

National Sovereignty and Freedom of Movement

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One of the major obstacles to an international right of free movement –the right to cross borders – is the principle of national sovereignty. According to this principle of sovereign states have complete power over their internal affairs and their territory, and that includes the right to control who enters that territory. As the right to freedom of movement entails that people should be free to enter any territory they wish, then national sovereignty and freedom of movement contradict each other.

How can we make progress towards freedom of movement against such a fundamental principle of international politics? Does it mean that a world of freedom of international movement can only be a world without nation states, and if it does, does that make freedom of movement such a remote possibility that it is not worth discussing it as a realistic prospect?

In fact I do think we can think towards a world of freedom of movement without having to imagine that world without nation states. First, I will examine the idea of sovereignty and its moral foundations, and argue that those moral foundations are not as firm as we may think – if we give them a shove they may give way. Second, I will argue that national sovereignty in relations to freedom of movement is already

limited, and therefore freedom of *international* movement would in fact be a small step from where we are now, rather than some wild leap of the imagination.

First, how should we understand national sovereignty? At its simplest, this principle states that the sovereign body within a nation-state – the accepted legitimate political authority – has the right to exercise political and legal power and control over a territory, and that power and control extends equally throughout the territory. As an idea it has two foundations, the first historical, the second ethical. The historical foundation lies within European history, with the Peace of Westphalia in 1648. The Peace of Westphalia is made up of two treaties, of Munster and of Osnabruck, which ended the Thirty Years War and are taken to establish the principle of national sovereignty. They established nation states as the sole form of constitutional authority in Europe, and so ended bitter wars of religion. Only the sovereign head of state could decide the religion for the nation, neither the Pope nor the Holy Roman Empire. The problem is that the principle of sovereignty has hardly been consistently applied by European states. Certainly those states continued to try to dominate each other, and they failed to recognise the sovereignty of the nations they went on to colonise throughout the world.

Stephen Krasner points out that the norm of national autonomy is also challenged by other elements, such as human rights, minority rights, fiscal responsibility and international stability (Krasner, p. 8). Therefore, he argues, the growth of human rights since 1948 has not been a fundamental break with the past or a dramatic clash with national sovereignty. “Understood more generally as a problem of the relations between rulers and ruled, human rights are but one more incarnation of a long-

standing concern in the international system” (Krasner, p. 125). David Held and his co-writers have also pointed out that the contemporary global order is hardly Westphalian. National governments are locked into an array of global, regional and multilateral systems of government. And so we do not live in a Westphalian world, and objections to international freedom of movement that suppose that we do are misplaced.

However, it could be argued that there is another source of sovereignty that a right to freedom of movement would undermine, and that is the right to democratic self-determination. Peoples have a democratic right to determine their own affairs, and that includes the right to prevent people entering into their territory. But in fact this argument only works if we accept a radical principle of democratic autonomy, in which the majority vote in a body of people can determine any outcome it wishes (Cole, p. 184). In fact liberal political theory – and liberal states – would not accept such a radical principle of democracy. Rather, the will of the people has to have side-constraints, and the most important side constraints are human and minority rights. As I argue: “If we believe that the moral equality of persons can act as the basis of a framework of international justice and human rights, then we do believe there are limits to self-determination; some matters can rightly be held to lie beyond the scope of the democratic powers of any body of people” (Cole, p. 184).

Therefore national sovereignty, even if we base it on the democratic will of the people, is not unlimited, and international human rights are a fundamentally important limitation on that sovereignty. If we can establish an international human

right to freedom of movement, then the principle of national sovereignty cannot obstruct it.

Of course, the question then is whether we *can* establish such a right, and what I want to do next is argue that in fact national sovereignty is *already* limited when it comes to freedom of movement, such that the step towards a fully international right to freedom of movement is not so large as we may imagine. There are two ways in which state control over freedom of movement is limited, and I want to suggest that we can learn from these two ways and build a much more radical case for freedom of international movement upon them.

The first way in which state control over freedom of movement is limited is internally. We might think state sovereignty means that states have unlimited power and control within their territory but of course they do not, because that power is limited by the rights of citizens and people within that territory. The power of liberal democratic states is limited by their respect for citizen and human rights.

One of those rights is freedom of movement. The fact is that everybody legally within the state's territory has the right to move anywhere they like within the territory. Under Article 13 of the Universal Declaration of Human Rights, everyone has the right to freedom of movement and residence within the borders of each state. And Article 12 of the International Covenant on Civil and Political Rights states that everyone lawfully within the territory has the right to liberty of movement and freedom to choose their residence.

What is the significance of this for freedom of *international* movement? The point is that human rights need to be grounded – they do not stand-alone but have a grounding that justifies them, and for some that grounding is that they protect certain vital interests that people have. There is a vital interest in freedom of movement because without it, many of the goods that go to make up a decent human life are impossible. The right to mobility is an essential part of the free agency of people.

