

IMMIGRATION AND ASYLUM LAW AND POLICY IN EUROPE

The Role of the State in Migration Control

The Legitimacy Gap and Moves
towards a Regional Model

Aoife McMahon

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Introduction

Immigration has proven itself to be one of the most sensitive and divisive issues on the political agenda of the modern state. Discourse on this topic is striking in its ability to evoke staunch and emotive views on both sides of the stronger/weaker controls debate. In political circles, those who favour stronger controls rely on such rationales as the protection of state sovereignty, the maintenance of the integrity of the immigration system, crime control, the protection of the national labour market etc. Those on the opposite side of the continuum raise such arguments as the illegitimacy of national borders, the existence of a universal right to free movement and that on global justice grounds developed states have a duty to accept migrants from poorer countries. But is there an optimum middle ground and if so, how can this be determined?

Political debates in this area, due to their emotive nature, tend to be overly simplistic. The reliance on such pithy arguments as the protection of state sovereignty for the adoption of greater migration control¹ measures for example fails to appreciate the complex history of this concept and at a deeper level fails to adequately justify in an intelligent and rational manner the measures in fact adopted. More is required of states by way of justification of the measures they take; such simplistic arguments are insufficient and quite simply unacceptable in present times of greater rationalisation. States have at their disposal increasingly advanced methods of data gathering and processing and so should be required to use same in demonstrating why particular measures taken will promote the common good.

In recent times there has been a rise in right-wing politics across the globe, accompanied by ever increasing restrictive measures of migration control. The negative impact of such measures, most notably serious breaches of the human rights of many migrants, is well documented. News articles abound detailing events of migrants dying at sea, being held in lengthy detention pending removal from states and being exploited as undocumented workers. In such circumstances, an inquiry into the legitimacy of state measures of migration control is timely.

The theory that a state has a sovereign right to control migration is invoked as a simple mantra with disconcerting frequency in case law of the European

1 I use the phrase "migration control" throughout the research. This captures the restrictive nature of present state measures in the area of migration. Some academics urge the use of "migration management", which to my mind would suggest a desirable more balanced approach. Until this is a reality however, I feel the phrase "migration control" is apt.

Court of Human Rights in particular, as will be discussed in Chapter 5. This theory has become so firmly entrenched as to render it controversial to even question such a given. In this respect, this research endeavours to break new ground in doing precisely that. Applying Weber's definition of legitimacy² on both a traditional and rational-legal basis, this research first seeks to determine whether the initial state measures of migration control can support the legitimacy of current such measures of a more general and systematic nature on a traditional basis. It continues to consider the question of whether current state migration control measures of a general and systematic nature can be legitimised on a rational-legal basis. It finally assesses what steps might be taken by states with a view to improving the legitimacy of migration control measures.

It must be clarified that this research does not deny a state the traditionally legitimate function of protecting such interests as security, order and health within its territory. Passport controls and security checks may be used to gather evidence on individuals who pose a real threat to these interests and where such evidence exists, a state has a legitimate corollary power to restrict the entry and residence of such individuals into and within its territory. Similarly, where the volume of anticipated immigrants is demonstrated by clear evidence to exceed that which a state could realistically absorb, this could amount to a significant threat to these interests and for the same reason, a state could take measures to restrict such flows. An approach which would presume that individuals will not constitute such a threat would still allow for a rebuttal of this presumption on an evidential basis.

Neither does this research go so far as to claim that a human right to free movement should exist. It confines itself to contending that in order for states to legitimise their measures of migration control, they must take some action, whether at the national, international or regional level, towards improving their evidential base on the concept of migration or returning the point of departure to "freedom unless you pose a threat". This phrase "freedom unless you pose a threat" derives from the historical exploration of Chapter 2 in which it is demonstrated that initial migration control measures were based on the premise of free movement unless a threat was posed to such essential state interests as public order, security or health. It is acknowledged that there is little difference in practical terms between a right to free movement and a "freedom unless you pose a threat" point of departure, yet there is a nuance on a symbolic level: what matters is not which international human rights documents states might agree to in the future, but what they must do at present to

2 Weber, *Economy and society: An outline of interpretive sociology*, Roth and Wittich (eds.), University of California Press, Los Angeles and London, 1978.

safeguard their own legitimacy. This research focuses on the perspective of the legitimacy of the state rather than the rights of migrants.

