedoms of others, and are consistent with other rights recognised by the present Covenant”¹⁵. There has been much debate over precisely which circumstances justify a state in derogating certain rights, and guidance is given by the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights¹⁶. These principles were drawn up in order to formulate a uniform set of interpretations of the limitation clauses in the ICCPR. The principles take care to spell out what will count as a public emergency which threatens the life of the nation, and in relation to Article 12, what will count as a relevant threat to national security, public order, and public health or morals. Although the principles are not binding, they are taken to offer authoritative and valuable legal guidance.

The view that emerges from the principles and from the ICCPR itself and other documents is that any restriction must be provided by law, must be necessary to achieve the purpose for which it is put in place, must be proportionate to those purposes, and must be “the least intrusive instrument amongst those that might achieve the desired result”¹⁷. In their discussion of the effect of the emigration of health care professionals from developing states, Judith Bueno de Mesquita and Matt Gordon ask whether the Siracusa Principles would justify the limitation of the right of those professionals to leave. A serious threat to public health is a legitimate ground for restricting freedom of movement, and most agencies agree that the state of the health systems in many developing states is critical. However, Bueno de Mesquita and Gordon conclude that “it is highly unlikely that a policy of restricting freedom of movement of health workers as a response to international health worker migration would meet these threshold requirements. Restriction of freedom of movement is unlikely to be the least intrusive policy that can be adopted to improve the right of health in the context of health worker migration”¹⁸. There are other measures which might be effective which are far less intrusive, and more proportionate to their purpose. An example of a health crisis which would meet the principles’ threshold requirements would be “where it is strictly necessary to contain an outbreak of certain highly infectious diseases”¹⁹.

The asymmetry we are faced with, then, is that states must meet highly stringent standards in order to justify control over emigration. However, they are not required to justify their control over immigration at all, and those attempts to justify it that we find in liberal political theory are based on hypothetical catastrophes and calamities for which we are presented with the most flimsy evidence, if any evidence at all. My proposal is that in the absence of any clear case that immigration threatens “the life of the nation” as defined by the Siracusa Principles, it should be brought under the same legal framework as emigration, creating a liberal order of universal mobility²⁰. Immigration controls would become the exception

¹⁵ Bueno de Mesquita and Gordon (2005), p.15.

¹⁶ See the Siracusa Principles on the Limitation and Derogation Principles in the International Covenant on Civil and Political Rights, UN doc. e/CN.4/1985/4, Annex (1985). Accessible at www1.umn.edu/humanrts/instree/siracusaprinciples.html.

¹⁷ Bueno de Mesquita and Gordon (2005), p.15.

¹⁸ Bueno de Mesquita and Gordon (2005), p.15.

¹⁹ Bueno de Mesquita and Gordon (2005), p.15.

²⁰ I do not define what counts as a threat to the life of the nation here. Arash Abizadeh usefully identifies certain situations which may count as such a threat in his contribution.

rather than the rule, and would stand in need of stringent justification in the face of clear and overwhelming evidence of national catastrophe, and become subject to international standards of fairness, justice and legality. This is far from the alarming picture of borderless, lawless anarchy that many defenders of border controls suggest. Rather it is a world with a legal and moral symmetry when it comes to migration. In the absence of any clear evidence or argument that this symmetrical world is unachievable, we should begin the process of imagining how it can be made a reality. I do not for one moment propose that we can move to international freedom of movement immediately, for the kind of cosmopolitan consequentialist reasons explored by Marchetti. But he, Schotel and Abizadeh all make interesting suggestions about how we can begin this process of political imagination²¹.

²¹ I am grateful to the anonymous referee and to Peter Dietsch for their constructive and challenging criticisms of the original draft of this paper.