THE FLYING DUTCHMAN ASYMMETRY

Migration rights in question

- PAPER & ABSTRACT PROPOSAL -

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The right to migrate - usually also referred to in the Latin original *ius migrandi* - describes at once a right to emigrate and a right to immigrate. This project focuses on both ends of this right and queries about the correlativity of exit and entry from a philosophical-legal viewpoint. What sort of right is the right to migrate? Is the correlation necessary? Is it desirable for the right to migrate to be conceived as a perfect right - or should we be satisfied with its apparently ‘imperfect’ nature? The asymmetry which this project sets out to problematic is the following: no one can leave a country without entering another. In other words, one can be legally entitled to leave my country, but what sort of entitlement is that if it does not grant him the legal possibility of entering another? Hence, for a right to be able to protect such individual conduct it must not only ensure the exit movement; it must also consist of a right of entry. In taking the wider perspective of the international system of states we are confronting the moral and legal validity of a right which can never be merely dependent on its enforcement by one single legal system. This project further reflects on the historical backdrop and the legal and political implications that a fully-fledged right to migrate can bring upon international law, international relations theory and the world system of states. It further wonders about whether certain rights - so-called ‘international special (human) rights’ - can only become enforceable - and hence be properly called “rights” - with the advent of a world *Leviathan*. 
INTRODUCTION

Within Migration Law scholarship, the study of migration rights has caught the attention of many scholars for the last decades and can now be said to be one of the core features of academic debates on the international movement of people. At the basis of any reflection on the rights of migrants lies the more fundamental issue of the existence of an individual right to migrate. This means that before we can begin to discuss the specific rights of any migrant - to work, property, or health care - one must first consider migration as a right in general: that is, the right that describes the right-holder’s liberty and entitlement to migrate from one country to another, regardless of the duties and other rights that may follow from the migratory movement itself.

Asking whether such a right to migrate exists thus begs the questions as to what a right is, what migration means and how and when a right to migrate is enjoyed. These are some of the questions that this research poses by focusing on its core research problem which can be referred to as the ‘flying dutchman’ asymmetry. Framing this research’s enquiry in terms of this asymmetry will allow for a careful exploration of the right to migrate in terms of the theoretical challenges that it poses to both international law and legal philosophy. More specifically, this research seeks to address the interrelated fields of individual rights and state responsibility. The right to migrate strikes at the heart of the confrontation between individual freedom and state sovereignty and thus speaks to one of the most permanent theoretical and practical tensions of the history of legal and political philosophy.

While individual liberty is usually said to undergird the idea of individual rights, the limitation of these rights by political authorities is usually grounded on a claim of self-preservation, through which the State vindicates a sovereign right to limit those rights. Concerns for security and the survival of the community hence feature as common justifications of those public policies that restrict the right to migrate. This means that the Sovereign State needs not refuting the individual right to migrate when it wants to forward a principled defence of its restriction; usually, the right to migrate becomes limited by means of the State’s recourse to another asymmetry.

1 I take this designation from Suzanne Dale’s 1991 article entitled ‘The Flying Dutchman Dichotomy: The International Right to Leave v. The Sovereign Right to Exclude’. Even though her recourse to what she calls ‘the mythic figure’ of the dutchman ‘who is condemned to roam the world never resting, never bringing his ship to port, until judgement day’ seems appropriate to my argument here, I disagree with her in the classification of the problem as a dichotomy, preferring instead to call it an asymmetry for the reasons which the text sets up (Dale 1991: 359).

2 Even though Christian Reus-Smit argues, alongside with John Ruggie, that such tension between political authority and individual rights was as problematic as it was constitutive of the modern idea of State Sovereignty (2001).
competing right: the right of self-preservation to which corresponds the state’s duty to ensure security. It is hence the State’s self-perceived right to protect rights that most frequently impedes the right to migrate from becoming a fully-fledged ‘perfect’ individual right. This goes to show that both the emergence of individual rights - such as the right to migrate - as well as their limitation or even revocation has historically operated by reference to rights as well. In modern liberal democracies, specific rights protecting specific interests are cancelled off or restrained often because of the need to enforce the rights of another party which seem to be at stake. The contractarian understanding of rights will not be dealt with at this stage but it is important to highlight the fact that most often the right to migrate is suspended lest its juridification jeopardise another set of competing rights. Hence, it is not just the impossibility of enforcing such a right that makes it very hard to consider it a human right; as with other rights that protect individual freedom and personal interest, the right to life and security often trumps the right to migrate. Historically, this means that the *ius migrandi* is a *ius imperfectum* as Pufendorf recognised. Hence, this research searches for some possible answers to the question as to why the right to migrate is an imperfect right and whether it can be considered a ‘right’ in the full sense of the term.