While arguments of global justice and ethics are also important, these are beyond the scope of this research, which takes a distinct legal positivist approach in inquiring as to the legitimacy of state laws on migration control. The term *positivist* is used rather than *rationalist* to insist upon the fact that even positivist law must be rational in the sense of being based on some arguments, whether or not these are considered to be good or bad on deeper levels of global justice or ethics. Given this limited scope, the arguments presented do not go so far as advocating for open borders in the vein of such authors as Carens.³ The research is silent on the ethical arguments raised by the latter and takes a minimalist approach – what is contended is the least that is required of states to legitimise their own actions. It proposes an optimum middle ground between the polar arguments set forth by Wellman and Cole⁴ that on the one hand legitimate states have the right to have any immigration regime they want, and on the other that national borders should be completely open. Its focus on the legitimacy of state action distinguishes it from Grey's focus⁵ on the demands of justice on immigration law. It is ultimately pessimistic as to the capacity of a state to legitimise its own actions of migration control and if this initial hurdle cannot be overcome, theories of substantive justice will have little utility. Procedural justice, with a focus on evidence-based decision making, is on the other hand key.

It furthermore only briefly addresses the tangential issues of the extent to which civil, social and economic rights should be afforded to immigrants by host states and in what circumstances they should be granted political membership of the state as naturalised citizens. Authors such as Walzer⁶ and Meilaender⁷ place emphasis on the value that comes with membership of a community in asserting that exclusion is justified by the right of communities to self-determination. These authors fail however to distinguish between control of immigration, *i.e.* the movement of people across territorial borders, and the control of membership of a community through naturalisation, a central distinction in this research. While Chapter 5 briefly suggests a possible tiered

3 Carens, *The ethics of immigration*, Oxford University Press, London, 2015; Carens, *Immigrants and the right to stay*, Boston Review Books, Boston, 2010.

4 Wellman and Cole, *Debating the ethics of immigration*, Oxford University Press, London, 2011.

5 Grey, *Justice and authority in immigration law*, Hart Publishing, Oxford and Portland, Oregon, 2015.

6 Walzer, *Spheres of justice*, Basic Books, New York, 1983.

7 Meilaender, *Toward a theory of immigration*, Palgrave, New York, 2001.

system for the acquisition of civil, economic and social rights by immigrants and advocates for just membership and an acceptance of citizenship constellations when it comes to membership of a political community, it is recalled that the central focus of this research is on the legitimacy of state controls on the physical movement of people across territorial borders. In this way the approach taken can be distinguished from that taken by authors who focus on the relationship between immigration, citizenship and sovereignty in the traditional sense.⁸

While approached from a legal perspective, the nature of the subject matter necessitated delving into other disciplines. In line with recommendations of Chapter 4 for an inter-disciplinary approach to be taken in order for all relevant disciplines to gain a greater understanding of the concept of migration, the focus spans from sociological and economic perspectives to historical and political perspectives throughout the research. A positivist legal approach nevertheless grounds the analysis of the core research question. A further feature of the approach taken is its markedly broad nature. States and migration are spoken about at a general level, with the examples of America and more particularly Europe being given where it became necessary to offer empirical examples. This broad approach was intentional and one of the aspects of the research setting it aside from other research in this area. Most research in the sphere of migration takes a narrower view focusing on particular regions, categories of migrants or associated problems. What is absent from the existing research is a bird's eye view of the whole, a lacuna I have endeavoured to fill. Another author aptly captures my sentiments in taking this approach: "it does seem to me that there is a virtue in looking across time and space in a comparative fashion. Some of the broader patterns of political development are simply not visible to those who focus too narrowly on specific subjects".⁹

A number of academic works in the field of migration similarly take a broad approach. Portes and deWind¹⁰ and Stalker¹¹ take a comprehensive approach

8 Joppke, *Immigration and the Nation State: The United States, Germany and Great Britain*, Oxford University Press, London, 1999; Adler-Nissen and Gammeltoft-Hansen (eds.) *Sovereignty games: Instrumentalising State sovereignty in Europe and beyond*, Palgrave Macmillan, Hampshire, 2008; Jacobsen, Sampford and Thakur, *Re-envisioning sovereignty: The end of Westphalia?*, Aldershot, Ashgate, 2008.

9 Fukuyama, *The origins of political order*, Profile Books Limited, London, 2011 at p. xvi.

10 Portes and deWind (eds.), *Rethinking migration: New theoretical and empirical perspectives*, Bergahn Books, New York, 2008.

