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The Nation-State, Liberal Global Orders, and Freedom of Movement

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In an illuminating essay, Jannis Panagiotidis argues that even before the Covid19 crisis forcefully reminded us of the state's power to regulate and restrict the movement even of its own citizens, a scholar of migration would have found little reason to believe the notion that the nation state could become obsolete anytime soon. While migrations transcends the confines of the nation-state perhaps nowhere is the nation-state more present than in migration matters.



In this essay, I discuss the nation-state and its relationship to the phenomenon of migration under conditions of (neo)liberal globalization. It is based on a talk I gave in May 2019 at the [CITAS conference](#) “Obsolete, Resilient, Resurgent? The Nation-State in a Globalized World.” Already then, several months before the Covid19 crisis forcefully reminded us of the state's power to regulate and restrict the movement even of its own citizens, a scholar of migration would have found little reason to believe the notion that the nation state could become obsolete anytime soon. To be sure, migration is by definition a phenomenon that transcends the confines of the nation-state. The paradigm of transnationalism, which has been dominant in migration studies for the past two-and-a-half decades, very much emphasizes the social spaces migrants create across national borders ([Faist et al. 2013](#)). And yet, it would take a very selective view of international migration to reach the conclusion that the nation-state was somehow becoming obsolete or powerless because of globalization. That is because perhaps nowhere is the nation-state more present than in migration matters.

The Liberal Paradox and the Universal Declaration of Human Rights (UDHR)

This has to do with the “liberal paradox” political scientist [James Hollifield \(1992\)](#) described almost three decades ago: in a liberal international economic order, states facilitate the free circulation of goods and capital, but not of people. While free trade is supposed to be good and beneficial and protectionism is frowned upon, free migration is considered utopian at best, harmful at worst. Borders have been unmade for things and money, but not for humans. There is free trade, but no free movement.

Why is this? Hollifield says that states are pressured to protect their borders from the entry of aliens in order to maintain the social contract between state and citizen (the foundation of liberal statehood). Therefore, they limit the free crossing of borders by people. The liberal state thus takes anti-liberal measures to protect the liberal order. The result is an asymmetric global order, in which (neo)liberal globalization has done away with most restrictions on the movement of capital and many goods, while the crossing of borders by people generally remains subject to state control.

This paradox is all the more remarkable as from a liberal point of view, it is feasible to make a dual argument for the free circulation of people: as a right of the free individual, and as an economic necessity for free circulation of an important factor of production, i.e. labor.

As a matter of fact, both these arguments are at the heart of the *internal circulation* of people within nation states. Here, the free movement of people is indeed a key feature of modern liberal societies and economies. The reduction of obstacles to free internal movement was one important dimension of the establishment of liberal market economies and the consolidation of nation states and national citizenship in the nineteenth century ([Torpey 2000](#)). This reduction could take different forms: in already consolidated territorial states, it was mainly a matter of reducing limitations to individual freedom, such as serfdom. In a national unification project like the German Empire, which involved the incorporation of many different territorial states into a single unit without totally abolishing subnational statehood, an additional issue was to facilitate the movement between federal states, thus unmaking internal borders ([Fahrmeir 2015](#)).

To be sure, such internal freedom of movement was not uncontested, even in long-established federal unions like the United States. This could be seen, for instance, in the limitations placed on the westward migration of “dustbowl” refugees, the so-called “Okies,” in the 1930s (immortalized in John Steinbeck’s *Grapes of Wrath*). These limitations were only struck down in the 1941 *Edwards v. California* Supreme Court ruling—tellingly as a violation of free interstate commerce: people were not to be treated worse than oranges ([Alvarez Minoff 2013](#)).

But this ruling also marked the transition from an economic interpretation of free internal movement to a rights-based one: the concurring opinions of the additional judges preferred to think of the case at hand as a problem of citizenship, not commerce. Ever since, a liberal state restricting the internal free movement of its citizens has been hard to imagine, also because the right to move freely within any country was set out in the 1948 Universal Declaration of Human Rights (UDHR), which unequivocally states in its [Article 13 \(1\)](#): “Everyone has the right to freedom of movement and residence within the borders of each state.” Typical exceptions include restrictive

measures to ensure public health under conditions of a pandemic, as citizens of many countries became painfully aware during several months of Covid19-related lockdowns since early 2020.[1]

In the international migration order, by contrast, it is still commonplace to treat people worse than oranges. Humans are neither generally entitled to free circulation as part of a global commerce in labor, nor does the *right of citizens* to move freely within their country that the US supreme court judges identified translate into a *human right* to move between states.

This does not mean that the UDHR remained completely silent on the issue of border-crossing migration. In Article 13 (2), it did establish a rule concerning free migration: the right of individuals to leave any country and to return to their own country. But with this *right to exit* came an additional paradox, for there is no corresponding norm permitting individuals entry to any given state. Emigration must thus not be impeded, but immigration does not have to be granted—a constellation that excludes large parts of the world's population from legal migration.

