

Sovereignty and Migration

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Abstract

Sovereignty and migration are two concepts often used together. Most of the scholars working of migration, as well as practitioners, are confronted to the argument of the sovereignty. This is not only the case in common language, for example in political speeches, but also in law, notably in jurisprudence. Sovereignty is invoked to limit migrants' rights or their ability to claim them, including in court. It is therefore essential to look at this concept of sovereignty, to understand it properly, to determine its influence and to identify the issues it raises.

Keywords:

I. Overview

‘The principle of sovereignty, that is of supreme authority within a territory, is a pivotal principle of modern international law’ (Besson [2011]). Historically, sovereignty is used to affirm the independence of the state in relation to the political authority of the Church. It represents the whole and absolute capacity of the nation-state in the domestic legal order and its independence in the international sphere (on Westphalian Treaties and Peace of 1648, see Beaulac [2004]).

This absolute capacity had at once to be relativized. In domestic law, the capacity of the authorities is based on rules, in particular of a constitutional nature. In the international legal order, the equality and the independence of the states have as counterparts their interdependence and the respect of the standards which they create for purposes of preserving and organizing the former.

Moreover, there is no longer one sovereignty, but sovereignties that must coexist. This is especially true in federated states where several levels of power coexist, but also where there has been a regional process of integration such as the European Union.

The evolution of international and domestic law concerning human rights confirms the functional character of sovereignty. They are not the state-owned property. In domestic law, it is said that human rights belong to the ‘nation’ or to the ‘people’ in the constitutional domestic system, so that the state cannot restrict them freely. In international law, human rights are not subject to the principle of reciprocity. A supranational control is organized, encompassing an increasingly direct access of the person to the authorities of control. It is true that the state is at the origin of human rights safeguards, but it is in the same time its guarantor.

II. Content and scope

1. Sovereignty and migration: myth or reality?

Since the creation of nation states, their sovereignty has been a weighty point of reference in migration law (Dauvergne [2004]). States, having sometimes transferred their competences to a regional organisation, such as the EU, claim the sovereign power to control who enters, stays and can be expelled from their territory (see also →European Union and migration). The rhetoric of states in this area is constantly reminiscent of their concern to remain in control of the composition of their population. Population, alongside territory and form of government, are traditionally considered to be the three elements of state sovereignty.

In 1854, in a chapter entitled 'Self-Preservation', Phillimore highlighted that 'it has received maxims of International Law, that the Government of a State may prohibit the entrance of strangers into the country, and may, therefore regulate the conditions under which they shall be allowed to remain in it, or may require and compel their departure from it'.

But at the same time, limits to this rule presented as a principle appeared, sometimes superficially, sometimes more substantially. Some internationalists already in the sixteenth, seventeenth and eighteenth centuries called upon the existence of a right of natural partnership and to communication (Vitoria in 1539 and its *ius societatis* and *ius communicationis*; of course, it was in the context of the colonisations), or a law of hospitality to allow the aliens to freely circulate (Grotius). Other ones as Pufendorf reversed the terms of the debate: sovereignty became the principle and hospitality an exception. Vattel in the XVIII century in the famous Law of Nations 'counterbalanced and qualified state sovereignty in the field of admission by two substantial caveats: innocent passage and necessity' (on this historical approach, see Chetail [2017]).

The jurisprudence confirms the doctrinal opinions, that immigration is a matter of national sovereignty, while reflecting the debate about its limits. Two decisions illustrate this reference: one from the Supreme Court of United States in the late XIX century, the second one from the European Court of Human Rights one century later (see also →regional human rights courts and migration). There are many others at domestic levels, in other regional systems of protection or in the UN bodies (see →UN treaty bodies and special procedures).

The first one which is one of the best known is the Chinese exclusion case decided by the US Supreme Court in 1889. The Congress decided to abolish the 'returning laborers' status. About 20 000 Chinese bearing these certificates were abruptly stranded outside the United States. Chinese challenged this law in court arguing that the 'Certificates of Return' should be honoured as contractual agreements between the now-excluded workers and the US government. The US Supreme Court upheld the law, citing the 'plenary powers' of the US government over immigration matters. The Supreme Court used the imperatives of self-definition and self-preservation, establishing the foundations of the extensive powers claimed by federal authorities over immigration subjects. 'It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe' (Fong Yue Ting v United States [1893]). The Court deduces from this that the Bill of Rights protects foreigners

present in the United States, but not →migrants, traditionally excluded from constitutional protection. The judicial power shows that in this field it largely defers to Congress. ‘Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens’ (Fiallo v Bell [1977]).

There were attempts to reverse this jurisprudence. The wording is particularly interesting in the Galvan case in 1954. Justice Frankfurter wrote for the Court and emphasized the weight of this case law. ‘But the slate is not clean. As to the extent of the power of Congress under review, there is not merely “a page of history,” ... but a whole volume’ (Galvan v Press [1954]). Illustrating the fact that the discussion continues over the decades, in 1996, in a very compelling concurrence, Judge Sarokin recommended: ‘I suggest that now is the time to wipe the slate clean and admit to the long evident reality that deportation is punishment’ (Scheidemann v INS [1996]).

