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Domination and migration: an alternative approach to the legitimacy of migration controls

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Freedom as non-domination provides a distinctive criterion for assessing the justifiability of migration controls, different from both freedom of movement and autonomy.

Migration controls are dominating insofar as they threaten to coerce potential migrants.

Both the general right of states to control migration, and the wide range of discretionary procedures prevalent in migration controls render outsiders vulnerable to arbitrary power.

While the extent and intensity of domination varies, it is sufficient under contemporary conditions of globalisation to warrant limits on states' discretion with respect to admission. Reducing domination requires, rather than removing all immigration restrictions or democratically justifying them to all, that there be certain constraints on states' freedom to control migration: giving migrants a publicly secured status somewhat analogous to that enjoyed by citizens, subjecting migration controls to higher legal regulation, and making immigration policies and decision contestable by those who are subject to them.

Keywords: domination, freedom, republicanism, immigration, migration controls, citizenship

Introduction

Whether states have the general right to exclude migrants is an issue which has been debated in terms both of freedom and of distributive justice. Here I address the issue of migration controls from the point of view of non-domination, a particular account of freedom that is broader than non-interference. Domination is understood as being subject to the arbitrary power of another in an unequal status relationship, and the threat of coercion, whether or not there is actual interference at any particular point in time. This account of freedom has been articulated mainly

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at the domestic political level with respect to a bounded state, where it is understood to require certain kinds of institutional structures that guarantee and publicly recognise the equal status of citizens, provide for the contestability of decisions, and protect citizens from arbitrary exercises of power. It is compatible with, and requires, extensive regulation by law, which, although it may interfere, does not dominate insofar as it is not arbitrary.

Migration is an area in which the theory of non-domination may seem to have particular relevance. While the classic cases of domination most frequently cited are slaves and wives within a patriarchal marriage, some of the starkest contemporary examples of vulnerability to arbitrary power may be seen in the realm of migration and access to citizenship, where states are considered to have a general right to determine entry and exclusion, and where broad discretionary procedures remain particularly widespread in practice. Those who are not fully protected by the legal structures, or are not participants in the political structures, of a state may be particularly vulnerable to the threat of domination. Non-citizens are vulnerable to domination by individuals and groups in society insofar as they lack the full range of protections of citizens, and by the state insofar as they lack the power to contest its decisions politically, and insofar as its powers over them are more discretionary than over citizens.

If we take non-domination as an important value to be realized, such domination of non-citizens has significant implications. The relevance of the theory seems clearly evident in the case of resident non-citizens. But here I address the more complex question of its application to controls on entry and residence. Non-domination provides a basis for considering migration controls that is different from other current arguments based on a right to free movement or on the need for coercion to be democratically justified.

I argue that the general power of states to exclude renders people vulnerable to domination by the state and by others. It applies not only to those who actually seek to enter, but also more widely, since the threat of interference or coercion hangs over all potential migrants. While it does not affect all equally, as the domination involved varies in intensity and extent, it is, especially under contemporary conditions of globalisation, sufficiently intense to warrant limits on the freedom of states to control migration.

In contrast to an argument based on a right of free movement, reducing this domination does not require the lifting of immigration restrictions. It does require that potential immigrants gain something analogous, if not identical, to the publicly secured status that citizens enjoy. This means that states do not have complete discretion with respect to admission. Migration controls, to be non-dominating, need to be subject to a higher legal regulation, and policies and decisions need to be contestable by those who are subject to them.

The structure of the paper is as follows: the first section situates this argument in the context of some current discussions of freedom and migration controls. I then specify the conception of domination and non-domination applied here. After outlining the ways in which domination extends beyond the bounds of the state, I address the extent and intensity of domination exercised over outsiders by migration controls, and draw out some implications for constraints on the power of states to exclude. Before concluding, I respond briefly to the objection that constraining states' control of migration is itself dominating.

The impact of migration controls on freedom: recent arguments

In recent years a variety of arguments with respect to the impact of migration controls on freedom has emerged. It has been argued, most notably by Joseph Carens, that migration controls interfere with a right of freedom of movement (Carens 1987, 2014). But, if freedom of movement cannot be shown to be a right that warrants absolute constraints on others, can it be the basis of a strong case against immigration controls? It can be argued that, even if freedom of movement is an important interest, it may be limited in certain ways, and so does not constitute an absolute right (Miller 2005). It may be seen as needing to be balanced against other interests or rights (for example, self-determination or free association) (e.g. Wellman 2008). Even if we accept free movement as a right, but one which is realisable only in an ideal world, it may not offer much in the way of guidance as to how we should address migration controls in our current non-ideal conditions (cf. Carens 1996).

