WHY DO STATES REGULATE THE ENTRY OF FOREIGN PROFESSIONALS INTO HEALTHCARE?

A HYBRID APPROACH TO SOVEREIGNTY

By

Sára Lafferton

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ABSTRACT

In this thesis I address the puzzle why states regulate the entry of foreign professionals into healthcare. I approach this problem building on two leading understandings of state sovereignty. One is juridical, implied in Kenneth Waltz's theory of international politics, and is best reflected in the neorealist thinking in the discipline of international relations. The other is biopolitical, developed by Hannah Arendt and Michel Foucault, applied first in critical social theory. I show that the juridical approach clarifies why states regulate policy domains that are strategically important to protect their own way of life, and the biopolitical accounts for the distinct attention states pay to the life and well-being of their population. Then, I approach the question historically, in order to reconstruct when France and the United Kingdom started to introduce the regulations concerned. Finally, I offer Giorgio Agamben's theory as a hybrid approach that shows why both law and life are fundamental to state sovereignty and which also accounts for the regulation on foreign health workers. I arrive at the conclusion that the conceptual foundations of the modern European nation–state are challenged, and the source of this challenge is, paradoxically, the nation–state itself by depriving its citizens of their political existence.

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INTRODUCTION

States perform sovereignty through various state practices. The concept of border guards performing sovereignty,[1] for instance, has recently made a splash in critical theory, and has drawn attention to more subtle ways of border control, among them technologies of screening and quarantine at airports.[2] Nevertheless, there are other, less apparent ways of articulating state sovereignty: by regulating trades or professions, for example.[3] In this thesis I aim to investigate a specific state practice from various approaches to state sovereignty by comparing these overwhelmingly theoretical approaches to the empirical "reality" out there. This specific state practice is the regulation on the entry of foreign professionals into the healthcare labour market.

The practice of regulation and state sovereignty are directly related. The theory of international politics, developed by Kenneth Waltz,[4] suggests that in the anarchic and self-help system of international politics, vis-à-vis the hierarchic order of domestic politics, states can preserve their status as sovereign states only through the development of similar mechanisms and capabilities, like that of the conduct of foreign policy, control of borders, fiscal and monetary policy, by which they can tackle the challenges they face. The careful development of these

[1] Didier Bigo, "Security and immigration: Toward a critique of the governmentality of unease." *Alternatives: Global, Local, Political*, 27.1S (2002): 63–92; Mark B. Salter, "Passports, Mobility, and Security: How smart can the border be?" *International studies perspectives*, 5 (2004): 71–91; Mark B. Salter, "The global visa regime and the political technologies of the international self: borders, bodies, biopolitics" *Alternatives: Global, Local, Political*, 31 (2006): 167–189; Joanna C. Long, "Border Anxiety in Palestine–Israel" *Antipode*, 38 (2006): 107–127; Wendy Brown, *Walled states, waning sovereignty* (Zone Books, 2010).

[2] Mark B. Salter, "Governmentalities of an airport: heterotopia and confession" *International Political Sociology* 1 (2007): 49–66; Sven Opitz, "Regulating epidemic space: the nomos of global circulation" *Journal of International Relations and Development*, 19 (2016): 263–284.

[3] For trade regulations, see; Paul R. Krugman and Maurice Obstfeld, *International economics: Theory and policy*. 2nd edition (Harper Collins, 1991). For regulation on professions, see: Giuliano Augusti, "Trans-national recognition and accreditation of engineering educational programmes in Europe: recent developments" *European journal of engineering education*, 30 (2005): 417–422; Regine Wagner and Merilyn Childs, "Exclusionary narratives as barriers to the recognition of qualifications, skills and experience—a case of skilled migrants in Australia" *Studies in Continuing Education*, 28 (2006): 49–62; Per Andersson and Shibao Guo. "Governing through non/recognition: The missing 'R' in the PLAR for immigrant professionals in Canada and Sweden" *International Journal of Lifelong Education*, 28 (2009): 423–437.

[4] Kenneth Waltz, *Theory of international politics* (McGraw-Hill, 1979).

mechanisms and capabilities is thus fundamental to every sovereign state. So, it can reasonably be assumed that their protection by legal means is a guarantee of state sovereignty.

Regulating a profession means the establishment of certain standards of skills which the applicant must comply with in order to practise. In general, the regulations do not necessarily target foreign graduates: initially, they were viewed as a kind of quality assurance that aimed at preventing incompetents from practising.[5] Before the emergence of the modern nation–state, guilds performed similar tasks in European towns, by controlling the practice of their craft. In the 19th century, however, comprehensive and state–wide regulations emerged, encompassing the profession and territories as a whole. These regulations, while maintaining their initial quality assurance purposes, further expanded in their aims and set another standard for applicants, testifying to its importance for states. This standard was nationality.

The scope of my research in this thesis is limited to the European Economic Area (EEA).[6] Although it is laid down in the Treaties of the European Union that the free movement of workers is one of its fundamental principles,[7] suggesting that the Union is keen to promote knowledge transfer within its boundaries, various state regulations apparently impede the integration of people with foreign qualifications into the labour market of the host country. The institution of non-recognition of foreign qualifications, also widely practised by other states out of the EEA,[8] is even

[5] The first decrees in France regulating the practice of medicine were issued as the decrees of Marly in 1707, and they allegedly aimed at "struggling against charlatans, quacks, and 'unqualified and incapable persons practising medicine'". Michel Foucault, *The birth of the clinic* (Routledge, 2012), 44.

[6] I am interested in the countries of the European continent, and to be able to arrive at the most general conclusions possible, the scope of my research does not confine itself to the countries of the European Union but focuses on the European Economic Area, which, besides the Member States of the European Union, also contains Iceland, Norway, Liechtenstein and Switzerland. These countries have dense, mutual relations with the European Union, and the state regulations the thesis is interested in also prevail in these four countries.

[7] Article 3(2) of the Treaty on European Union (commonly referred to as Treaty of Rome) and Articles 4(2)(a), 20, 26 and 45-48 of the Treaty on the Functioning of the European Union (commonly referred to as Maastricht Treaty). "Free movement of workers, 2016" <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.1.3.html> Last accessed: 24 May 2016.

[8] In the US (for the implications of the regulation in the US see: Linda Rabben, "Credential recognition in the United States for foreign professionals" [*Migration Policy Institute*, 2013]) or in Israel ("Israeli Medical

more surprising when placed in broader perspective: on one hand, developed countries aim to attract highly skilled workers through targeted migration policies,[9] while on the other hand, by compelling these immigrants to pass comparative tests in the field of their expertise, and, in cases which are identified on an individual basis, to fulfil compensation measures, the same states clearly delay the integration of these skilled experts.

Regulations on the entry of foreign professionals into their professional area in general are mainly under EU-control, but Member States have high levels of discretion in deciding on both the specific professions to which they actually wish to apply these regulations, and on the specific applicants whose qualification they wish, or do not wish, to recognise.[10] There are different mechanisms for recognition, based on the type of regulation (e.g. temporary recognition, automatic recognition, recognition based on professional experience), but in none of these cases does the applicant escape the supervision of the competent authorities of the host state.[11]

The sector that is regulated in the greatest proportion across the Member States, both in cumulative terms, that is, in the aggregate statistics of the EEA, and in individual terms, i.e., in every single Member State separately, is healthcare.[12] There are disparities in levels of regulations across Member States,[13] but the dominance of the healthcare sector in this respect is unquestionable. Qualifications in these fields are subjected to the mechanism of automatic

Association". <http://www.ima.org.il/ENG/StaticPage.aspx?Page=4227> Last accessed: 24 May 2016), for example.

[9] A phenomenon that is often called as "race for talent" (Ayelet Shachar, "Race for Talent, Highly Skilled Migrants and Competitive Immigration Regimes" *The New York University Law Review*, 81 [2006]) or "brain drain" (Devesh Kapur and John McHale, *Give us your best and brightest: The global hunt for talent and its impact on the developing world* [Center for Global Development, 2005]).

[10] European Commission, Directive 2005/36/EC "Recognition of foreign qualifications in practice". <http://ec.europa.eu/growth/single-market/services/free-movement-professionals/qualifications-recognition/index_en.htm> Last accessed: 25 May 2016.

[11] Ibid.