A century after the Chinese controversy, the European Court of Human Rights decides to follow this traditional view of ‘classic’ international law, according to which the right of a state to decide on aliens’ admission in or →expulsion from its territory represents a logical and natural consequence of its sovereignty. In the 1985 case *Abdulaziz, Cabales and Balkandali* the ECtHR affirmed the state power to control the entry and residence of aliens. This principle is presented as ‘well established in international law’ which has, since then, become a ‘mantra’ (Carlier and Sarolea [2016]), permeating the whole of the migrant case law in Strasbourg. It is, indeed, typical for the Court to start its reasoning in a migration-related case with this principle. Paradoxically, however, this creates what has been called the ‘Strasbourg reversal’ (Sarolea [2006]; Dembour [2015]) insofar as the Court, at least in migration matters, considers the right of states first, as a default position, while migrants’ rights may somehow be seen as exceptions which often serve to limit the—apparently ‘untouchable’—state control principle.

This sentence, affirming national sovereignty, will subsequently be repeated, in all the Court's case law on migration-related issues. It may concern →extradition (Soering v United Kingdom [1989]), individual expulsion (Cruz Varas v Sweden [1991]), collective expulsion (Hirsi v Italy [2012]), →detention of foreigners (Riad and Idiab v Belgium [2008]) or the →borders control (read the Grand Chamber decision in Ahmed [2021]: the Court, after having reiterated the sovereign right to control national borders, added that states also enjoy the ‘right [...] to take measures against foreigners circumventing restrictions on immigration’).

In particular, the Court states that ‘the corollary of the right of States to control immigration is that aliens have an obligation to submit to immigration controls and procedures and to leave the territory of the Contracting State concerned when ordered to do so if they are validly refused entry or residence’ (Jeunesse [2014]).

To finish this historical presentation, one has to mention the two *Global Compacts* endorsed in Marrakech in December 2018 under the auspices of the United Nations: the *Global Compact for Safe, Orderly and Regular Migration* and the *Global Compact on Refugees*. The nature of those texts identified as soft law materials illustrates the tensions between sovereignty and rights. Even though the pacts are not binding on states, their adoption “has prompted an intense political debate at both the international and domestic

level” (Chetail [2020]; on these controversies see also Capone [2020]). The GCM, in particular, definitely represents an experience of an intergovernmentally agreed framework for a ‘collective commitment to improving cooperation on international migration’ (GCM, par. 8). Defined as ‘a non-legally binding, cooperative framework’ (par. 7), it does not qualify as international agreement nor does it add or create new legal obligations for States. Rather, it acknowledges the need for closer cooperation and policy coordination in order to better achieve international standards that States have already agreed upon and effectively pursue objectives that have already been set and identified. In doing so, no new obligations are imposed nor sanctions are prescribed in case of non-compliance. Nevertheless, the Compact “underlines by the same token the continuing legitimacy and relevance of international law to frame migration and intergovernmental cooperation” (Chetail [2020]).

Nevertheless, since the very beginning, the scholars and the caselaw reveal that the sovereignty is limited and has to be consistent with international cooperation as well as human rights.

III. Challenges and controversies

Even before the very existence of a jurisprudence based on human rights, the power of decision of the states has never been without restrictions. One could identify three categories of limits: the first ones are linked to the transnational nature of migrations, the second one to the cooperation between states and the last ones on human rights safeguards.

1. The transnational nature of the migration phenomenon

Even if quantitative datas on migration flows reveal that more than two thirds of forced displacements are internal ones, it remains that in numerous cases migrants cross a border. Migration is a transnational act that concerns a minima two states. It has led some states to try to find a solution in case of conflicts on the way one of their nationals has been treated in a third country.

Already in the nineteenth and early twentieth centuries, states used arbitrators to settle disputes of this kind. While the awards do not call into question the sovereignty of states, none of them recognize absolute freedom. Some arbitrators required just cause; others analyzed decisions in the light of the principle of proportionality.

In a Paquet case between Belgium and Venezuela in 1903, it was ruled that ‘the right to expel aliens [...] is generally recognised’ but it can only be exercised if the state considers the alien ‘dangerous to public order, or for reasons of high policy’. The arbitrator adds that this right can only be exercised in this case. Furthermore, the arbitrator points out that the practice is to inform the state of which the person concerned is a national. Since this was not done, the expelling state refused to do so, the expulsion entails compensation.

More recently, in 2007, in a case *Guinea v Democratic Republic of Congo*, the →diplomatic protection has also been invoked before the International Court of Justice. Guinea alleged that the DRC had violated the rights of its national by arresting and subsequently expelling him from its territory. The ICJ decided on the violation of Mr. Diallo’s

rights as an individual and as a shareholder in two Congolese companies. On the merits, the Court found the DRC responsible for the violation of various provisions of international human rights treaties and of the 1963 Convention on Consular Relations.