A different argument, concerned with freedom as autonomy, and framed in the context of democratic theory, has been proposed by Arash Abizadeh, who claims that migration controls coerce all outsiders, and hence require some kind of democratic justification to all: 'a right to unilaterally control (and close) borders is incompatible with liberal and democratic reasons for

the existence of borders (except under stringent circumstances) and ... potential justifications for border restrictions must be addressed in democratic forums in which foreigners, on whom such restrictions coercively fall, also have standing to participate' (Abizadeh 2008, p.54) ¹

But do migration controls in fact coerce all foreigners, or rather only *threaten* to coerce them, and thus do not require such justification? For David Miller, migration controls actually coerce only those who seek to enter or migrate to states, and coerce others at most hypothetically. In addition, they rule out only some options for those they exclude (who may be able to go to another country), thus *preventing* one action rather than coercing people into undertaking any specific action. Thus, he concludes, they do not invade autonomy in a way that requires democratic justification to all outsiders (Miller 2010).

If we accept that some people are more affected by migration controls than others, and that only some are actually coerced, the conclusion that the violation of autonomy they involve requires democratic justification to all may not be warranted. The democratic justification argument may not be a perfect fit for the threat to freedom constituted by migration controls. But even hypothetical coercion is not unproblematic, especially where there is more than a remote possibility that people may migrate. It is the problem of just such *threats of coercion*, wider than actual coercion, that the concept of domination grasps.

Accordingly, this exchange suggests that an examination of migration controls in the light of the conception of unfreedom as domination may provide some illumination. Recent theories of domination understand it in terms of the systematic threat of coercion, or vulnerability to the exercise of arbitrary power. If we can understand the danger to freedom that migration controls represent in terms of domination, this may lead to a conclusion with respect to such controls different from those reached by either Abizadeh or Miller.² In the rest of this article I examine whether migration controls dominate those outside the state, how serious is this domination, and what implications can be drawn with respect to constraining the general right of states to control their borders.

It should be noted at this point that this argument does not depend on all being equally dominated by migration controls. Nor, as we shall see, is the problem of domination significantly addressed if other options remain, or if a state's migration controls prevent the uptake of only

one option. Domination depends not only on the range of options available to a person, but also on the costs these involve, and the effect on their decision process with respect to any range of options.³

Domination and freedom as non-domination

The conception of domination invoked here has been developed by authors including Philip Pettit, Quentin Skinner and Frank Lovett (Pettit 1997a, 2001; Skinner 1998, 2008; Lovett 2010). Domination is understood as systematic subjection to the threat of interference even if one is not interfered with at a particular point in time. This theory thus identifies a broader range of situations of unfreedom than theories of freedom as non-interference.

To be dominated means to be systematically vulnerable to the exercise of arbitrary power in virtue of your status. Here the ‘arbitrariness’ of power is a matter of its being an unchecked exercise of the will of another, rather than its being ‘random’ or ‘undeserved’, as it is sometimes understood in moral debates. The classic examples of domination are those of a slave, or of a wife in a patriarchal marriage (Pettit 1997a, Ch 1). In both these cases, the person is unfree insofar as they are dependent on the good will of the master or husband. While the precise articulation of the nature of domination is a subject of internal debates among theorists of domination, I will adopt a recent formulation, in which it is usefully specified as follows: ‘Persons or groups are subject to domination to the extent that they are dependent on a social relationship in which some other person or group wields arbitrary power over them’ (Lovett 2010, p. 119). Thus, for the purposes of this argument I adopt a procedural account of the arbitrariness of domination in terms of will rather than interests.⁴

Domination thus arises in the context of some kind of relationship. Such relationships involve a form of interdependence, in which those exercising arbitrary power benefit from this, and those dominated either cannot leave the relationship, or exit costs are too high for them realistically to do so. Thus domination exists (even in the absence of actual interference) wherever there is an unchecked capacity to interfere – or the *threat of coercion*.⁵ This has constraining effects on the slave or wife; it affects their ability to live independent lives, and leads them to adjust their behaviour to ingratiate themselves with others in order to pre-empt interference. From this perspective then, domination is broader than actual interference, and can be more pervasively damaging.⁶

Thus the *threat* of coercion may constitute domination, a significant form of unfreedom that needs to be addressed. In contrast to some liberal or democratic approaches, what is at stake here is not the justification of coercion, but the reduction of domination. It is important to note also that, since it is the arbitrariness rather than the interference that constitutes the harm of domination, it also means that not all interference is dominating, if it is subject to certain checks.⁷