[12] European Commission, "The EU Single Market: Regulated Professions, 2016". <http://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=map&q_selector=2> Last accessed: 25 May 2016. Health professions meaning nurses, midwives, doctors, dentists and pharmacists

[13] Nuno M. Garoupa, *Regulation of professions in the US and Europe: A comparative analysis*. Available at SSRN 640502 (2004). <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=640502> Last accessed: 25 May 2016.

recognition, which, in contrast to what its name would suggest, means that "professionals must apply to the authority that oversees the profession in that country, providing proof of their qualifications", and then wait until the competent authority decides to grant them the application, with the process taking between three and four months.[14]

The professional basis for these regulations within the EEA is rejected in this thesis. There can be differences between educational methods of medical studies across Europe, but these in themselves cannot justify the existence of state regulations because they would imply the discrimination of certain universities rather than foreign states. The national labour market, of course, is free to make a distinction between the value of a diploma from a high-ranked university and that of a low-ranked university, but that is the business of individuals and companies, and is unrelated to state regulations.

Suspicions of successful lobby activities also lack grounds. It seems unreasonable to assume that in every single Member State it is the Medical Chamber that is overwhelmingly the most influential association, at the expense of others, in lobbying for its own interests.[15] It would probably be even less sensible to believe that there is an EEA–wide secret and powerful medical association in the background that, counter–intuitively, seeks to promote state protectionism in the national labour markets, as opposed to liberalisation and the free movement of its members.

There seems to be no apparent reason explaining the phenomenon of regulations on the entry of foreign professionals into healthcare.[16] Their existence, however, is a systemic pattern across the Member States of the EEA, which are officially committed to the values of liberty, equality and non-discrimination. But having established the largest single market of the world and

[14] European Commission, "Automatic recognition, 2016". < http://ec.europa.eu/growth/single-market/services/free-movement-professionals/qualifications-recognition/automatic/index_en.htm> Last accessed: 25 May 2016.

[15] With regard to the portion of regulations across economic sectors, the two extreme countries are Poland and Lithuania. In the former, health professions make only the 22.9 percent of all regulated professions (uniquely sharing its "first position" with regulations on transport professions), whereas in the latter, they make up to 77.6 percent.

[16] Health professional meaning nurses, midwives, doctors, dentists and pharmacists.

moving towards political federalism, why do these states still regulate among themselves anything at all? Or, if they do, what makes health professions so special from a state's point of view so that they leave other sectors, such as business, financial and agricultural professions, far behind in this respect?[17] When were these regulations first introduced, what motivated the governments in adopting them and what does this information tell us about state sovereignty?

I claim in this thesis that state regulations on the entry of foreign professionals into healthcare tell us about the very foundations of state sovereignty. Nevertheless, it is not easy to address this complex problem from the point of theories of sovereignty. An approach, implied in the theory of international politics referred to above, that understands sovereignty chiefly in juridical terms, can simply account for state regulations within the EEA. It asserts that states are primarily concerned with the protection of their own way of life, defined by their people, and the nature of the international system is such that it leads to the systemic regulation of any field that is found to be related to that way of life. Any field, however, is limited to a certain set of domains that, when it comes to the actual protection of the foundations of state sovereignty, directly contribute to the international performance of the state.

Another approach, advanced by Hannah Arendt[18] and Michel Foucault,[19] which defines sovereignty in biopolitical terms, can explain the obvious importance of health professions for states by arguing that, since modernity, states have been interested predominantly in the economic productivity of their population, conditioned primarily by the life and the well-being of their

[17] Regulations on health professions take 40.4 percent of the aggregated statistics of the EEA, whereas business, financial and agricultural professions take 14.2, 0.8 and less than 2.2 percent, respectively. "The EU Single Market, 2016".

[18] Hannah Arendt, *The Human Condition* (University of Chicago Press, 1958); Hannah Arendt, *The origins of totalitarianism* (World Publishing Company, 1962); Hannah Arendt and Jerome Kohn, *The Promise of Politics* (Schocken Books, 2007).

[19] Michel Foucault, *The History of Sexuality. An Introduction* (Pantheon Books, New York, 1978); Michel Foucault, *"Society Must Be Defended": Lectures at the Collège de France, 1975-1976*, trans. David Macey, Reprint edition (New York: Picador, 2003); Michel Foucault, *Security, territory and population* (Palgrave Macmillan, 2007); Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–1979*, trans. Graham Burchell (Palgrave Macmillan, 2008).

society. Therefore, while trying to enhance the living standards of their population, states have been engaged in dismantling national boundaries for the sake of increased economic progress. It seems, thus, that both approaches can clarify certain aspects of why states regulate health professions by breaking down the problem to its elements and focusing on one half, while disregarding the other, but neither of them can offer a satisfying account for the *regulations on the entry of foreign graduates into healthcare* as a complex phenomenon.

I argue that there is an approach that is suited for this task. This suggests, building on Giorgio Agamben's[20] theory of state sovereignty, that both law and life are fundamental concepts for the modern nation–state, which original project was both to protect its own way of life, as its people conceived of it, and also to take care of the life of its citizens, who were the bearers of sovereignty. At the time of the national awakening in Europe, when it was assumed that law, life (or nativity) and territory somehow "naturally" converge, it seemingly became important for states to start to regulate the entry of foreign professionals into healthcare and thus to articulate their national sovereignty. Nevertheless, since the First World War, the conceptual grounds of the nation–state have constantly been called into question, and so the nation–state started to reassert the foundations of its own sovereignty. This explains why states, while trying to protect their own way of life with regulations on strategically important policy domains, are also concerned with an economic area that is directly related to the life of their citizens. In the 21st century, when the economic and political environment is unprecedentedly hostile to the nation–state, this is also a way of performing sovereignty and articulating that the nation–state still has a decisive role in the international political realm.

In order to illustrate the validity of the above argument with empirical cases, I approach the problem of regulations on health professions historically, by reconstructing when they were introduced. I find that these regulations date from the time of the national awakening, that is, from

[20] Giorgio Agamben, *Homo sacer: Sovereign power and bare life* (Stanford University Press, 1998); Giorgio Agamben, *Means without end: Notes on politics* (University of Minnesota, 2000).

the Napoleonic wars: in France, they were adopted in 1803, and the United Kingdom introduced them in 1858.

Nevertheless, it is worth emphasising that empirics are indecisive here. They tend to serve illustrative purposes, as the aim of the thesis, i.e. to provide a novel combination of existing theories in order to interpret a state practice, is theoretical in its nature. To fulfil this aim, the thesis endeavours to elaborate on and ultimately support Agamben's account for state sovereignty by applying it in the field of international relations, in order to better explain a concept which is fundamental for this discipline.

The thesis is structured as follows. The first chapter sets the theoretical framework by reviewing the literature on the juridical and the biopolitical approaches to sovereignty, and also identifying their blind spots. The second chapter shows that discrimination in the labour market against physicians conceived of as "strangers" was customary well before the adoption of state regulations, then briefly summarises the history of public health and the introduction of the regulations on foreign health workers. The third chapter offers a hybrid approach to state sovereignty that accounts for the problem of health regulations, and also complements the two previous approaches in this respect. Finally, I conclude that the nation–state is currently in crisis, because it eradicates the conceptual foundations of its own sovereignty by depriving its citizens of their political existence.

CHAPTER 1: TWO CONCEPTUALIZATIONS OF SOVEREIGNTY

Here I present two ways of understanding sovereignty. One way, which I term juridical, is best reflected in the neorealist thinking in international relations, claiming that the international system is a self-help system. Its units are states, the activity defined by their own people as appropriate in this realm is their utmost concern, and to ensure this freedom for themselves and their citizens, they can never truly rely on other states but only on themselves, at least in matters of strategic importance. In other words, the states play an international zero-sum game, premised on the opposition of "us" and "them" or "friend" and "enemy". The other way, which I call biopolitical in the following, has been developed by, broadly speaking, critical social theorists, stating that since modernity, states have regarded human beings primarily as economic producers and consumers, and have been concerned with the well-being and life of their population. Therefore, governments have been justifying their political goals in relation to their economic efficiency and hence have been evaluating the importance of each human being against their economic utility. This approach is based on the fundamental categories of "life" and "politics" or "socioeconomics" and "politics", the former expanding at the expense of the latter. Both approaches can tell something about the phenomenon of healthcare regulations, but their explanations are only partial: the juridical clarifies why regulations exist, the biopolitical spells out why healthcare is important for states. Neither of them can account for the problem of regulations the entry of foreign professionals into healthcare, as a complex phenomenon.