2. BRIEF HISTORICAL OVERVIEW

To make the normative claim that emigration rights should correspond immigration ones falls short of universalising those rights to the whole population on earth. Contrariwise, what a normative theory of perfect correspondence sustains is the idea that *whoever has the right to emigrate must also have the right to immigrate in order for there to be a ius migrandi*. By problematising the right to migrate in terms of the flying dutchman asymmetry I do not suggest any easy solution for the problem. Indeed, the asymmetry never assumes any democratising agenda as it could hardly be resolved by focusing on the universality of the right-bearers. If hypothetically this research does ever arrive at the conclusion that there should be a perfect asymmetry - a claim that would be normative - it could do so without any need to make all humans the equal subjects.

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3 I take Samuel Pufendorf’s classic definition of a perfect right as a right that corresponds to a legally identifiable duty and can therefore be considered enforceable within the context of a specific legal system.
of these rights. To say that a right is perfect - in that it corresponds to a ‘perfect duty’ \(^4\) on the part of another agent - is a totally different thing then saying that everyone should have that right \(^5\).

Even though this research project develops the first systematic account of the flying dutchman’s asymmetry, the problem has been raised, however, in the literature - albeit not in a way that pointed to the need to study it in more detail. While I have pointed to the reasons why it should, and to the overall relevance of the problem for several audiences, most authors either refer to it in a rather superficial manner - without flushing out its implications in full - or prefer to focus on just one side of the problem, thus treating the right to emigrate in relative isolation from the right to immigrate. The first reference to the problem of the migration rights asymmetry that we encounter in the history of migration research dates from 1924. In an article entitled ‘The Rights of Emigration and Immigration’, the founder of the Institut des Hautes Etudes Internationales in Paris, Paul Fauchille, claims that ‘it can hardly be possible for the individual to have an inalienable right to emigrate but no right to settle anywhere’ (1924: 324). Fauchille directly puts the finger on what seems to him to be an age-old contradiction. However, in stressing this asymmetry, he is calling attention to the fact that the state’s sovereignty as well as its authority to limit individual freedom is no longer absolute, but ‘relative’ (1924: 324). His discussion does not therefore allow for a full reconsideration of the nature of this right, nor of the need to have such correspondence as a defining feature of an individual right. He thus fails to tease out the full philosophical consequences of his remark to the very definition of a right, preferring instead to lay out the content of the state’s right to self-preservation as far as it legitimates the limitation of individual freedom. And he therefore never draws the conclusion which his observation seems to imply: that there is not right of emigration when the right-bearer is impeded from bearing the right to immigrate not somewhere else, but to anywhere else.

In fact, it is only at the end of the second world war, right at the time that the right to emigration was incorporated into the *Universal Declaration of Human Rights* and upheld by the United Nations as the founding treaty of a new human rights regime, that we arrive at a more cogent problematization of the contradiction that the asymmetry lays evident. International Law

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\(^4\) This also raises the important question as to whether a ‘universal right to asylum’ can be seen as a satisfactory response to the problem raised by the asymmetry since asylum consists of the legal provision of a right to immigrate which is only justified by a right, however due to exceptional circumstances, to emigrate (Kuosmanen 2012: 24-43)

\(^5\) Indeed, even in those regional legal and political systems in which the symmetry is near perfection - such as the Schengen agreement - the correspondence between the right to leave and the right to enter remains the privilege of national citizens of EU member-states, and therefore corresponds to a legal duty of the latter towards the former. However difficult it may be to find a theoretical solution to the lack of correspondence, that solution need not claim that it can be applicable to everyone on earth.
Professor Hersch Lauterpacht spots the paradox in the internal conceptual relation implicit in the right to migrate when claiming that

‘it is clear that for a period of one hundred and fifty years the United States were enunciating in the form of a general principle of an inherent right of man a national policy dictated by the requirements of a country of immigration. But the intrinsic value and justification of that principle is not affected by the circumstance that it was propounded in conformity with or in pursuance of a national interest. Neither is it rendered purely nominal by the fact that the country which propounded it adopted in the twentieth century a rigid policy of limitation of immigration. It is true that without a corresponding right of immigration and naturalization the freedom of emigration tends to become theoretical’ (my own italics, An International Bill of the Right of Man, 1945: 130).