It may be objected that domination is very pervasive, and thus not possible to address. But, against this, domination is a matter of degree; even if we cannot eliminate domination entirely, we may aim to reduce or minimise it. In contrast to some rights-based approaches, on this account freedom is not an all or nothing matter. Domination can vary in both intensity and extent. The intensity of domination depends on how arbitrary the interference can be, how easy it is for the dominator to interfere, and how severe are the measures that can be taken (Pettit, 1997, p. 58). The extent of domination depends on which areas of a person's life are subject to arbitrary interference, and the range of their options. The scope of domination, or how many people are affected, will also be relevant. For theorists of domination, the priority is identifying where there is domination and trying to intensify non-domination in those areas. This means that in promoting freedom on this view it is more important to constrain possibilities for arbitrary interference than to extend the range of choice. 'Reducing the intensity of domination is prior to increasing the range of choice' (Pettit 1997a, p.106).

Freedom as non-domination

Non-domination, the kind of freedom that is promoted when domination is limited, is not a natural property, but has to be realised through certain kinds of institutional structures that guarantee and publicly recognise the equal status of citizens. These limit the capacity for arbitrary interference by creating a secure status for those who would otherwise be vulnerable to domination. Non-domination then is compatible with, and requires, extensive regulation by law, which, although it may interfere, does not dominate insofar as it is not arbitrary. There is, of course, a danger that the state itself may be dominating, if it rules in an arbitrary manner. So the legal and political structures that check power and protect against arbitrary interference (non-state and state) include more specifically:

- (1) the rule of law and the publicly established equal status of citizens

(2) accountable institutions in which power is dispersed

(3) the contestability of political decisions

(1) The political implications of such a conception of freedom are a system of laws that provide guarantees against illegitimate interference, so that citizens may be able to act independently. On the non-domination view, freedom is not a condition that exists prior to law, nor an external consequence of the laws, but is constituted by the institutions of rights and accountability. By creating a recognised legal status that deters interference by others, these give immunity from interference rather like antibodies in the blood (Pettit 1997a, p. 108). It is arbitrary power, not law, that is incompatible with freedom. Laws provide security in non-interference, or resilient protection from domination. Freedom is a status, recognised by all, which receives institutional support. So the constraints of law are compatible with this (wider) status of freedom.

(2) To guard against the danger that the state may itself come to dominate, it is important that institutions be accountable. This supports the dispersal of power between different branches of government, a strong judiciary, and many kinds of appellate procedures to higher authorities with respect to acts of government. While not all actions of government can be specified precisely in law, the actions of government, agencies and officials in areas in which discretion is exercised can be framed by clear and transparent goals and principles that are publicly known, operate within guidelines for its use, and be subject to appeal and review, and to sanctions for abuse.⁸

(3) Rather than consent, ensuring the contestability of all decisions is the most important guideline for designing democratic institutions. In addition to institutional provision, this favours broad public debate and active social movements. These are required to give voice to all. 'Being a person is intimately tied up with enjoying a certain status in communion with others, and perhaps the best marker of the required status is that your voice is authorized by those others' (Pettit 1997b, p. 52).⁹

Those who are not citizens of states that secure their equal status through the rule of law, accountable institutions and contestable political decision-making processes are more vulnerable to domination. This can arise either where the state is not strong enough to protect against domination by others, or where the state's capacity to dominate is inadequately constrained. To

the extent that contemporary constitutional democratic regimes provide a secure status of equality for citizens today, domination is tempered, but not eliminated. In other political regimes, the state may either dominate its citizens, or be too weak to protect them from domination by others. Relations of domination, moreover, are not confined within state boundaries.

Addressing domination – from domestic to global

While most domination theory so far has focused on tackling domination within the state, it is clear that arbitrary powers of interference extend beyond state boundaries. Both states and non-state actors can dominate citizens of other states to the extent that they have the power to interfere arbitrarily in their lives, where they lack institutions strong enough to protect them. This is evident in the case of those who are ruled by imperial or colonial powers. But domination arises also to the extent that people are subject to unconstrained powers which reach across state boundaries, whenever state power is not adequate to constrain these, and when there are no structures that work to minimise domination at an international level. These can be, for example, transnational corporations, international market actors or international agencies. Domination arises when ostensibly independent states are in dependent relationships with stronger states, or subject to arbitrary interference by international agencies. In the contemporary world even relatively successful liberal democratic states are not fully capable of protecting their citizens effectively from domination by such agents (Bohman 2007). It can be argued that globalisation has involved an increase in the potential for domination, with increasing connectedness, asymmetry of power, and dependence across borders (especially, but not exclusively of those in less developed countries). It operates both directly on individuals, and indirectly by rendering their states incapable of fulfilling their protective role. Cécile Laborde and Miriam Ronzoni have argued that states (in particular, but not only, less developed states) are dominated by the institutions of globalisation, which are shaped by the interests of wealthy powers and allow developed states and international corporations to require states, for example, to open up their markets, to concentrate on commodity production, to offer low tax rates and to reduce pay levels and regulation of work conditions. ‘Globalisation then, may be accused both of offering opportunities for some states to dominate others, and for powerful non-state actors to exercise some domination over all states, albeit not to the same degree.’ (Laborde and Ronzoni forthcoming).