In this chapter I present these two approaches by briefly describing how they have been developed and what they mean today, drawing primarily on the works of Kenneth Waltz on one hand, and that of Hannah Arendt and Michel Foucault on the other. Having mapped out how these approaches understand sovereignty, it becomes clear why, if we believe that they are concerned mainly with their freedom, states bring the policy areas that they regard as strategically important under direct control, any and why, if we accept that they are interested primarily in their

economic progress, states dedicate distinct attention to the life and well-being of their population. This chapter informs our investigation of healthcare regulations by showing that the juridical and biopolitical approaches to state sovereignty, although both are widely acknowledged by the academic community, fail to explain a specific state practice, that is, why states regulate the entry of foreign professionals into healthcare.

1.1. The Juridical Understanding of Sovereignty

The juridical understanding of sovereignty has its roots in the ancient Greek approach to politics. Hannah Arendt argues that for the Greeks, to live a political life meant the same as to live in the *polis*, that is, to decide on every issue of the community by speaking about them and persuading one another, not merely accepting the coercion of others or carrying out their orders.[21] Nevertheless, this does not equate to merely talking about certain issues. What the Aristotelian term *zoón politicon* suggests, so argues Arendt, is only that human beings are in possession of the additional capacity to live politically qualified lives.[22] Nevertheless, from this it does not necessarily follow that wherever human beings live, politics naturally emerge from their mere coexistence.[23] Politics requires the plurality of men,[24] but is not a self-evident concomitant phenomenon of human communities.

As politics is premised upon the plurality of men, it needs to happen in the public space. To decide on common issues, Greek citizens gathered together in the *polis*, which was a physically and conceptually different space from the private household, the *oikos*.[25] The *polis* was founded to secure this public space which preserves the great deeds and great words of free men: the "magnificent experience of life's possibilities among one's equals" that was "already present in the Homeric epics".[26] There was no possibility of doing great deeds or talking great words in the *oikos*,

[21] Arendt 1958, 22.
[22] Ibid.
[23] Arendt 2007, 116.
[24] Ibid. 93.
[25] Arendt 1958, 28.
[26] Arendt 2007, 124.

which was characterised, among others, by the rule of the head of the household over the rest, precisely because the presence and the recognition of other equals were what made these deeds and words great.[27] Achilles's dilemma between peaceful and joyful life and participation in the Greek war against Troy where one can do great deeds was, for instance, ultimately resolved by the desire to make his appearance and get recognised in the public space.[28]

Taking active part in the life of the community required that the individual was free. Political activity had two prerequisites. First, all citizens participating had to be equal when entering the political space; each of them had to have the same right to speak.[29] Second, all citizens participating had to be liberated from the problems of the household; the necessities pertaining to the maintenance of life had to previously be satisfied, so when doing politics they did not have to worry about these everyday issues.[30] Consequently, politics, and also the public space attributed to it, meant freedom in two senses. It was freedom from the coercion of others, as everybody had equal right to negotiate common issues and convince fellow citizens of their opinion. It meant freedom, however, even more so in the sense that it was a liberation from having to deal with life and the biological necessities that resulted from it.[31] The public space was "a sphere where neither rule nor being ruled existed",[32] and any life-related issues were thus excluded from this domain. Precisely the lack of problems pertaining to the maintenance and care of life were what made the political realm.

Establishing or maintaining this public space were, however, not regarded as political activities. From the same belief that in the realm of the political there is no command or obedience, whose relationship constitutes the household, it followed that war, to which both relations are also

[27] Ibid. 123.
[28] Ibid. 172.
[29] Ibid. 118.
[30] Ibid. 122.
[31] Ibid. 121.
[32] Arendt 1958, 33.

essential, does not belong to the political sphere.[33] As the conduct of relations with other city states did not have to proceed politically but force could be employed, foreign policy in general was regarded as a non-political activity.[34] In other words, in order to ensure that the city state remains free, the citizens of the *polis* had to strictly control its borders, which they regarded as non-political activity that, consequently, has nothing to do with freedom either.

Politics was later dissociated from freedom. Due to the strong influence of Augustine's reinterpretation of politics, its understanding changed with the advent of Christianity; politics released certain areas from its control, leaving them to religion.[35] Consequently, the meaning of public space altered: the site of appearance, characteristic to the Greek public space and so badly sought by Greek citizens, was to be avoided because that would have turned the Church into a worldly power.[36] Furthermore, doing glorious or even simple good acts for the sake of being commemorated was inconceivable for Christianity. Being a good Christian was the business of God and the person concerned; his deeds need not be shown in public because that would amount to hypocrisy.[37] The fulfilment of this project also necessitated that governmental issues were dealt with by the few (which itself was not a phenomenon exclusively characteristic to Christianity but had already been present at its advent), so that the many did not have to bother with common matters and could devote themselves to the mission of being a good Christian.[38] Politics were no longer identical with freedom; it preserved this meaning only in some ideas and practices like that of, as the German historian Leopold von Ranke termed, "the primacy of foreign policy".[39]

The juridical understanding of sovereignty is based on the premise that foreign policy has primacy over other policy domains. If the meaning of politics as freedom is preserved in the priority

[33] Arendt 2007, 165.
[34] Ibid. 129.
[35] Ibid. 139.
[36] Ibid. 140.
[37] Ibid. 137–138.
[38] Arendt 1958, 35.
[39] Arendt 2007, 144.

foreign policy, that means that the state can only choose the way of life of its own people without having to justify its choice to or comply with other states' expectations if it conducts effective foreign policy. Therefore, foreign policy is fundamental for modern nation–states in trying to maintain their freedom on the international scene;[40] only through foreign policy can they preserve their sovereignty.

In agreement with Arendt's presentation of the importance of the primacy of foreign policy for modern states, for Kenneth Waltz sovereignty means that a state can decide for itself "how it will cope with its internal and external problems", [41] which it can reasonably achieve only through the conduct of effective foreign policy. It does not mean, however, that states can act as they please, nor that they act in a vacuum, are unrelated to each other or that the action of one has no implications for another.[42] Sovereign states are the units of the international system, bound together by the political structures that emerge from their coexistence, and hence are interconnected and interdependent.[43] In practice, one may be stronger than the other, but in theory, they all have equal claim to international political activity.

International political activity understood as freedom means that the primary task of the state is to protect itself. The international system in which this protection has to be realised is a self-help system of theoretically equal states, meaning that they cannot absolutely rely on the help of another but have to take care of themselves. Each state must develop its own mechanisms to control the policy areas that it believes to be essential to maintain its status as a sovereign state in the international political system.[44] These areas cover domains that are related to what Waltz calls the "capabilities" of the state: material resources with the use of which it can influence international

[40] Ibid.
[41] Waltz 1979, 96.
[42] Ibid.
[43] Ibid. 91, 96, 104.
[44] Ibid. 105–107.

politics.[45] In practical terms, these can mean, besides the conduct of foreign policy, the command of army, border control, control of fiscal and monetary politics, etc.

The self-protecting aim of each state results in the similarity of the units across the international system. The units of an anarchic system, like that of the international, are functionally undifferentiated, precisely because the self-help logic does not allow them to develop dissimilar competences.[46] Each state has to develop its own mechanisms and capabilities to tackle similar challenges, because otherwise their interests would not be managed on the international scene and hence their survival would not be secured.[47] In this zero-sum game, each state is an individual, self-regarding player, and hence regards fellow states as enemies rather than friends.[48] Competition across the units for survival as sovereign states, on the other hand, leads to the enhancement of their mechanisms and capabilities.[49] This process ultimately results in similar units.