By ‘theoretical’, Lauterpacht clearly meant that the right to emigrate could hardly be seen as a right in any real sense of word, and specially in any legally enforceable way, for precisely the reasons I have already laid out. He would add to this the caveat that this right ‘...is not altogether theoretical so long as immigration and naturalisation take place...’ by which he clearly meant to stress the importance of a right to emigration in its own right. Overall, however, his overall argument in the Bill does point out to the great difficulty of qualifying this type of right as a fully enforceable right when both sides of the movement are not guaranteed by right; emigration and immigration. Lauterpacht hesitations in this regard are indeed symptomatic of an unsolved theoretical problem, no matter how far back the theoretical justifications of a right to emigrate, as much as of a right to immigrate, actually go.

Indeed they go as far back as the beginning of the Roman republic. At this stage there is, however, the need to make an important distinction as far as the literature on the right to migrate is concerned. Indeed, the intellectual history of this right indicates that while contemporary legal and scholarly discussion on the topic pays more attention to the right to immigrate - especially since what James Nafziger has called, in referring to the 19th century, as the ‘era of immigration laws’ - classical philosophical writings on the theme focus, instead, on the right to emigrate (Nafziger 1983: 815). Apart from the ancient roman examples already alluded to, the historical example of the English Magna Carta confirms this view by enlisting the right to emigrate as a fundamental individual right which the state is obliged to protect, while it shows no concern whatsoever for the rights of individual immigrants:

‘It shall be lawful in the future for anyone to leave our kingdom, and to return, safely and securely, by land or by water, and without violating our trust, but not during war or for some
other brief period, nor if the good of the kingdom will be affected’ (McKechnie, W.S., ed. 1995 (1215), art. 42).

We also know from various historical accounts that during the heyday of absolutism, and up until the French Revolution, emigrating could actually be condemned as political treason due to the fear that a great number of males would actually flee from military conscription. The same thing applies to most cases of modern dictatorships as the modern tendency to call for a universal right to emigrate as a concomitant of democratic citizenship was naturally a liberal pressure put upon them who prohibited emigration such as the Soviet Union (Whelan 1980). The proclamation of a universal right of emigration alongside a universal right of immigration in both the Universal Declaration of Human Rights of 1945 (UDHR) and the International Covenant on Civil and Political Rights of 1966 (ICCPR) - arguably the two most important treaties on international migration rights - still shows a great concern for the former rather than the latter. As Susan Martin observes, they point out that while ‘nationals have the right to leave and enter their countries’ - and hence are entitled to return - ‘they do not have the right to enter into another country, limiting the actual ability of persons to exercise the rights’ (Martin 2005: 7).

3. RESEARCH PROBLEMATIC

In general, the right to migrate - usually also referred to in the latin original *ius migrandi* - describes at once a right to emigrate and a right to immigrate. This research project focuses on both ends of this right. Even though it acknowledges the need to approach the right to leave and the right to enter in their own right, as a great deal of the literature on the topic does, our emphasis will be on their intricate relationship. This is because, irrespective of their peculiarity, one cannot be understood without the other. Indeed, the characterisation, both from a historical and a philosophical viewpoint, of the right to emigrate on the one hand, and the right to immigrate on the other, can be undertaken independently. In other words, the fact that a legal system is able to accommodate an individual right to emigrate - either explicitly or by omission as well as by condemning the prohibition of individuals to leave -, that says nothing about what that same legal system ensures in terms of the right to immigrate. The acknowledgement, attribution or assertion of a right to emigrate by a legal system is hence not concomitant to that of a right to immigrate.