Thus there has been some discussion among analysts of domination how to address such domination extending across borders. On one account, it means that there is a need for a multi-level global democracy (Bohman 2007) or a global republic (Marti 2010); on another, it means that we should aim to ensure that weaker states are better secured from domination (Laborde and Ronzoni forthcoming; Maynor 2012).

What is agreed by all these authors is that domination extends across borders and beyond communities of citizens. While Laborde and Ronzoni focus on the problem of the domination of states, this affects individual citizens directly in a variety of ways. As Laborde puts it:

Multifaceted processes of globalisation have meant that the geographical and symbolic superimposition of extremes of wealth and destitution have created new forms of status anxiety and despair, as the global poor become aware of their permanent reject status from an inaccessible but omnipresent rich world (Laborde 2010, p. 52).

The question I address here is the extent to which migration controls, in creating different levels of reject status, contribute to situations of domination.

Migrants and domination

On the account of domination given so far, migration controls in the contemporary world are *prima facie* dominating. First of all, they are justified in terms of a general right of states to determine who to admit and who to exclude: this is arbitrary power to the extent that there are no, or very limited, international checks or accountability with respect to these, and those to whom they apply have an unequal status, and cannot contest the laws involved.¹⁰ Moreover, the implementation of migration controls features a wider range and extent of discretionary powers, with fewer constraints, than prevail in domestic policy areas.¹¹

The case may seem to be more easily established for the argument that, within the state, migrants or resident non-citizens are subject to domination. They clearly lack an equal status and the full range of protections of citizens; state powers over them are more discretionary than over citizens, they lack the power to contest decisions politically, they are dependent on the relationship with the host society and the state, and either cannot exit from this, or risk high costs of exit (See Benton 2010 and articles by Benton, Fine and Hovdal-Moan, this issue).

The focus of this article, however, is on those *outside* the state, who are potential or would-be migrants. I argue that, in a context of globalised relationships, if states are recognised as having a general right to exclude, migration controls are inherently dominating. Moreover, in practice, the more widely discretionary are the procedures through which these controls are implemented, the more dominating they may be in their effects.

It may be objected that, even if we understand the threat of coercion as domination, migration controls threaten to coerce only those with an immediate intent to migrate; others with no intent to migrate, are not dominated. Moreover, it may seem implausible to suggest that those in more developed countries are dominated by one another's controls. Thus, it might be denied that a citizen of the United States is dominated by Finnish migration controls. Yet domination is a matter of degree, where some are affected more than others; some are subject to rather limited or weak domination by any single state. To warrant addressing domination politically, it is not necessary to show that all are equally dominated by migration controls. What is important is to establish how pervasive are their effects (Carens 2014, Ch. 11), and whether they create a level of domination intense enough to warrant intervention.

To begin with, we should not underestimate the extent to which all non-citizens are subject to these controls (with the marginal exclusions of those who live in special travel areas or regional polities). If they want to enter or live in another country they will face the controls which that country places on movement, whether this be for purposes of transit, entering for a temporary period, gaining a work permit, living with their family, and so on. These apply to citizens of developed states as well as others, even if the controls vary for different categories of migrant, and may sometimes be waived for some. The impact of migration laws even on those in developed states is not negligible. Migration controls such as visa requirements and security clearance apply to them even if they do not plan to become long-term residents, and they too generally have no power to contest decisions.¹² Further, those who actually do apply and are rejected for admission or residence are dominated (to the extent that they lack a secure legal status, right of contestation of the laws or process, and often no right of appeal). But we may go further to say that those threatened with rejection are also dominated, including those who adapt their expectations to the reality of its difficulty, and who would be likely to apply for entry if they had greater expectation of success (Carens 2014). Thus the domination of outsiders through

migration controls extends beyond the *immediate* threat of coercion. We can agree, nonetheless, that not everyone will be equally dominated by migration controls; those who have satisfactory lives in their own countries, and who do not have reasons to migrate, whether economic, political, cultural or family-based, are less affected by these controls.