1.2. The Biopolitical Understanding of Sovereignty

The biopolitical understanding is based on a different approach to the meaning of politics. If the juridical approach asserts that states are concerned first and foremost with foreign policy for their freedom, the biopolitical approach argues that states are chiefly concerned about taking care of the life and the well-being of their citizens for their economic progress. The argument goes back to modernity which expected its states to take care of the necessities of life so that men could "develop their socially productive energies, to produce in common goods for a 'happy' life".[50] In line with Arendt, Michel Foucault argues that it was at the beginning of modernity when politics was reduced to the management of human affairs as the state had discovered the economic potential in the

[45] Ibid. 98.
[46] Ibid. 97.
[47] Kenneth N. Waltz, Reflections on "Theory of International Politics": A response to my critics, in: *Neorealism and Its Critics*, ed. Robert O. Keohane (New York: Columbia University Press, 1986), 342.
[48] Waltz 1979, 93.
[49] Ibid. 98.
[50] Arendt 2007, 142.

society and started to rationalise its operation.[51] This was due to a period of accumulation of wealth, relaxation and the end of endemics and famine, which was the result of general economic development, improvement of medical knowledge and agricultural techniques.[52] This point marks for Foucault when life first was taken into account as a relevant factor in history and "biological existence was reflected in political existence".[53] The life and the health of its citizens has become a matter of primary concern for the state.

The biopolitical understanding of sovereignty has its roots in the changes that, as Arendt shows, came with Christianity and then with modernity. In the Middle Ages, salvation became the highest goal of the individual, replacing the Greek concept of freedom, understood as the possibility of deciding on our own matters. The burdening management of common issues was not motivated, as it was for the Greeks, by the fear of being governed by others, whom by definition must be worse than themselves,[54] but by love for ones fellow man.[55] The work of doing politics was thus handed over to professional politicians so that people could act freely in their private lives; and the more this latter realm was at the expense of the former, the more people's freedom was regarded.[56] Hence politics, which for the Greeks was itself an end because it meant freedom, became a means for freedom.[57]

The role of politics has further changed with modernity. By the beginning of the 18th century, politics was less conceived of as a means to protect freedom and more as a means to take

[51] Foucault, 1978, 142.
[52] Ibid. 142.
[53] Ibid. 141–142.
[54] By definition, because for the Greeks it was obvious that their own issues can best be done by themselves and not by others. In principle, it was not inconceivable for them that others could have a better grasp of what in general is needed for a community, but quite simply because the community concerned is in the position of knowing the best what is good for itself. This idea was first attacked by Plato who developed the allegory of the cave and the theory of the philosopher king who must rule the many. Arendt 2007, 132.
[55] Ibid. 137.
[56] Ibid. 142–143.
[57] Ibid. 117, 132, 143.

care of life.[58] Life and its necessities gained dignity and came to the forefront of political matters while the religious sphere sank back into that of the private.[59] Arendt describes this process as the emergence of the social sphere, which, regarding its origins, neither belongs to the private, nor to the public realm, but which ends up coinciding with the political sphere, as governments tend to regard taking care of the life of their people as their primary political activity.[60]

This process had a remarkable impact on the relation between the sovereign and their subjects. If life becomes the highest end of politics, replacing freedom, this for Arendt means that social elements until then excluded from politics (women and workers) were becoming emancipated and equal with the rest.[61] Man acquired "inalienable" human rights.[62] This shift in the importance of life for politics, argues Foucault, is reflected in the transformation of "subjects" of the sovereign or the "people" into "natural processes to be managed" or "population".[63]

From the state's point of view, this process also resulted in the reconceptualization of power. Around the turn of the 17–18th century, besides the former, disciplining power, a new, regulating power was developing.[64] The former, practised primarily by the army and schools, via rationalisation of the capabilities of the human body, had an individualising effect and introduced the anatomo-politics of the human body.[65] The latter, addressing the natural life processes of a mass of people with techniques of public hygiene and enhancement of economic productivity had a massifying effect and achieved the biopolitics of the human race.[66]

As a result of such changes, the state aimed, first and foremost, at ensuring the well-being of its population via controlling life-related policy areas. The state established the sciences of

[58] Ibid. 144.
[59] Ibid. 141.
[60] Arendt 1958 28, 33.
[61] Arendt 2007, 144.
[62] Arendt 1962, 268.
[63] Foucault 2007, 67–70.
[64] Foucault 2003, 242–243.
[65] Foucault 1978, 139–140.
[66] Foucault 2003, 249.

statistics, demography and social medicine so that it could rationally control and manage the natural processes of the population.[67] This led to the emergence of various policy areas like that of public health, education and employment. The development of medical rationality, in which keywords are risk calculation, prescience and prevention, has imbued the whole of governmental planning.[68] A normalising goal was set, conceptualised both in individual terms, creating the idea of the "model man",[69] and in social terms, constructing the notion of the "normal society".[70] In France, for instance, the law adopted by the Consulate in 10 March 1803 (*la loi du 19 ventôse an XI*) founded the basis of a biopolitical regulation by designing a state politics of health and institutionalising public health standards.[71]

Nevertheless, effectively controlling policy domains pertaining to life necessitates cooperation between states. Sven Opitz argues that epidemics and the measures taken against them re-articulate the political space of the world by dismantling state borders, because "epidemics appear as singular moments of crisis that provoke the development of novel spatial orders and technologies".[72] Through applying the de-territorialising means recommended by intergovernmental organisations to respond to the crisis, the world is moving towards liberal worldwide governance, but states at the same time are re-articulating their sovereignty by implementing control systems, like screening and quarantine, that re-territorialise the disease. The contradiction of the traffic, i.e., the unimpeded circulation of individuals across the globe that is simultaneously "*a* risk and *at* risk" is reflected by the tension between the liberal end to keep the flow of individuals, and the sovereign means to filter out the threatening elements.[73]

[67] Foucault 1978, 145–146.
[68] Foucault 2007, 61–62.
[69] Foucault 2012, 34–35.
[70] Foucault 1978, 149.
[71] Christelle Rabier, Une révolution médicale? Dynamiques des professions de santé entre révolution et empire (In English: "A medical history? Dynamics of health professions between the Revolution and the Empire"), in: *Annales historiques de la Révolution française*, ed. Armand Colin, 359 (2010), 152. <https://ahrf.revues.org/11451> Last accessed: 31 May 2016.
[72] Opitz 2016, 266.
[73] Ibid. 271–274. Italics in the original.

The tension between state sovereignty and economic progress is rooted in early modern Europe, and has been released by economic speculation that pushed states towards domestic liberalisation and international power balance. The physiocrats and the political economists of the 18th century in general developed a rather sophisticated view of the population.[74] They assumed that it was basically a set of natural processes, conditioned by several factors (climate, material surroundings, circulation of wealth, laws, customs, moral and religious values, means of subsistence).[75] They also pointed out that by affecting these factors one can indirectly influence on the productivity of the population.[76] In other words, they realised that not the direct intervention of the disciplining power but the careful creation of the appropriate context by the regulating power could affect positively the life and the productivity of the population, so the rational planning machine of the government was set into motion. The governments of Europe already in the 18th century discovered that if they develop the mechanisms of the police state with unlimited internal objectives, while maintaining the balance of states, in terms of their power, across the continent, an unlimited economic progress could be achieved in the long run.[77] The European stability, so argues Foucault, was built on the notion of the plurality of its equal units that colonise the rest of the world they maintain relation with.[78]

Consequently, the image and the role of the market changed fundamentally in the 18th century. Before the middle of the century, the market was a distributive force, a "site of jurisdiction", because it was invested with several strict regulations, aiming to set a decent price for the products exchanged, and also to ensure that the least well-off could buy food for themselves.[79] After this period, however, the market transformed into the "site of veridiction", meaning that the price established by pure market mechanisms was regarded as the normal or good price for a

[74] Foucault 2007, 69.
[75] Ibid. 70.
[76] Ibid. 71.
[77] Foucault 2008, 51–54.
[78] Foucault 2007, 385–386.
[79] Foucault 2010, 30.

product, regardless of its implications for the social actors.[80] In other words, the responsibility of deciding who and how should get along, initially determined by the Church and the political power through the maintenance of the feudal social order, was tacitly assigned to market mechanisms.

Governments were trying to produce the citizen most appropriate to pursue the governments' policies. The above described goal of normalising the society has been approached not only by the establishment of certain policy domains, which is the task of the disciplining power, but also through the spread of discourses with the aim of setting specific norms, which is a kind of indirect mediation, managed by the regulating power.[81] As Foucault puts it, "a power whose task is to take charge of life needs continuous regulatory and corrective mechanisms. It is no longer a matter of bringing death into play in the field of sovereignty, but of distributing the living in the domain of value and utility."[82] Not bounding by the force of law, norms have been one of the set of the subtle techniques of governmental rationality (or governmentality, a term coined by Foucault in the late seventies) by which the context appropriate to make the population produce the most they can could be created, by socialising them into thinking that increasing production is a social value.