But this mutual independence only obtains when looked at from within the internal viewpoint of the national legal system. When we take the broader perspective from an external angle, their correlation becomes evident: no one can leave a country without entering another. I can be legally entitled to leave my country, but what sort of entitlement is that if it does not grant me the
legal possibility of entering another? Hence, for a right to be able to protect such individual conduct it must not only ensure the exit movement; it must also consist of a right of entry. In taking the wider perspective of the international system of states we are confronting the moral and legal validity of a right which can never be merely dependent on its enforcement by one single legal system.

Initially, we are led to the conclusion that this right must hence have something to do with its enforcement by more than one legal system: in order to exist, it must at least be granted by two. For to say that one emigrates legally at the start is of arguable legal validity if one then proceeds to immigrate illegally at the arrival point. Therefore, when referring to a right to migrate we are talking about both emigration and immigration rights. The right to migrate can thus be divided into two legal requirements without which such right, if it exists at all, looses its meaning and thus its presumed legality.

We are hence confronted with the question as to whether there can be a right to emigrate without having a right to immigrate. But before exploring this issue, we still need to lay out a further aspect which relates to this one. Adding to the correlation between exit and entry, we must consider the correspondence of these rights with duties. This is not a methodological decision to define ‘right’ in such and such way. In correlating rights with duties I still leave open the possibility that what constitutes a right (and for that sake, a duty) might be something altogether different or anyway not exhausted by the correlation itself. I thus refrain, at least for the time being, from endorsing the traditional natural law understanding of ‘right’ as always implying a duty. I take up Michel Villey’s important methodological insight that Wesley Hohfeld’s correspondence theory also carries problems of its own. I am referring to his incapacity to account for the voluntaristic assumptions that underly his first category of right as ‘liberty’ which states that the individual has a right whenever he does not have the duty not to hinder its own action (Villey 1983: 32; see also Hohfeld 1921).

But whether or not we choose to exclusively define an individual ‘right’ as corresponding to a duty - a problem which will be raised at a later stage when we ask what a right actually is - it seems logical to assume that, in the case of the right to migrate, whenever such right is enjoyed by its bearer, that immediately determines a duty on the part of another relevant agent not to interfere with such right. Theoretically, the duty-bearer is in that case in a capacity to ensure that the right in question comes to fruition. Whether it does so actively or passively is another matter. But the fact of the matter remains that a right tells us something not just about the right-bearer but also about those agents which are either responsible for ensuring such right or about those who could potentially threaten or impede it - the bearers of the duty to respect and/or enforce the right. In general terms, then, the right to migration collapses into four logical requirements:
In abstract terms, the individual right to either emigrate or immigrate - however different these two interdependent rights might be characterised - presupposes a corresponding duty of another agent not to interfere with one or the other. In theory it is safe to say that one can only conceive of an absolute right to leave a country if one is also allowed to enter another. This in turn leads us to make a set of considerations about the sociopolitical arena where migration rights come into force and which sets them apart from other individual rights which are endorsed and proclaimed in domestic spheres by national or regional legal systems. We must take into account that migration rights, as much as migration law and international law more generally, rests upon a closed-circuit international system that is constituted of Sovereign States. These rights refer to a human conduct which never occurs within a single democratic state but implies, in turn, the exit and entry from and into a state. Hence, with a few exceptions - whose relevance for the topic of migration is arguable - the international system of sovereign states is gapless in this sense. The fact that, from a political viewpoint, there is no ‘no man’s land’ in the international sphere means that emigration equals immigration everywhere and always.

Our working assumption here is therefore that there are no unchartered territories in a world governed by the principle of sovereignty: from a strictly legal perspective one cannot be an emigrant of one country without being an immigrant in another. If it is true that the movement of people across different geographies is as old as humankind, the framing of mobility in terms of inter-national migration thus presupposes sovereignty to the extent that emigrating and immigrating imply the crossing of political borders. By breaking up the right to migrate into two rights, as well as its corresponding duties, we thus arrive at a workable - however provisional - definition of our problem. The internal conceptual relations which derive from our decomposition of the right to migrate in those terms are a very precise indication of the sort of problems which confront the real world and the concrete phenomenon of migration as well as the legislation and enforcement of modern rights by the legal systems of sovereign states.