11 Stalker, *The no-nonsense guide to international migration*, New Internationalist Publications limited, Oxford, 2008.

to researching the causes and effects of migration essentially from a socio-political perspective. Their research is particularly valuable in contributing to a holistic understanding of this concept. Hatton and Williamson¹² have made significant contributions to the broad historical understanding of migration patterns. They demonstrate that a temporal comparative approach serves to place present migration patterns in context, particularly in affording an appreciation of the qualitative and quantitative characteristics of the great migration waves of the 19th and 20th centuries. Koser¹³ and Moses¹⁴ take similarly broad approaches but go further in criticising current migration policies and regimes. Koser sets out to debunk myths such as the claim that migrants take jobs away from local workers, or that they take advantage of health care systems in presenting a fundamentally human side to migration. At a deeper theoretical level, Moses makes moral, political and economic arguments in favour of the free mobility of human beings across national borders.

More recently, efforts have been made to approach the subject of migration from an interdisciplinary perspective. Brettell and Hollifield¹⁵ appreciated that in order to deepen our understanding of this concept a combined input was required across such disciplines as anthropology, political science, demography, geography and sociology. The approach of such texts is to a large extent descriptive and although valuable in drawing together such a spectrum of views, given differing theoretical models and methodologies, the views remain segmented.

Further works examine this concept from a legal perspective. Two works in particular explore how international law applies to various categories of migration. "Various categories" because no single framework or even agreed definition of migration yet exists in the international sphere. Although dispersed in many different legal texts, Cholewinski, Perruchoud and MacDonald¹⁶ manage

12 Hatton and Williamson, *Global migration and the world economy*, MIT press, London and Cambridge, 2005; Hatton and Williamson (eds.), *Migration and the international labor market 1850–1939*, Routledge, London and New York, 1994.

13 Koser, *International migration: a very short introduction*, Oxford University Press, 2007.

14 Moses, *International migration: Globalisation's last frontier*, Zed Books, London, 2006.

15 Brettell and Hollifield (eds.), *Migration theory: Talking across disciplines* (2nd ed.), Routledge, New York, 2008; see also Arcarazo and Wiesbrock (eds.), *Global migration: Old assumptions, new dynamics*, Praeger, Santa Barbara, 2015; Segal and Elliot, *Immigration worldwide: Policies, practices and trends*, Oxford University Press, London, 2010; Maloney and Korinek (eds.), *Migration in the 21st century: Rights, outcomes, and policy*, Routledge, London and New York, 2011.

16 Cholewinski, Perruchoud and MacDonald, *International migration law: Developing paradigms and key Changes*, T.M.C. Asser Press, the Hague, 2007; see also Opeskin,

to draw together the principal strands of what is today accepted as international migration law. They identify two key pillars underlying this area of law: state sovereignty and human rights.¹⁷ Betts¹⁸ asserts that unlike many other trans-boundary policy areas, international migration lacks coherent global governance. His work resigns itself to posing the normative question of how claims about the type of global governance that should exist in each distinct category can be grounded. Dummett and Nicol¹⁹ provide a valuable insight into the development of immigration law at the national level, using the example of Britain, while placing its experience in the European and International context. They note the turning point from transient and small-scale measures of migration control to those of a more general and systematic nature and identify its origins in racial theory. Their work culminates in a tentative argument, based on standards of international law, for a human right to freedom of movement across borders.

This research seeks to build on this existing literature in taking a broad approach to the field of migration, based on the theoretical concept of the state, while building on it in developing a normative legal argument regarding migration control measures. It commences with an analysis of the concept of the state in an effort to identify the general role of this social construct. The research continues to take a legal positivist approach to the question of whether or not current general and systematic measures of migration control by states are legitimate or indeed can be legitimised.

Chapter 1 seeks to come to an understanding of the concept of the state. A brief historical account traces the transition from early forms of social organisation to political organisation. From the birth of the modern state, political theorists have formulated varying theories aimed at justifying the existence and functions of this political entity. In a piecemeal and gradual manner, these theories have influenced the addition of elements to the modern state in the name of greater legitimacy, from the constitution to an independent judiciary. Others theories have ossified concepts, such as the nation state and sovereignty, which have proven less helpful in the quest for legitimacy. The modern state has been in a continuous state of flux, reacting to new theories and new

Perruchoud, Redpath-Cross (eds.), *Foundations of international migration law*, Cambridge University Press, Cambridge, 2012.

17 On this aspect, see also Rubio-Marín, *Human rights and immigration*, Oxford University Press, London, 2014 and Husain and Blake, *Immigration, asylum and human rights* (2nd ed.), Oxford University Press, London, 2016.