To sum up, these two approaches to state sovereignty conceptualise their subject based on fundamentally different categories. The juridical approach argues that the international political sphere is a self-help system of states, which play a zero-sum game for material resources to develop similar capabilities, in order to maintain their status as sovereign entities, and, being wholly driven by their own interests, they treat each other rather as enemies than friends. As the maintenance of their own way of life without having to justify it is of utmost importance, nothing is more natural

[80] Ibid. 31–32.
[81] Foucault 2003, 38.
[82] Foucault 1978, 144.

for states than bringing a policy area that is related to this way of life, which must by definition contribute directly to their international performance, under state control.

The biopolitical approach, on the contrary, argues that states are primarily interested in their economic progress, to which the key element is the well-being of their population, therefore states are keen to enhance the living standards of their citizens. To further this aim, states are willing to harmonise their interests and cooperate with each other, also by dismantling national borders, if needed. In other words, the importance of socioeconomic matters for states is so great that even their own political authority is worth sacrificing in order to settle them.

CHAPTER 2: A HISTORY OF REGULATIONS ON FOREIGN HEALTH WORKERS

In the 18–19th century, there was a tension in state practices across Europe. On one hand, the state defined and granted for the first time inalienable rights to its people and released certain areas from its control. For instance, the 1789 *Declaration of Rights of Man and Citizen*, first adopted in France and then spreading as one of the guiding principles of constitutions worldwide,[83] contained that all men were free and were equal in rights; specified the rights of liberty, private property, the inviolability of the person, and resistance to oppression; determined freedom of religion and speech, and also established the rule of law. On the other hand, there were new domains, previously left unregulated by law, which the state started to exercise control over. The adoption of the *Code Napoleon* in France in 1804 and its spread throughout the whole world clearly exemplified this process.[84] It brought military, criminal, civil and commercial issues under control but had no religious content, which delimited the strategically important policy areas, and also signed the questions to which state power was indifferent. The sovereign right of coinage remained a state monopoly,[85] state armies grew at unprecedented pace,[86] and public health became a public policy agenda.[87] The increasing importance of economics in world politics was reflected in Napoleon's decision on the introduction of the continental trade blockade in 1806 to destroy the United Kingdom economically, assuming that it would destroy the Kingdom politically, too.

This tension can be shown in the state regulations on specific professions. As the above list demonstrates, the priorities of the state were changing, and this shift was also mirrored in the

[83] Arista Maria Cirtautas, France, in: *Comparative politics: interests, identities, and institutions in a changing global order*, ed. Jeffrey Kopstein (Cambridge University Press, 2014), 72.
[84] Xavier Blanc-Jouvan, "Worldwide Influence of the French Civil Code of 1804, on the Occasion of its Bicentennial Celebration" *Cornell Law School Berger International Speaker Papers* 3 (2004) Paper 3. 1. <http://scholarship.law.cornell.edu/biss_papers/3> Last accessed: 19 May 2016,
[85] Paul D. Van Wie, *Image, History, and Politics: The Coinage of Modern Europe* (University Press of America, 1999), 55.
[86] David Blackbourn, *History of Germany, 1780–1918: The Long Nineteenth Century* (Blackwell Publishing, 2003), 17.
[87] George Rosen, *A history of public health* (John Hopkins University, 1993), 137.

regulation on certain professions. As the name "university" suggests, graduates from the prominent universities of Europe were previously welcome to practise their professions in each monarchy of the continent because the education they received was regarded as universal, but by the turn of the 19th century, this liberty came to an end, at least in terms of health professions.

In this chapter I briefly present the history of European public health and state regulations on the entry of professionals into healthcare. The chapter illustrates how healthcare gained increasing importance for European states of the 19th century, at the time of the national awakening throughout the continent. In terms of the adoption of regulations on foreign health workers, my aim is limited to explore the origins of the process in France and the United Kingdom.

In this chapter, we can see both the juridical and biopolitical approaches presented in chapter one playing out, in two conceptually different ways. I show that states started to bring an economic area under direct control, suggesting that the domain has strategic importance for maintaining the state's status as sovereign. Nevertheless, I also demonstrate that states started to devote distinct attention to the life and health of their citizens as they developed the concept of public health and introduced regulations on foreign health workers.

I start with the discussion of the idea of labour market discrimination against certain physicians in the early modern Europe, building on Jonathan Gil Harris's[88] empirical study on this subject. Then I summarise how the idea of state as responsible for the health of the society developed and paired with state regulations on the entry of foreign graduates into healthcare, largely relying on the historical works of Michel Foucault, George Rosen and Dorothy Porter.[89] I conclude by claiming that European nation–states indeed started to devote distinct attention to the life of their population at the time of the national awakening.

[88] Jonathan Gil Harris, *Foreign bodies and the body politic: discourses of social pathology in early modern England*. Vol. 25. (Cambridge University Press, 1998).

[89] Dorothy Porter, *The history of public health and the modern state*. (Editions Rodopi, 1994); Dorothy Porter, *Health, Civilization and the State: A History of Public Health from Ancient to Modern Times.* (London; New York: Routledge, 1999); Dorothy Porter: *Health Citizenship: Essays in Social Medicine and Biomedical Politics* (University of California, San Francisco, 2011).

Discriminating against someone in the health labour market with legal measures by virtue of belonging to a "different group" is well rooted in European history. As Gil Harris has shown, well before the era of national awakening or the development of the modern concept of hygiene, the body politic of early modern Europe was already formulated and turned against the "other" practitioner, who, for the people of the Europe who at that time overwhelmingly defined themselves as Christians, was the Jew, for example. The social image of the Jewish doctor, nourished primarily by folk narratives and popular beliefs, and articulated as common sense,[90] in early modern Western Europe was founded on an antagonistic ambiguity: as Jews, they were regarded as malicious poisoners, but as Jewish physicians, they were treated as "medicinal presence".[91]

The ambiguous social imagination of the Jewish doctor did not discriminate according to social classes. In the 15th century, the Castilian court decreed that "no Jew could be surgeon or physician, except for the king's personal doctor".[92] The English king Henry IV and several French nobles, defying existing norms and also their own rules enacted against Jewish practitioners, also frequently employed Jewish doctors in their courts.[93] This fact is even more interesting if put against the historical background. Just to mention two remarkable and enduring examples, set by the great powers of their era, English courts in the Middle Ages went as far as prohibiting for nearly three centuries Jews from setting foot in England,[94] and the enlightened Russian Empress Catherine the Great created the "pale of settlement", determining in clear geographic terms where her Jewish subjects were allowed to live, that lasted for more than one hundred years, preventing Jews from moving "too close" to the centre of the Empire.

[90] Harris 1998, 85.
[91] Ibid. 86.
[92] Ibid. 85.
[93] Ibid.
[94] Ibid. 81.

The necessity of discrimination against foreign practitioners was also supported with publications that were regarded as 'scientific' by contemporary academic communities. As Harris has shown, the conviction that one people's body is distinct from all the rest has its roots in early modernity.[95] The author presents the famous anatomist John Banister's book, the *Historie of Man*, published in 1578, in which Banister contests a temporal and spatial differentiation of the human body, claiming that the modern body has in general shrunk since the Antiquity, but it has further varied across nations, depending on where these nations lived.[96] In his catalogue of national bodies, Banister points out that the English nation's body takes the splendid middle way between the bodies of people living in the cold northern regions and the hot southern territories.[97] Similar theses reflected and contributed to the development of hierarchical racial and social imaginations. [98] This tells us that the legal discrimination of the "other", conceptualised either in religious or in national terms, was already embedded in the European thinking at the time when states started to regulate the entry of foreign nationals into their healthcare labour market.

The idea of the state as responsible for the health of the society started to develop with the advent of modernity. According to Dorothy Porter, the development of public health in Europe was the result of a mixture of different factors. It was partly due to a spreading philanthropic effort, but in most countries, the idea of rational government, political expediency and economic utilitarianism played the dominant role in its success.[99] In other words, the old regimes started to comprehend that the subject who dies cannot pay taxes, and hence wars fought for political reasons unbearably charge the diminishing reserves of the Treasury.