The UDHR thus challenged the absolute sovereignty of states over their borders, but it got stuck half-way. It deemed illegitimate the practice of controlling the exit of citizens, which at the time constituted an explicit criticism of the restrictive emigration practices of socialist countries, the Soviet Union and its satellites, in which no right to exit existed (Zahra 2016).[2] But it did not touch state control over the entry of citizens, which remained the (almost) exclusive prerogative of nation states. In this sense, the postwar human rights order, rather than subverting nation state sovereignty, actually reinforced it to some extent.

Yet this is not the whole story. During the second half of the twentieth century, migrants did obtain certain rights that increased their possibilities to cross borders and enter foreign countries, thereby challenging state sovereignty over their borders and control over the cross-border flows of migrants. While there was no *right to entry* in the singular, there were *rights to entry* in the plural. These rights were based on certain norms related—or even unrelated—to migration and freedom of movement. Total control over migratory flows would have implied the violation of these norms, a price that liberal states were not generally willing to pay.

The first such norm is the *right to asylum* laid down in Article 14 of the UDHR, which gave “everyone ... the right to seek and to enjoy in other countries asylum from persecution.” It was further elaborated in the Geneva Refugee Convention, which is at the heart of the global refugee regime to this very day (Gatrell 2013). The principle of *non-refoulement* forbids signatory states from turning back asylum seekers from their borders.

A second relevant norm is included in Article 16 of the UDHR, which provides special protection to the family as “the natural and fundamental group unit of society.” Originally, this provision was part of the overall postwar effort to reconstitute war-torn societies (Zahra 2011). Yet from this special protection, the human *right to family unity* could be derived, and hence the entitlement of migrants to family reunification. And family reunification was and is an important “loophole” undermining restrictive migration regimes. This is true for both emigration and immigration restrictions. It provided loopholes to leave socialist states in Eastern Europe, but also to circumvent immigration restrictions in West European countries after the recruitment stop for “guest workers” in 1973 (Panagiotidis 2018). Protection and reunification of families thus turned from a generic human rights

principle into a key motor for enabling migration (both emigration and immigration) and challenging the absolute sovereignty of states over exit and entry from their territory.

In addition to the codified human right to exit and the explicit or implicit rights to entry, a third pillar of increased individual freedom of movement in a liberal order is the *right to stay* that migrants can obtain in liberal states. Here, too, the migrant is an individual endowed with rights which, thanks to the separation of powers characteristic of functioning liberal states, can be enforced against the state executive (Panagiotidis 2020). Liberal states thus cannot simply deport aliens at will, a fact that contributed to the creation of permanent immigrant populations in “non-immigration countries” like West Germany, even when no new immigration was supposed to happen.

On the level of international institutions, there was also an interesting attempt to merge the issues of emigration and immigration in an international resolution, the planned *UN resolution on freedom of movement* under discussion in the UN Economic and Social Council in the mid- to late-1980s (cf. Dowty 1987). This initiative was remarkable in that it tried to take a broad view on the issue which transcended the common focus of the day on freedom of *emigration*, and also explore the possibility of free *immigration*.

The Cold War, the Global South and Mobility

As mentioned before, freedom of *emigration* was a key point of contention between West and East from the beginning, and it remained so also during this phase of the Cold War. The 1975 Final Act of the Conference for Security and Cooperation in Europe (CSCE) had included some provisions in this regard, and indeed there had been some degree of exit liberalization in the Soviet Union and other Eastern European countries during the 1970s. These had been rolled back during the “second Cold War” of the early 1980s, so that by the mid-1980s, just before the onset of Perestroika, the issue of emigration had become particularly acute.

The Federal Republic of Germany was at the epicenter of the emigration question, as it concerned both GDR citizens and ethnic Germans from East European countries like Poland, the Soviet Union, and Romania, for whom West Germany assumed responsibility (Wolff 2019; Panagiotidis 2019). For that reason, the German officials whose discussions on the initiative I have studied in the German federal archives were quite happy about the sections of the preparatory study for the resolution that addressed *emigration*.