So, whether migration controls warrant constraint will depend on the intensity and extent of the domination they exercise over outsiders. We should acknowledge that someone in Asia is not subject to the continual threat of interference in their lives by western states with strict migration controls in the same way as slaves or wives in the classic examples.¹³ They do not live in daily fear of the impending exercise of the dominator's power over their every action, thus do not become instruments of the dominator's will in the same sense (cf. Miller 2010, p. 118). By comparison, non-citizen residents, and especially the illegal migrant or the visa overstayer, are more closely analogous to the wife or slave; in the light of their insecure status, they have to be wary of non-state actors such as employers and landlords, and of the possible incursion of state controls in police and other checks. Those outside the state cannot be seen as vulnerable to domination by migration controls in exactly the same way. We need then to examine more closely the intensity and extent of domination of outsiders that is entailed in migration controls.

The intensity and extent of domination by migration controls

The *intensity* of domination, as noted above, will depend on the degree of arbitrariness; the ease of exclusion; and the severity of the measures excluding foreigners (Pettit 1997a, p. 58). The intensity of domination of migration controls is then a function, first, of the general right (with limited exceptions) of states to decide who to admit and who to exclude. The arbitrariness of migration controls appears in the way in which the exact requirements for migration are liable to change according to the will of the admitting state; would-be migrants thus face frequently changing criteria for, for example, accepted labour skills, economic resources, and language and other requirements. The intensity is increased by the arbitrariness that arises from the greater prevalence of discretionary powers in the area of migration than in most areas of domestic policy: here agencies and officials are given wide powers, often laid down without legislative provision or oversight; their decisions are often not subject to review, judicial or otherwise; the framework within which they make decisions is often neither clearly laid out nor well known to citizens as well as non-citizens. As to the ease of exclusion, while states have difficulty in

excluding migrants entirely, they can readily restrict legal access, and impose illegal status on those who breach entry controls; and they can shift the burden of controlling borders to others (other states, carriers, etc.). Finally the severity of the procedures, which (even when not discretionary in practice) range from exclusion by walls and barbed-wire fences, through deportation to detention or incarceration of illegal migrants. Even in the case of, for example, family reunification, where there are norms of more favourable treatment, the procedures can include stringent tests of language, and demanding requirements of financial resources. There is clear evidence of the dominating impact of these provisions on individuals - they lead people to change their behaviour in order to avoid coercive exclusion in ways that include destroying basic identity documents, marrying someone for whom they have no affection, leaving their families, learning (and speaking) other languages, and choosing or changing careers in the hope of facilitating mobility and gaining admission somewhere that will offer them better prospects of earning a living.¹⁴

The *extent* of domination will depend, first, on the range of areas of their lives affected, and the degree to which their options are limited for those who are excluded. On this basis, evidence suggests that the extent of domination by migration controls is significant. The whole lives of potential migrants who lack the basics of a reasonable level of subsistence may be determined by the difficulty of migration, which leaves them unable to access the preconditions for a flourishing life – even if they are not continuously subject to interference in each aspect of their lives. In cases where migration controls prevent spouses or parents with young children living together, this exclusion also affects a central area of their lives. For those who already have the basics, exclusion limits their options, and also constitutes domination (though this may be seen as less serious, since extending the range of options is less important than reducing the intensity of domination).¹⁵

The scope of domination will also depend in part on the numbers of people affected. Here we have seen that migration controls affect not just those who attempt to migrate, but the many who have significant reason to do so, whether political, economic, cultural, familial, or religious, or more specifically, where they might be able to move from countries where there is no level of secure non-domination, to a country where they might gain such security. A state's migration

controls may also reinforce the capacity of other states to dominate their own citizens to the extent that they have no real option of leaving the country.

But it is not just the case that migration controls have intensive and extensive effects on many outsiders. What makes migration controls particularly dominating of potential migrants is that they are in a *relationship of dependence* with the countries which exclude them. In a global economy and society, potential migrants can be seen as living in a relationship of dependence, in which those exercising arbitrary power benefit, and those dominated either cannot leave the relationship, or their exit costs are too high for them to do so realistically. Drawing on the arguments of Laborde and Ronzoni, for example, we may argue that significant numbers of potential migrants are indeed in such a relationship with countries with strict migration controls; these countries benefit from a relationship which secures low cost commodities and labour costs abroad, taxation advantages, etc. Moreover, this is a relationship from which would-be migrants cannot easily exit (in the absence of other countries to migrate to or other options for securing non-domination). Indeed, migration controls (and the associated sanctions) literally make individuals' exit from this dependency relation impossible or extremely costly.