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Given what the right to migrate implies by definition the set of concerns that guide this project are that of knowing if there is a universal right to emigrate; if such a right can ever reach the status of a perfect right - in the sense of corresponding symmetrically to a right to immigrate; and if such right can indeed be theorised without compromising other rights which are equally perceived as fundamental, namely the right of each state to bar incomers for the sake of national security. The direct relevance of these concerns stems from the fact that, in contemporary international law and political practice, one can hardly speak of an enforceable right to migrate, however desirable that maybe - and certainly that are many who proclaim its moral necessity. As composed of a right to leave or exit and a right to enter sovereign territory, the right to migrate is severely restricted, when not altogether revoked, by states. And if it is the case that the right to emigrate is increasingly enjoyed by a significant number of people around the world, the same thing cannot be said about the right to immigrate (Kleven 2000).

If migratory movements can be conceptualised as the movement between the moment of exit and that of entry, then the impediment of either of them results in the cancellation of a perfect right to migrate altogether. We are therefore in face of a theoretical problem which this research is set to explicate and respond to:

- how can there be a right to emigrate without the corresponding right to immigrate?

Taking our earlier correspondence theory as a starting point, this research also questions whether there can be a duty not to interfere with emigration without the corresponding duty not to interfere with immigration. Hence, what is at stake in this research problematic is naturally not only the legal correlation between rights and duties; neither is the ontological correlation between emigration and immigration alone. Indeed, what concerns this research is the fact that when claiming a right to exit a country such claim necessitates both a right of entry into another and, in general, an assurance by both the State of origin and the receiving one that they will not interfere with the movement of the migrant. In short, the right of emigration cannot be fully enjoyed if one is barred from entering another country.

More importantly, even if the migrant is allowed entry into all countries in the world except one, that already compromises a fully fledged right to emigrate given the asymmetrical nature of the movement: emigrating from one specific country does not determine another specific country as the destination of entry. Basically, while the country which is the object of emigration is known at the start, the same thing is not necessarily true about the country of destination. The correspondence between emigration and immigration - that is the fact that one necessarily follows the other - is therefore not met with a similar correspondence between a country of exit and a country of entry. Surely, leaving one country means entering another; but while country
one leaves is not open to question - I cannot choose to emigrate from just any country in the world - the destiny of immigration can be any country (including the one I have just exited), provided that I have such a right. This means that no matter how much a state succeeds in applying the legislation that enforces the right to emigrate, such right is never ‘perfect’ if one among two hundred states feels entitled to bar immigration or limit it in some way.

This is what many authors have recognised already as an important theoretical problem in migration law. But the lack of correspondence between rights and duties this field has not led any of them to question the very notion of individual right and the common-held definition of a right as necessarily corresponding to a duty. Surely, the asymmetry is only an asymmetry if one assumes such correspondence to be the defining feature of a right. Hence, when approaching the right to migrate in terms of the ‘flying dutchman’ asymmetry, this research project proposes to raise more fundamental questions about the the philosophical underpinnings of migration law and put forth a discussion about the meaning of rights. What does it mean to have a right? Does having a right presupposes that it can or ought to be used in practice? And what are the implications for those agents responsible for ensuring that the right-bearer can actually claim such a right? Moreover, who is to ensure the existence of a right to migration in a legal context where, by definition, there is no single authority capable of assuming the duty of enforcing it? Can we ask the same question about human rights in general as they pretend to be universal and hence apply to as many national legal systems as possible? Should we thus conceive of international individual rights as conceptually distinct from those individual rights that exist within domestic legal frameworks?

Questioning the right to migrate in this way directly places both the content and the scope of this project within the horizon of philosophical legal discussion. This means that the recourse to intellectual history and the history of ideas about such diverse topics as migration, rights, sovereignty or the rule of law, however essential they may be for the project, are not taken as its aim. Indeed, as the next part shows, most academic work that has been devoted to the study of the right to migrate tends to adopt a historiographical approach, either by looking at concrete legal practices and migration regimes, or by enquiring into the intellectual underpinnings of specific understandings of law and rights. This work is fundamental for any philosophical discussion on the topic of migration rights, but does not exhaust that discussion. Indeed, this research question sets up a research trajectory which stresses the importance of an added focus on rights in migration law scholarship. It is therefore far from a merely descriptive account of past intellectual efforts to address the problem, nor does it seek to merely recast previous understandings of what the right to migrate once was or should have been. It speaks directly to the ongoing debate about migration rights and in doing so seeks to contribute to the study of migration as much as the study of rights in both political and legal philosophy.