Medical knowledge gained increasing importance and its authority became ubiquitous. In tandem with such realisations, argues Foucault, more and more aspects of life became medicalised,

[95] Ibid. 20–22.
[96] Ibid. 21.
[97] Ibid.
[98] Ibid.
[99] Porter 2011, 30.

that is, were imbued by medical content and perspectives.[100] The social space was increasingly penetrated by the medical space as the result of the people's rising awareness of their health, and this endowed doctors with increasing authority over multiple aspects of the life of their patients, entitling them to a differentiated supervision.[101] This development ultimately led to the emergence of two myths. On one hand, there was the myth of the nationalised medical profession, organised similarly to the clergy, as its tasks were regarded as similar in kind ("are not doctors the priests of the body?"), and on the other hand, due to the spreading preventive measures, the myth of the disappearance of disease.[102] Although this latter could have reduced the importance of doctors, it instead led to the growth of their role as medicines were more and more linked with the "destinies of states".[103]

The implementation of the idea of public health was, however, not a smooth or a generally successful phenomenon. It faced two major practical obstacles as the appropriate medical knowledge was still lacking across the continent, and the administrative apparatus in general was premature to satisfactorily realise the conception nationwide.[104] In other terms, healthcare was not regarded as strategically important area by states and so they did not invest much into it so it. As it required a change in the approach of states to their societies, the actual development of the concept of public health started only at the end of the 18th century, and was largely limited to German-speaking lands, revolutionary France and Victorian Britain.[105]

Health as a public policy issue entered a different stage in the second half of the 18th century, in the German lands of enlightened despotism. The term "medical police" was coined in 1764, inspired by political theorists, and it meant the creation of a medical policy by the government and

[100] Foucault 2012, 30.
[101] Ibid. 31.
[102] Ibid. 31–32.
[103] Ibid. 34.
[104] Rosen 1993, 137.
[105] Ibid.

its implementation through administrative regulation.[106] Even though this idea was never realised in its original form, its impact cannot be ignored because it served as the basis for other medical ambitions in France and Britain, where similar efforts were taken only at the beginning and the middle of the 19th century.[107]

The public health leader at this time was France. In order to protect the profession from "charlatans, quacks, and 'unqualified and incapable persons practising medicine'", decrees of Marly were issued already in 1707,[108] though they primarily dealt with the regulation of medical education.[109] At the end of the century, it was already clear that "a free state that wishes to maintain its citizens free from error and from the ills that it entails cannot authorize the free practice of medicine".[110]

Philanthropic concerns and utilitarian considerations mingled in state plans and actions. Between 1790 and 1792, the Constituent Assembly and then the National Convention of France declared health to be one of the rights of man.[111] To make sure that qualified physicians were treating French patients, a law enacted by the Consulate brought remarkably new perspectives into the regulation of health professions. *La loi du 19 ventôse an XI*, that is, the Law adopted in 10 March 1803, represents a rupture between the old and the new regimes of health professions.[112]

This law created the administrative framework and also the apparatus which, replacing and substituting the old corporations, continued the war against illegal work.[113] Regarding its main

[106] Ibid.
[107] Ibid. 143–144.
[108] Foucault 2012, 44.
[109] Salomon-Bayet Claire, "L'institution de la science: Un exemple au XVIIIe siècle" (In English: The institution of science: An example from the 18th century) *Annales. Économies, Sociétés, Civilisations*. 5 (1975), 1040.
[110] Foucault 2012, 46.
[111] Porter 1994, 8.
[112] Rabier 2010, 148.
[113] Ibid. 158.

purposes, it prohibited the practice of health profession without diploma,[114] and so aimed at defining in legal terms whom it recognised as legitimate physician, surgeon or health officer. Its first article reads:

> From the 1er vendémiaire an XII [*the first day of the following year of the Republican Calendar*], no physician, surgeon or health officer is allowed to practise their profession without being examined and recognised as it is prescribed by the present law.[115]

Whereas Article 3 grants the right to practise to all the physicians and surgeons who started practising in the *ancien régime*,[116] Article 4 reads that the government, if it finds it convenient, can grant the right to practise in France to foreign physicians and surgeons, and to foreign graduates, only after having examined each proposed case separately.[117] Article 35 specifies the sanctions applicable to those who practise without having permission to do so:

> Every individual who, after six months from the publication of the present law, practises medicine, surgery or delivery, and is not on the list of those specified by Article 25, 26 and 36, and has no diploma, certification or reception letter, will be prosecuted and condemned to a monetary fine, owing to hospitals.[118]

These regulations did not ease later either. According to the Decree of 18 October 1834, foreign physicians who sought to practise in France had to hold a diploma at one of the three faculties of the Kingdom: "*this title* [i.e. that of the physician] *can be given on the advice of the Royal Council of Public*

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[114] Luc Forlivesi, *Santé publique et hygiène, 1800 – 1940* (In English: "Public health and hygiene, 1800–1940"). Répertoire numérique de la sous-série 5 M. Archives Départmentales, Tours, (2007), 4. <http://archives.cg37.fr/UploadFile/GED/Archives1800-1940/1178520065.pdf> Last accessed: 20 May, 2016.

[115] Rabier 2010, 148. In the original: "À partir du 1er vendémiaire an XII, nul ne pourra embras ser la profession de médecin, de chirurgien ou d'officier de santé, sans être examiné et reçucomme il sera prescrit par la présente loi".

[116] Guill Favard de Langlade, *Répertoire de la nouvelle législation civile, commerciale et administrative : ou analyse raisonnée: des principes consacrés par le code civil, le code de commerce, et le code de procédure; par les lois qui s'y rattachent; par la législation sur le contentieux de l'administration; et par la jurisprudence* (In English: "Register of the new civil, commercial and administrative legislation, or their rational analysis: the principles dedicated to the civil code, the commercial code and procedural code; by the related laws; by the legislation on the disputes of the administration; and by the jurisprudence"). Vol. 4. (1823), 283.

[117] Archives Nationales (In English: National Archives), 2005. <https://www.siv.archives-nationales.culture.gouv.fr/siv/cms/content/display.action?uuid=abcdbb0c-0bcf-4c30-8b53-f6fd0b671ac3&version=3&preview=false&typeSearch=&searchString=> Last accessed: 20 May 2016.

[118] Langlade 1823, 284. In the original: "Six moins après la publication de la présente loi, tout individu qui continuerait d'exercer la médecine ou la chirurgie, ou de partiques l'art des accouchements, sans être sur les listes dont il est parlé aux Article 25, 26 et 36, et sans savoir de dilpôme, de certificat ou de lettre de réception, sera poursuivi et condamné à une amende pécuniaire envers les hospices".

Education".[119] The list of registered foreign physicians starts with the year 1813, and contains data up to 1866.[120]

The entry of foreign graduates into healthcare, so it can be said, was under direct and strict state control in France, starting from the beginning of the 19th century. It was the government and then the Royal Council of Public Education who were charged with the decision on the case of each foreign graduate applicant. The Law of 10 March, 1803, founded the basis of a biopolitical regulation by designing the state politics of health,[121] and these foundations were further advanced throughout the century.

These regulations on the practice of foreign graduates in France were relatively strict when compared to the public administration of healthcare of French society. The commitment of politicians of the 19th century to liberal political–economic philosophy long hindered the evolution of state apparatus of disease prevention,[122] even though the philosophy they subscribed to recognised that prevention is economically beneficial.[123] Because of the tension between the individual rights and the state duties, "not until the 'Pasteruisation of France' did the medical administration of public health became a national policy agenda".[124] Healthcare was recognised as a strategically important area. Throughout the whole 19th century, France was balancing between the statist model of the German territories and the *laissez-faire* model of the United Kingdom.[125]

The British public health agenda was shaped under the aegis of private initiatives and utilitarianism. In response to the then-developing axioms of political economy, Jeremy Bentham constructed his theory of utilitarianism, in which civil law created the framework for the operation of market mechanisms, so that the greatest degree of freedom was achieved while benefiting the

[119] Archives Nationales, 2005.
[120] Ibid.
[121] Rabier 2010, 152.
[122] Porter 1999, 100.
[123] Porter 1994, 8.
[124] Ibid. 10, 14.
[125] Porter 1999, 104.

greatest number of people.[126] In the first decades of the 19th century, however, there was still no state agency running public health policy. Various aspects related to health issues and public hygiene were dealt with by various companies and local authorities, but in the lack of full responsibility they did not perform an altogether satisfactory work, so a unitary, comprehensive approach was missing.[127]