Without such relations, in a world of genuinely independent states, the scope of domination through migration controls could perhaps be limited to the – still significant – numbers of those coerced or threatened with coercion, who actually sought and were refused entry, or who would have sought entry if there seemed a greater possibility of legal migration.¹⁶ This latter should not be underestimated: a 2013 study reports that up to 90% of men aged 18-35 surveyed in Senegal said they would migrate if they had the papers to do so.¹⁷ In practice, under conditions of contemporary globalisation, migration controls dominate in the context of those asymmetrical power relationships, in which people are dependent on, and subject to, the arbitrary power of corporations, wealthier states, international organisations and others. Moreover, while any individual state excludes would-be migrants only from its own state, in a world migration regime where all states have migration controls (albeit of varying stringency), it may be argued that there is a distributed system of domination, to which all states contribute in their migration decisions, even if no state can solely coerce a would-be migrant to do a particular thing, namely to stay in their own country.¹⁸

Thus even if not all are equally dominated, migration controls constitute domination of sufficient intensity and extent to warrant addressing. We have seen that they have a major effect on the actions and lives of many of those excluded, especially in a context of relationships of dependence, and have effects that extend to a significant proportion of the world's population.¹⁹

If it is important to address domination that is significant in intensity and extent, we can draw the implications that the arbitrariness of migration controls should be limited.

An initial outline of what would be required to reduce domination in this context would include establishing the legal status of migrants, and recognising their equality in respects other than admission; applying the rule of law to migration controls by limiting arbitrary powers and constraining discretionary procedures; making accountable the institutions determining migration law and policies by the introduction of a higher regulatory authority; and, finally, making migration laws and policies contestable in some way by those who are subjected to them. This does not mean that migration controls should be lifted entirely – domination does not mean the absence of interference, nor that they need to be democratically justified to all – domination requires restriction, not justification. This would not require global governmental institutions, but could be implemented through a competence-specific authority like the UNHCR, though with greater powers.²⁰ Contestation would not be limited to individual appeal on entry decisions, but also include the possibility of referring migration laws to an overseeing authority; yet the capacity to contest would not amount to full democratic justification, and what kind of, and how much, participation in decisions about migration law is entailed, is a question left open here.

This is a single-step approach to criticising and modifying existing domination through migration regimes. This approach is not framed in terms of a distinction between the ideal and what can be hoped for in a non-ideal world. Domination is always a matter of degree, as people may be more or less dependent on a social relationship, and others may have more or less arbitrary power over them. Because non-domination is a goal to be pursued, and a matter of degree, rather than an absolute constraint on action, unlike, for example, a right of free movement may be understood, this has certain consequences. Compared with a right of free movement, it does not pose such a stark contrast between an ideal and a non-ideal situation. It does not frame the problem of migration controls in a way that distinguishes (say) between an ideal situation of maximum non-domination, and a non-ideal situation where we recognise the

reality of domination, but attempt to temper its effects (cf. Carens 1996 and his critics). Being concerned with the reduction of domination wherever it appears, this approach can be applied critically to existing migration control regimes to identify those which dominate more intensely and to a greater extent, and various ways that this might be addressed, even if more is required to determine specific policies in different contexts.

An objection: regulating migration controls will dominate states

It may be objected at this point that there is a contradiction between the fundamental goal of non-domination and imposing constraints on the powers of states. If the freedom of citizens depends on a state to protect them from, not only internal but also external, domination, then states themselves must not be subject to external interference. On some views such constraints and oversight of states' migration laws and policies could themselves be seen as dominating (e.g. Fine this issue).²¹

The foundation for this view may be seen in republican political theory, the tradition in which contemporary non-domination theory has its clearest roots. On one influential account, republican non-domination rests on two planks – the free person, and the free state. This has been expressed most clearly by Quentin Skinner, who identifies these as the two central axioms in the tradition: For it to be possible to act freely you must be a free person; and you can live and act freely only if you live in a free state (Skinner 2010, pp. 98-99). Thus the freedom of the person is secured only in a state with internal protections against domination, and which itself is not subject to the threat of arbitrary interference from outside.

This raises large issues concerning the nature of states' freedom. Here I am concerned specifically with the suggestion that restricting states' right to exclude constitutes a form of domination.