18 Betts (ed.), *Global migration governance*, Oxford University Press, Oxford, 2011.

19 Dummett and Nicol, *Subjects, citizens, aliens and others: Nationality and immigration law*, Weidenfeld and Nicolson, London, 1990.

social phenomena, and yet many regard the state as a rigid given and fail to even question its powers of control in areas such as migration. A theory which has recently gained in momentum is that of rationalisation – the idea that in order to take political action, there must be some minimum evidential basis to demonstrate that this in some way will advance the common good. This chapter contends that, beyond the few core functions of the state which have been legitimised on a traditional basis, no functions of the state can simply be taken as a given and must be demonstrated on each occasion to be justified on a rational basis. The onus is thus on the state to demonstrate on an evidential basis that it has a legitimate role in taking measures to control migration.

Chapter 2 analyses the development of state control of migration on an empirical level. The chapter commences with a consideration of some of the earliest examples of general legislative measures of migration control. These early control measures for the most part took as their point of departure “freedom unless you pose a threat”. A significant turning point is then identified first in America and then generally across Europe on the advent of the first world war. Control measures took on a more general and systematic character and were clearly influenced by the racist ideologies that spurred on the war. The point of departure in this way became “control unless we want you”. While measures at this time of war were adopted as emergency measures, they were simply continued after the war period. It is widely presumed that the control of migration can be justified on a traditional basis, which fails to appreciate this significant turning point or the racist origins of such measures. Where attempts are made to justify such measures, they are commonly based on generic phrases such as the protection of state sovereignty or security. Little effort has been made by states to identify on an evidential basis how migration affects either of these vague interests.

Alongside this shaky foundation to the legitimacy of state control of migration, increasing limits from external forces have been placed on states’ ability to adopt and enforce measures of control. *Chapter 3* examines these external limits in four general categories. First, international and regional law place obligations on contracting states to afford certain individuals international protection, notably in accordance with refugee and subsidiary protection regimes. Second, various international and regional fundamental rights regimes limit contracting states’ ability to adopt both direct and indirect measures of control. Relevant rights protected include the right to liberty and security of the person, the right to respect for private and family life, the right to fair procedures in criminal law and the right to privacy. Third, certain regions are developing areas of free movement of goods, capital, services and to an increasing extent people. The example of the European Union as an advanced region is focused on, with a brief mention of other regional migration regimes which

are following suit. Finally, economists and economic lobbying groups are putting increasing pressure on states to remove some of the restraints on labour migration. With such increasing external pressure, the time is apt to consider more closely whether or not the state has a legitimate role in pursuing its own unilateral migration control agenda in direct confrontation with these limits.

Chapter 4 endeavours to demonstrate the difficulties inherent in defining the concept of migration. While a lack of political will may explain the fact that there is no legal definition of migration in the international sphere, the difficulties of other disciplines in grappling with and defining this concept has repercussions for the legal sphere. If the object of control cannot be defined, how can states legitimately adopt measures of control on an evidential basis? What is it they are seeking to control? Until quite recently, research was carried out in a segmented manner, by individual disciplines following their own theories and methodologies. Only in the past few years have attempts been made to form bridges between the disciplines. While these developments constitute a considerable advance in improving our global understanding of this concept, all disciplines require reliable empirical data to test their theories. Given that to a large extent, these studies focus on cross border migration, cross border empirical data is imperative. Thus, another significant obstacle lies in the problem of a lack of comparability in international migration data due to a marked lack of political will to establish similar definitions and methods of data collection. This chapter makes clear that in the absence of state cooperation in obtaining international migration data, our global appreciation of this concept remains distorted. In order to know precisely what it is they are controlling and so to have any legitimate role in the control of migration, states will at a minimum have to take steps to remedy this situation.

Chapter 5 delves into a deeper analysis of the legitimacy of state control of migration on a theoretical basis. It commences with a clarification of what it is that is being sought to legitimise as distinct from issues beyond the scope of this research. This research confines itself to considering the legitimacy of state controls on the physical movement of people. It is acknowledged however that this inevitably leads to such issues as to what rights immigrants should be entitled and in what circumstances they should be accepted as naturalised citizens. A possible approach to these tangential issues is very briefly set out. The rest of the chapter is based on Weber's theories of traditional and rational-legal legitimacy.²⁰ Traditional legitimacy is approached from both an international and internal perspective and it emerges that neither perspective leads to a sufficient foundation on which the legitimacy of general and

20 Weber, *Economy and society: An outline of interpretive sociology*, *op. cit.*