This situation was about to change in the 1830s, strictly in accordance with the utilitarian idea. Concerned about the "rising cost of poverty",[128] friend and follower of the philosophy of Bentham Edwin Chadwick became convinced that the general filth and dirt in the cities caused disease, which he viewed as the root cause for pauperisation, leading to the general phenomena of alcoholism, crime, overcrowding and violence.[129] In 1832, he was appointed by the Royal Commission to inquire the operation and administration of the New Poor Laws of 1834 which, in the absence of an independent public health policy area, covered also public health issues.[130] In this quality he had opportunity to turn his "sanitary idea" into reality, building on the conviction that civil engineering can result in the general improvement of hygienic and sanitary conditions of the society.[131]

It was in the middle of the century when public health management was organised under largely state responsibility. The sanitary idea was replaced by the concept of "state medicine", a nearly socialistic idea based on a comprehensive and centralised approach to public health.[132] Subscribing to this model, the first Public Health Act was adopted in 1848, creating the central agency of the General Board of Health which cooperated with local authorities in managing public

[126] Porter 2011, 28.
[127] Rosen 1993, 135–136.
[128] Ibid.
[129] Porter 2011, 30.
[130] Rosen 1993, 175.
[131] Porter 2011, 33.
[132] Ibid. 34.

hygiene and health issues.[133] This marked a "major landmark" in public health policy,[134] but did not dissolve aversions against state intervention. The Victorian state administration of public health was stuck between two antagonistic expectations throughout the century: legislative and professional purposes demanded further, systematic, compulsory state regulations, whereas the Victorian society remained "suspicious of paternalistic despotism".[135]

The Medical Act of 1858 was the first law issued by the state that regulated the practice of foreign medical graduates in the Kingdom. The Act was a milestone in the development of the medical profession,[136] as it "marked the beginning of the modern system of medical training".[137] Its main purpose, as defined in the preamble, was to ensure qualified medical aid to those in need of it.[138]

According to the Act, every health professional worked illegally in the Kingdom unless his qualification was recognised from the list attached to the Act and payed the registry fee. The list attached to the Act (Schedule A) specified those whose qualification was recognised.[139] With regard to foreign graduates, it claimed that those who had started practising in the United Kingdom before 1 October, 1858

> shall produce Certificates to the Satisfaction of the [*General*] Council of his having taken his Degree of Doctor of Medicine after regular Examination, or who shall satisfy the [*General*] Council, under Section Forty-five of this Act, that there is sufficient Reason for admitting him to be registered.[140]

[133] Rosen 1993, 196–197.
[134] Ibid. 197.
[135] Porter 2011, 41.
[136] Christopher Ham, *Health policy in Britain* (Palgrave Macmillan, 2009), 8.
[137] Rosemary Stevens, *Medical practice in modern England: the impact of specialization and state medicine* (Transaction Publishers, 2003), 23–24.
[138] Medical Act of 1858. 677. <http://www.legislation.gov.uk/ukpga/1858/90/pdfs/ukpga_18580090_en.pdf> Last accessed: 20 May, 2016.
[139] Ibid. 681.
[140] Ibid. 693.

Section XXXIV specifies that everyone registered shall be regarded as a "legally qualified Medical Practitioner" or "duly qualified Medical Practitioner",[141] whereas Section XXXVI specifies that those not registered shall not practise as physician in any medical capacity.[142]

Strangely enough, foreign graduates who had not started practising before the Act was passed were not even explicitly mentioned. According to Section XLVI, the General Council had the ability to grant an exception to holders of foreign diplomas already practising in the United Kingdom from the provisions specified in Schedule A, but it said nothing about foreigners only aspiring to set up their medical career.[143] As there were clearly defined provisions for those who had already practised by the time the Act was passed (and in general for everyone wishing to practise as a physician, regardless of nationality), it can be assumed that the General Council *ex officio* had to decide on the cases of foreign graduates who had not yet practised in the Kingdom, either by granting them exception or by examining their qualifications.

Briefly, in the middle of the 19th century, the recognition of foreign qualifications in the United Kingdom was brought under state control. The competent authority, that is, the General Council made clear distinction between compatriots and foreigners in this respect, as it had the right to decide on the certification of foreign graduates, either by revising their foreign qualifications or by exempting them from such examinations.

In this chapter I have established that there were tensions in state practices in the 18th and 19th century, as states tended to devote distinct attention to seemingly dissimilar and contradictory policy areas, while releasing others from previous control. I have demonstrated that discrimination against physicians who were regarded as "strangers" in the labour market has had a long history in Europe. This discrimination was institutionalised later when the "other" was not defined anymore

[141] Ibid. 686.
[142] Ibid. 687.
[143] Ibid. 689.

in terms of the weakening religious identity of the people, but according to the developing national identities. I have summarised the development of public health policy that took different paths in various parts of Europe, but as a public policy issue it first appeared in the second half of the 18th century. I have also shown that in France and in the United Kingdom, the development of public health apparatus paired with the advancement of specific policing regulations on the entry of foreign professionals into the health labour market. Briefly, it can be said that although both states were balancing between centralised and decentralised models of state control, they were nonetheless leaders in administering public health issues, and, among them, the entry of professionals into the health labour market. Now, the question remains how the regulations on foreign health workers can be explained. This question will be explored in chapter three.

CHAPTER 3: A HYBRID APPROACH TO SOVEREIGNTY

I have presented in the above theoretical chapter what the juridical and the biopolitical approaches to sovereignty mean today and how they were developed. Up to this point, one seemingly remains with two different conclusions regarding these approaches. On one hand, from the juridical point of view, it can be argued that the state can survive as a sovereign state in the international system only if it can manage everything on its own that is needed to protect its freedom. In practical terms, it means that states should aim to keep the domains essential for their survival under the greatest control possible, and *vice versa*. Due to the limited resources that are at states' disposal, those domains that are the most highly and directly controlled must be those that are strategically the most important. The understanding from biopolitics, on the other hand, requires the most liberal, invisible, non-interventionist and non-politicised state possible, which lets people move, work, circulate the way they please, because that has been proved to be economically the most productive. To put it another way, states engaged in biopolitics should enhance the fundaments of their economic progression, that is, human resources, also at the expense of their own spheres of political activity, to ensure the least constraint on people's productive activity.

It turns out, however, that the most strictly regulated economic domain within the European Economic Area currently is that of healthcare. It means that if a citizen of a Member State, who is a qualified health professional,[144] moves to another Member State with the aim of working there, they cannot practise their profession straightaway, but must apply for the recognition of their diploma to the authorities. The trend of regulating health professions at the greatest share, that is, at the expense of other professions, can be detected both in general, cumulative terms, in the aggregate statistics of the EEA, and on individual, country-based cases, in every single Member State, separately.[145]

[144] Health professional meaning nurses, midwives, doctors, dentists and pharmacists.

[145] "The EU Single Market, 2016".

This trend simultaneously justifies and rejects both the juridical and the biopolitical approaches. Regulation of an area means that the state aims to maintain direct control over that domain, which suggests that the domain is of strategic importance. Therefore, according to the juridical understanding, must be somehow related to the zero-sum game between states in the international system. Nevertheless, the object of regulations is healthcare, which is a typically biopolitical domain, suggesting that states are highly interested in ensuring the well-being of their population, because this guarantees their economic progression. For this purpose, in the biopolitical understanding, states are ready to sacrifice their political authority to some extent. Nevertheless, neither of these approaches offers a satisfactory explanation for the problem of regulations on the entry of foreign graduates into healthcare, the history of which I have reconstructed in the empirical chapter above. But what makes health professions strategically important so that they are worth regulation? Or, the other way around, what is the point of impeding the free circulation of highly qualified immigrants?

In the following, building on Giorgio Agamben's theory of sovereignty, I offer a hybrid approach that I claim can better explain this phenomenon. Agamben's theoretical argument is that the elementary categories of Western political philosophy are not "friend" and "enemy" or "life" and "politics", which cannot account for the historical facts of the 20th century, but that of "bare life" and "political existence". Below I show how his approach combines the law- and life-centred understandings of sovereignty characteristic of the juridical and the biopolitical approaches, by taking both law and life as its pivotal concepts.