Procedurally, it is states that initiate a claim against another one on the basis of the diplomatic protection of its citizens. This does not preclude the emergence of substantive as well as procedural considerations relating to humanitarian considerations and to the rights of the migrants concerned and not only of the states acting.

2. International cooperation in the migration field

Beyond the search for a solution in a singular case, the second category of limits come from the fact that states negotiate agreements on migration issues, sometimes as a part of a larger agreement. One could share those treaties in conventions aimed at creating an integrated regional area and conventions whose purpose is to facilitate the movement of third country nationals. Some of them pursue both objectives.

The integration process supposes a transfer of competences to the regional organisation created. This transfer is initially an expression of the sovereignty of the state that decides to do so and, in so doing, gives up part of its sovereignty for the future or, at the very least, delegates it. Even if the European integration has reached a high level, those kinds of agreements exist elsewhere. In West Africa, two regional integrations with a principle of free movement exist: the West African Economic and Monetary Union and the Economic Community of West Africa. The same applies to East Africa with the East African Community.

The second category refers to conventions whose purpose is to facilitate the movement of persons by the abolition of short-term →visas and sometimes obtaining a residence permit. Even if states negotiate these treaties as sovereign and equal states, it is clear that the content of the conventions signed will reflect de facto unequal power relations. For example, while there are many visa exemptions for European citizens wishing to travel to third countries, nationals of the destination countries often need a visa to enter the EU. Sometimes third countries negotiate alone with an international organisation such as the EU.

3. Lastly limits have been built on the basis of the interpretation of civil liberties and human rights

Human rights provisions protecting migrants are enshrined in various categories of texts, from the Constitutional ones too international treaties. They can be classified on the basis of the content of the safeguard: substantial, procedural or transversal, such as the equality and →non-discrimination principles.

What is interesting is that only a few human rights targets specifically migrants. Most of them protect 'everyone' without any consideration of →nationality. Those dedicated to migrants are primarily the →right to leave a country (f.i. ICCPR, Art 12.2), the right to enter its own country (f.i. ICCPR, Art 12.4), the principle of →non-refoulement (f.i. CAT, Art 3; Geneva Convention, Art 33), the prohibition of collective expulsion (f.i. ECHR, Protocol 4,

Art 4), the prohibition of arbitrary expulsion of a settled migrant interdiction (f.i. ICPPR, Art 13). Certain rights are guaranteed to specific categories of migrants. Without claiming to be exhaustive, we can mention refugees and stateless persons (Geneva Convention, 1951, and New York Convention, 1954), children (International Convention on the Rights of the Child, art. 10, 22) or workers (ICRMW, the two ILO Migrant worker Conventions). It is interesting to mention that the Migrant Worker Convention has been mainly signed so far only by emigration countries, although this status is never fixed. Their rights have been adopted by sovereign states, duly informed of their content.

The situation is different with regard to human rights recognized to all persons, such as the right to respect for family life or the prohibition of inhuman and degrading treatment. It is the teleological and evolutionary interpretation of these rights that has led to the construction of a body of case law that protects them in the context of migration. This evolution was difficult to foresee, so that states feel that it is an infringement of their sovereignty as expressed at the time of the adoption of the text.

Leading to a vast caselaw, 'common' human rights interpreted in a migratory situation are the right to life, f.i. against an expulsion where there is a risk of torture (CAT, Art 3) or of death penalty (ECHR, Art 2), the right to private and family life, invoked notably in →family reunification cases or when the social ties in the host country are opposed to a removal grounded on public order reasons (ECHR, Art 8). Some of those rights protect specific categories of persons such as children, women, racial minorities, disabled persons on the basis of United Nations treaties such as the Convention on the rights of the child (1990).

For instance, in family life, the Court of Strasbourg has accepted that the expulsion of settled migrants and foreigners unlawfully present on the territory of a contracting state may interfere with their right to respect for their private and family life and, in certain circumstances, be incompatible with their rights under Article 8 of the Convention (Savran [2021]).

The role of courts has been decisive in achieving this outcome, leading to the emergence of limits to the exercise of states' powers and prerogatives. As a result, ultimately, if sovereignty allows controls, sovereignty itself is, in turn, controlled.

Even if the material scope of application of these texts is broad, their territorial applicability to migration disputes raises complex issues. Often, part of the facts is located outside the territory of the respondent state, either because a visa application has been lodged abroad or because an interception takes place at sea (Hirsi [2012]; M.N. [2020]; N.T. & N.D. [2020]) (see also →extraterritorial jurisdiction and migration; →interception at sea). These issues give rise to a large body of case law reflecting the concern of states to limit their commitments in the name of their sovereignty in its territorial dimension.

IV. Conclusion

As one of the subtitles suggests, drawing on the interrogative phrase myth or reality, sovereignty is both present and has implications in migration law, while, in the same time, its legitimacy is otherwise contested. Sovereignty may be a myth because of the fragility of its legal foundations, but it is still a reality.

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