We can see how important that link is when we see that it is an essential component of the idea of citizenship in liberal democratic states, so much so that if there is such a thing as European Citizenship as part of the European Union, then freedom of movement is an indispensable part of it. That is why it has emerged as non-negotiable despite recent arguments coming out of the United Kingdom.

But that still only gets us to freedom of movement for citizens of EU member states and we want to be far more radical than that – but if we are we need to be aware that we do need to re-think political theory itself, so that the attachment of membership to nation-states becomes questioned.

This is to look towards Yasmin Soyal's idea of a postnational model of citizenship, one that in the words of Harold Kleindschmidt "confers upon every person the right and duty of participation in the authority structures and public life of a polity,

regardless of their historical or cultural ties to that community” (Kleindschmidt, p. 13; Soysal, p 4).

This is to look towards an idea of membership of a global political community, such that to be a free and equal member of that global community, to be an equally powerful participant within it, is deeply connected with one’s freedom of mobility throughout it.

This may seem a radical and far-off vision, but as Duncan Ivison observes: “I take it that one of the great projects of twenty-first-century political thought is to develop new models of transnational and global political order that can provide not only effective security and welfare provision for citizens, but that can also become the object of people’s reasoned loyalty; to construct, in other words, new forms of transnational democracy” (Ivison, p. 212).

And so state sovereignty has no purchase on people’s freedom of movement internally, and that gives us the grounds for making a case for international freedom of movement based on the same grounds that justify internal freedom of movement.

But while state sovereignty has no purchase on internal freedom of movement, surely it is clear that it has a strong purchase on international freedom of movement? But in fact, while it has some purchase here, it is still limited.

Article 13 of the Universal Declaration states that everyone has the right to leave any country, including their own, and to return to their country. And Article 12 of the ICCPR says that everyone shall be free to leave any country including their own, and no one should be arbitrarily deprived of the right to enter their own country.

In other words, states have no control at all over outward movement, and limited control over inward movement. And so the idea that states have sovereign power over who crosses their borders is mistaken – again citizen and human rights limit that power.

If we take four possible directions of travel --

1. The exit of citizens.
2. The exit of non-citizens.
3. The entry of citizens.
4. The entry of non-citizens.

-- what we see is that the state has the right to control only one of these, the fourth one. And if we take the right to asylum seriously, even that fourth one has its own limits.

But my point here is not simply to point out this limitation, it is also to point out the asymmetry between the right to enter and the right to leave. Every one has the right to leave, but only citizens have the right to enter. What can morally ground this

difference in the way that emigration and immigration are treated? I've argued elsewhere that it is very hard to find any difference that can ground this asymmetry, and so there is a strong case for treating them the same.

And what I would argue is that it is the emigration regime that gives us the right model, and so provides us with the right to international freedom of movement. While some would say that this would create an anarchic migration regime with no rules, they would be wrong, because the right of emigration is subject to an international legal framework which can be coherently and consistently applied to immigration.

The right of emigration is a derogable right that 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".

And 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, public health or morals or the rights and freedoms of others, and are consistent with other rights recognised by the present Covenant." There is some debate about what would constitute a public

emergency which threatens the life of the nation under Article 4, and, in relation to Article 12, what will count as a relevant threat to national security, public order, and public health or morals.

However, what we can see is that states must meet highly stringent standards in order to justify control over emigration, but they are not required to justify their control over immigration at all. My proposal is that in the absence of any clear case that immigration threatens “the life of the nation”, it should be brought under the same legal framework as emigration, creating an order of universal mobility.

Immigration controls would become the exception 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.

To conclude, while it might first appear that national sovereignty and freedom of movement are in contradiction with each other, the truth is that national sovereignty already has limited purchase over the right of people to move and to cross borders. And if we take national sovereignty to be a principle which aims at the

exclusion of the power of other states, not people, then there is little reason for states to claim that purchase, except under extreme emergencies.

An international regime of freedom of movement can exist alongside more or less the same system of nation-state sovereignty we currently have, complete with national borders.

Far from being an unachievable dream, international freedom of movement is within our grasp, we should begin the process of imagining how it can be made a reality.

References

Phillip Cole (2000) *Philosophies of Exclusion: Liberal Theory and Immigration* (Edinburgh University Press).

Christopher Heath Wellman and Phillip Cole (2011) *Debating the Ethics of Immigration: Is There a Right to Exclude?* (Oxford University Press).

Duncan Ivison (2008) *Rights* (Acumen).

David Held, Anthony McGrew, David Goldblatt and Jonathan Perraton (1999) *Global Transformations: Politics, Economics and Culture* (Polity Press).

Yasmin Soysal (1994) *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago University Press).

Harald Kleindschmidt (1996) "Migration and the making of transnational social spaces".