They were less thrilled, however, about the bits that talked about *immigration*. The preparatory study, which had been drawn up by Zambian diplomat Chama L.C. Mubanga-Chipoya, discussed the possibility of including the right to immigrate to any country into the resolution, with a view to the aspirations of citizens of the Global South to improve their lot. The German commentators were quick to point out that there was, in fact, no such right, in contrast to the codified human right to emigrate, and that these issues should not be jointly discussed under the label “freedom of movement.” Freedom of immigration, they argued, would indeed be in violation of the right of peoples to self-determination and other principles of the UN Charter, thus contradicting Mubanga-Chipoya, who had referred to the “fundamental human rights” and “the dignity and worth of the human person” mentioned in the preamble to the Charter.[3]

But the states of the global south, too, were not convinced that such a liberalization of exit *and* entry would be a good idea, given the ever-present danger of “brain drain” ([Dowty 1987](#)). There was thus a disjuncture between the individual aspirations of the citizens of the Global South, from whom a right to entry into wealthy states of the North would have provided ample opportunity at economic betterment, and the collective interest of nation states, which feared the loss of “human capital.”

The resolution eventually never came to pass, presumably because the end of the Cold War rendered the issue of emigration restrictions obsolete. But the related debates brought into focus some of the most contentious issues and contradictory imperatives in the field of international migration: state sovereignty, individual liberty, human rights, and economic considerations on the national and individual levels.

The EU and Free Movement

So while global freedom of movement was shelved (whether there was any real chance for the resolution to pass is doubtful anyway), the European Union produced a comprehensive free movement regime as part of regional integration ([Maas 2007](#); [Comte 2018](#)). It evolved out of the economically motivated rules for the free movement of workers, becoming a rights-based free movement regime including the right to entry and settlement of community citizens in other member states. But here, too, the unmaking of borders did not happen without its discontents, producing some debates which were quite similar to what I have described for the UN free movement resolution before ([Panagiotidis 2019b](#)).

This was particularly obvious during the EU’s 2004/2007 eastward extension, when West European states barred the free immigration of East European citizens for up to seven years, out of fear of being “flooded” by foreigners. An important exception was the UK (as well as Ireland and Sweden), which granted those people immediate access to their labor markets. What followed was substantial immigration from the accession countries, especially Poland, which boosted the UK economy and labor market. As a consequence, however, European free movement has then loomed large during the Brexit campaign, being an important concern of the leave camp. For many, “taking back control” also meant preventing the unrestricted influx of East European immigrants.

East European states, by contrast, have been and still are in favor of free internal movement, given the large numbers of their citizens who work and live in countries of the “old EU,” the revenue this creates, and the relief on the national labor markets this provides. But here, too, initial doubts are arising, as some observers have started worrying about the possible detrimental effects that the constant outflow of human capital might have on the economies and societies of the countries of origin. For now, this is hardly a majority position, but as we have seen before, emigration countries’ concerns about suffering a damaging loss of citizens is nothing new. The beneficial impact of higher migrant productivity in their country of destination than in their country of origin only works up to a certain point, before it becomes a matter of concern for the country of origin. The tension between the aspirations and interests of individual citizens and nation states thus remains salient, as do nation states and their interests in general, even in a free movement system like the European Union.

The continued importance of the nation state has become even more obvious during the 2015 “migration crisis.”

Since then, borders have become fashionable again. Fences have been built, and the German government is still under attack for allegedly “breaching the law” when it “opened the border” in the summer of 2015 (never mind that the border *was open* under the Schengen regime, see [Detjen/Steinbeis 2019](#)). But not only that: refugees are also supposed to be registered and processed by states, who then distribute them within their territory or, as some EU countries would like it, also among the member states. This serves as a reminder of what the state is still supposed to be capable of in migration matters: it is supposed to control its borders and have complete oversight over those who enter, register them, and distribute them according to a preconceived plan and rational criteria. It is, in other words, supposed to be in control of “human flows.” The Covid19 crisis, where “human flows” and “infection chains” have entered into an unholy alliance, has only reinforced this trend.

Conclusion

What is remarkable is that after years, even decades of talk about shrinking state capabilities under conditions of neoliberal globalization, the state is still supposed to be all powerful when it comes to controlling the movement of people. When all around us there was the neoliberal dogma that the state has to retreat from most walks of life and that individual initiative as well as the invisible forces of the market should be placed at the center of everything, this dogma mostly did not apply to migration matters.

So perhaps it would be no exaggeration to say that the current resurgence of the nation state, including the much-scolded economic protectionism, is indeed an “overspill” of the pristine faith in the almighty nation state in migration matters. In the long run, the claim that nation-state is obsolete is hardly reconcilable with assigning it the role of ultimate authority when it comes to the movement of people.

Notes

[1] See, for instance, Article 11 of the German Basic Law, which grants freedom of movement to all German citizens, while enabling its restriction in case of a pandemic, among other things.

<https://dejure.org/gesetze/GG/11.html>

[2] On a side note, it should be mentioned that still in the 1950s the US, too, denied passports to leftist citizens like Paul Robeson (Zahra 2016, 240), while a democratic state like Israel only let citizens leave with a special permit (Rozin 2011).

[3] Stellungnahme Bundesministerium für Justiz, 15 February 1989, Bundesarchiv B141/124711.

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