The basis of the state's right may be expressed in terms either of the people's right to self government or of the sovereignty of the state itself. To be self-governing, it may be argued, a people must be able to determine who is and who is not accepted as a member, and that this extends to controlling entry. To respond briefly to these objections, I argue that a people may have a right to be self-determining, but this does not include a right to choose their members, in so far as a political community is not strictly analogous to a club, in which membership is a

matter of consent, but rather a group of people whose membership stems from their being or becoming collectively subject to a common political authority.²²

Even if we were to grant self-determining peoples the right to determine who their members are, control of membership is not the same as control of *territory*, and does not extend to controls on entry or general discretion in exclusion.²³ While a people may be justified in resisting domination by excluding invading forces or colonising powers, this does not apply to migrants, who are not intrinsically dominators – insofar as they lack a superior status and are not in a position to exercise arbitrary power over the existing population.

A second formulation relies on the notion of state sovereignty, in seeing the free state as the guarantor of non-domination, so that over-ruling the state constitutes domination. On this point, it may be responded that, even if we accept that the state is sovereign in certain respects, sovereignty is composed of different elements, some more central than others. Control over borders is less central than the state's authority *vis á vis* its subjects and other states, and has not always been understood to be an essential part of sovereignty (Krasner 1999).

Furthermore, even if a 'free state' of some sort is necessary for non-domination, this does not mean that no constraints on that state's powers are justified. A free state is one that is not dominated, rather than a state that is not interfered with at all. Interventions that are not arbitrary may be justified. On this view the understanding of freedom as non-domination rather than non-interference would suggest a reformulation of the notion of sovereignty itself.²⁴

If we agree that free states are essential to securing non-domination, but deny that this rules out all intervention in their affairs, we can see that regulating or limiting the right of states to control migration does not inherently undermine or contradict the promotion of non-domination.

Conclusion

I have argued that domination exercised through migration controls is of an intensity and extent to warrant limiting the discretionary power of states to grant or refuse admission. The non-domination approach offers a freedom-grounded critique that does not depend on an absolute or over-riding right of freedom of movement, nor assume that all are equally coerced by migration controls and argue that they must accordingly be democratically justified to all.

It aims to reduce the most intense domination even if domination cannot be eliminated entirely. This does not mean abolishing migration controls; it does mean limiting the arbitrary power of states to exclude. In contrast to other, rights-based, arguments, reducing domination does not require the lifting of immigration restrictions, but that they should become less dominating. It does require that potential immigrants gain something analogous, if not identical, to the publicly secured status that citizens enjoy. This means that states do not have complete discretion with respect to admission. For migration controls to be less dominating, national immigration laws need to be less arbitrary, state policies and decisions to be subject to higher legal oversight, discretionary procedures to be more constrained and contestable by those who are subject to them.

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Notes

¹ In a more succinct formulation, Abizadeh puts it: 'Border laws pose a unique problem because they inherently subject both citizens and foreigners to the state's exercise of power. This is why a liberal democracy does not legitimately enjoy absolute discretion to determine its own border laws: for the same reason that it does not have absolute discretion in how it treats its own domestic population.' (Abizadeh 2012)

² Autonomy is a more encompassing concept than non-domination; Miller and Abizadeh agree that it requires the capacity to form intentions, a sufficient range of valuable options, and independence in choosing. Autonomy can be violated if any one of the three is absent (Miller 2010; Abizadeh 2008, 2010). Non-domination depends mainly on the third feature. The range of options is less central. Laborde and Ronzoni (forthcoming) distinguish domination and coercion on the basis that domination does not require actual coercion; that domination is not to be justified (as coercion) but minimised; that coercion does not necessarily dominate – only coercion that is arbitrary, i.e. not subject to control of those subject to it; and domination is by agents, but draws on systemic positions in society, while coercion may not.

³ Defeating the autonomy argument also relies on the availability of other options when one state excludes. How far this is a reality under current migration regimes is a matter of debate, and is addressed briefly below.

⁴ Issues arise with respect to whether the arbitrariness of domination rests in the exercise of will or the failure to track the interests of those affected; both were implied in Pettit's original formulation; the latter is problematical with respect to whether interests are to be understood subjectively or objectively. Differences also arise with respect to the nature of the procedural checks, and whether external constraints or more or less democratic contestation or both are essential to check domination. I see these as less significant differences within the broader account of domination as arbitrary interference in a relationship,

where both external constraints and contestation by those affected may be required to reduce domination. There are other conceptual differences and unresolved issues within the conceptual debate on domination that I largely set aside here.

⁵ Note that this is a matter of capacity rather than likelihood (congruent with arbitrariness being a matter of will rather than unpredictability).

⁶ Being a matter of the threat of interference, however, it is not entirely separate from interference, and thus remains in most respects a negative conception of freedom.

⁷ Pettit also makes the distinction between what ‘compromises’ and what ‘conditions’ freedom, or more recently between what ‘invades’ and what ‘vitiates’ freedom (Pettit 2001, 2012).

⁸ By ‘discretionary power’ I understand power exercised according to an agent’s decision rather than being completely specified in law. Not all discretionary power is arbitrary, however, and not all discretionary powers can or should be eliminated, as they can be essential for implementing general provisions in specific cases. For Lovett, justified discretion involves powers being exercised in the pursuit of commonly known goals, subject to oversight by those from whom they have been delegated, and with limits on their exercise (Lovett 2010, pp. 95-97; 217). Discretionary powers become arbitrary when they do not meet these criteria. See also Pettit 2013: in criticising defences offered for the police treatment of David Miranda, he argues for tight constraints on the occasions when special powers can be used, exact specification of how they can be used, effective channels of complaint for those affected, independent reviews of the ways in which the powers are used, and sanctions for deviant officials.

⁹ How substantial are the democratic procedures that this requires is internally debated among theorists of domination (e.g. Pettit 1997, Honohan 2002, Maynor 2003).

¹⁰ Insofar as the entry of refugees is an exception, this represents a limit in principle on the discretion of states to exclude.

¹¹ Migration policies risk arbitrariness at two levels, since states are considered to have the right to determine their migration laws and policies independently of any other authority, and immigration procedures frequently involve determinations based on administrative decisions rather than by law.

¹² Thus, when many work for international corporations, even a privileged person’s promotion – or continuing job prospects – may depend on accepting a posting with their company in another country, and their not happening to fall into a category restricted by that country’s migration laws.

¹³ Family reunification of spouses and young children could be seen as one possible exception here.

¹⁴ A graphic fictional account of the ways in which people are willing to alter their behaviour in order to gain access to western states features in Kiran Desai’s *The Inheritance of Loss* (Desai 2006, pp. 182-187).

¹⁵ As Fine notes: ‘Prohibiting outsiders from settling in and becoming members of a particular state hinders or prevents their pursuit of all the many familial, social, religious, cultural, political, or economic interests tied to residence and citizenship in that state, despite the fact that some, if not all, of their basic needs could be met elsewhere’ (Fine 2010: 348).

¹⁶ This would be true even if those states were unequal in many respects, and even if many states did not do a good job of promoting non-domination internally – at least and only as long as domination of unrelated others by others is not considered to require action

¹⁷ A study of 8,000 people in 16 different areas within Morocco, Senegal, Turkey and Ukraine in 2011 shows that, in the age group 18-35, between 25% and 76% of women and 43-90% of men aspired to emigrate in the next five years, with significantly higher percentages saying they would do so if they were given the papers. In Senegal these figures were highest: up to 65% of women and 94% of men would travel if they had the papers (Carling 2013).

¹⁸ Cf. Christiano (2008, p.8) for a similar argument on the collective effects of individual states’ migration policies. This addresses the objection that migration controls do not *coerce* anyone into doing a particular thing, but only *prevent* them doing one specific thing – namely immigrate into that state’s territory (Miller 2010). Miller recognises that when many states collectively create a system of exclusion, or when they independently exclude where they have a responsibility to avoid restricting freedom, the result is more serious (Miller 2010, p.118).

¹⁹ In the context of global relationships, the problem cannot wholly be addressed by attempting to reduce domination in migrants' own country as an alternative to reducing the domination of migration controls. Such an argument would parallel that for improving conditions in less developed states, making greater transfers of aid from better off to less developed countries, sometimes proposed as an alternative to reducing migration controls in distributive justice arguments.

²⁰ This is similar to the suggestion with respect to other policies put forward by Ronzoni in her argument for re-envisioning sovereignty (Ronzoni 2009, 2012).

²¹ Thus Laborde and Ronzoni also argue that minimising domination should focus on strengthening the capacity of states to protect their citizens rather than attempting to promote non-domination from the top down in global terms (Laborde and Ronzoni forthcoming).

²² 'In the absence of full control over access to membership, a group still can be self-determining to the extent that it is free to set its own internal policy agenda without external interference. That freedom might be limited by the lack of control over membership rules, but liberal and democratic principles already constrain the extent of the citizens' discretion to control the membership of their political community.' (Fine 2010: 353)

²³ 'The citizens' collective right to freedom of association could not support a right to prevent outsiders crossing the state's borders anyway because their mere presence has no bearing on the citizens' individual or collective associational freedoms.' (Fine 2010: 352). Some control on entry might be justified if migration was such as to undermine the very possibility of self-government (cf. Bauböck 2009). See also Bertram (this issue).

²⁴ Cf Ronzoni (2012), in which global regulatory institutions are seen as supporting rather than undermining positive sovereignty. See also Oberman (forthcoming) and others.

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