Agamben argues that the modern nation–state was initially designed to carry out an intertwined project which was related to both law and life. As to the legal dimension, he asserts that the "nation–state means a state that makes nativity or birth [*nascita*] … the foundation of its own sovereignty".[146] Therefore, a nation–state means that the nation has its own state, thus the

[146] Agamben 2000, 20. Italics in the original.

nation is the sovereign of its own state, being in the position of setting the end to and supervising the operation of its own juridico-political apparatus; or in more general terms, can freely define its own way of life. With regard to the dimension of life, Agamben argues that since modernity, the state was dedicated to transforming every newly born man into a citizen, to whom its laws apply, and so who, being the unit of the nation and, therefore, the bearer of sovereignty.[147] The aim of the nation–state was thus to carry out the following syllogism: (1) only the citizen is the bearer of sovereignty; (2) but every man is a citizen; (3) every man is the bearer of sovereignty.

Within the framework of the nation–state, sovereignty is thus deeply related to both law and life. Since there are territorial limits to the observance whether law is being complied with, and the abstract concept of nativity assumes the fundamentally physical process of birth, law and nativity both have a spatial quality. The principle of the nation state is thus the "trinity of state–nation–territory".[148] That is, the running of the juridico-political apparatus that administers birth or nativity, when it happens within certain spatial limits.

Law and life also presuppose and necessitate each other. Referring to Carl Schmitt, Agamben argues that law needs the factual regularities of life to which it can be applied.[149] Within the framework of the nation–state, such factual regularities are the birth and death of citizens, the emigration of some citizens to other states, the immigration of citizens of other states, and the mere routinized processes of everyday life, too.[150] Should these regularities stop occurring all at once, law would have no point to be applied to; it is the collective of such regularities that form the framework within which law can be meaningfully applied. Such framework was the modern

[147] Agamben 1998, 8. Agamben brings the Declaration of Rights of Man and Citizen (*La déclaration des droits de l'homme et du citoyen*) to exemplify the first efforts of the nation–states, drawing attention to the fact that "it is not clear whether the two terms *homme* and *citoyen* name two autonomous beings or instead form a unitary system in which the first is always already included in the second". Ibid. 126 – 127. Italics in the original.

[148] Agamben 2000, 21.

[149] Agamben 1998, 16.

[150] From legal point of view, both guilty (e.g. people steal private property from time to time) and non-guilty (e.g. citizens do sports from time to time) regularities count as normal, without regarding to their moral dimension. Ibid. 27.

nation–state, rising at the end of the 18th century. Nevertheless, these factual regularities also necessitate the application of law, so that order and the possibility of coexistence within a territory is ensured.[151] In other words, people comply with the law if that sanctions their deviations from it, and adapt themselves to the new legal environment. This can occur, for instance, by defining themselves in terms of legal categories, as it happened in the 19th century, at the time when "nations awakened" and started to historicise their origins, legitimising their domination over other, not recognised socio-political structures.[152]

There is a certain amount of change, a backlash in these processes that law still recognises as normal – but there is also a threshold to them. From below that threshold, law can be applied as it is recognised as normal because it is claimed that the framework remained the same as it was to which law had been designed to be applied.[153] From above that threshold, however, law cannot be applied as usual but must be suspended because the framework has changed to such an extent that it is no longer the same, and therefore law loses its validity.[154] This case is the state of exception, which is an excuse from law.

But when law is suspended, it is non-applied, which is a kind of application, too. Although in the state of exception law is suspended, it still has a relation with what is does not apply to anymore, and Agamben calls this relation "abandonment".[155] Therefore, as the maintenance of the normal framework ultimately constitutes law, the suspension of law in the state of exception, which is also a kind of application, constitutes law, too.[156]

What the sovereign decision is ultimately made on is the relation of life and law. Agamben agrees with Schmitt on the point that what is recognised as normal, that is, being inside the normal

[151] Ibid. 26.
[152] Agamben 2000, 20.
[153] Agamben 1998, 16.
[154] Ibid. 19.
[155] Ibid. 28–29.
[156] Ibid. 26.

juridical order, or as exception, i.e., being outside of it, is indeed a matter of a sovereign decision.[157] This decision is made on the threshold which divides the normal framework from the exceptional. However, as law it is applied both inside the normal juridical order and outside of it through its non-application, therefore, it is in the constant position of animating those factual regularities of life in both spheres to which it can be applied or non-applied to.[158] Again, there are mutually constitutive relationships between the regularities of life that necessitate law in order to coexist in peace and order, and law also presupposes these regularities, because these are its reference points. Accordingly, the nation–states regulating the entry of foreign professionals into healthcare in the 19th century can be described as a legal consequence or manifestation of the fact of the "national awakening", which, however, would have not been possible without the creation of the legal concept of the nation–state. As Agamben puts it, "in this impossibility of deciding if it is guilt that grounds the rule or the rule that posits guilt, what comes clearly to light is the indistinction between outside and inside and between life and law that characterizes the sovereign decision on exception".[159] What the sovereign decision is ultimately made on – whether the matter concerned is inside or outside the normal juridical order – thus, can be the matter both of life, the regulation of which law was originally made, and law, something that is animated by law to serve as its reference point. In other terms, the issue can be both originally factual and law-made.

This paradox was exemplified by the First World War and the role of the nation–state in it. The First World War resulted in such changes (the creation and dissolution of states) that produced more stateless people (who are men living without being the bearer of sovereignty of any state) than the nation–state was originally designed to be able to deal with.[160] Such masses were not counted not as a backlash of normal processes but as exceptional cases high above the threshold of the normal framework; and accordingly, law applied to them by no longer applying, by

[157] Ibid. 25.
[158] Ibid. 26.
[159] Ibid. 27.
[160] Agamben 2000, 15–16.

suspending itself.[161] But the fact of being stateless was the result of the sovereign decision that had created the nation–state and thus had aimed to turn every man into a citizen of a state. Or in more general terms, law created a category in life which thus became a fact with its factual implications for people, who then served as a reference point to law.

This, of course, was not a planned outcome for nation–states. The nation–state was initially imagined in a way that life (birth/nativity), law (state) and the space where these two meaningfully constitute each other (territory) would necessarily correlate and determine one another, and would not raise doubts about the validity of the other. Certain slight changes happened always but were regarded as secondary phenomena under the threshold, especially at the time of the rise of national awakening ("who would go and live in a foreign state when having an own nation?"). Nevertheless, when this assumed necessary correlation was exposed as a fiction in the First World War, the principle of state–nation–territory disintegrated: "the birth–nation link has no longer been capable of performing its legitimating function inside the nation–state, and the two terms have begun to show themselves to be irreparably loosened from each other".[162] Several European states altered their laws on who counted as citizen proper and who counted as "citizen of 'enemy origin'", and denationalised those who fell under the latter category from 1915 onwards.[163] The "inalienable" human rights, as Agamben argues in reference to Arendt, which were supposed to ensure that the fundamental rights of these people for whom no state assumes responsibility (the stateless) are still protected even in this exceptional case outside the normal juridical order, were effectively not defended by any state.[164] Millions of men ceased to become citizens; they were actually turned from citizens to men. The state started to eradicate the foundations of its own sovereignty: the original project of the nation–state failed completely.

[161] Ibid. 17–19.
[162] Agamben 1998, 131–132.
[163] Agamben 2000, 17.
[164] Ibid. 17–19. Also see Arendt 1962, 271, 277–279.

The evidence that such decisions are being constantly made by the sovereign has been provided since the beginning of the 20th century. The process of producing lives absolutely deprived of their rights, both as citizens and as human beings – life that Agamben calls bare life – reached its horrible excellence in the Third Reich, but has been still going on ever since.[165] As Judith Butler argues, the reconsideration of whom any law applies to, which in this sense means that entitles them with certain rights, is an activity frequently performed by today's sovereigns, often with reference to preventive purposes. She analyses a specific type of detainee of Guantánamo Bay who has not even committed the crime yet, but as a suspect is already being detained.[166] In other words, in order to animate the state of exception, law no longer needs the factual evidences produced by life (and indirectly by itself), and hence the suspension of law can last *ad infinitum*. In order to protect life, which in this case is the life of the American people, the law of the United States suspends itself and detains life in an "indefinite detention". The sovereign is thus in the constant position of reasserting its foundations, to which both law and life are fundamental.

As law has been suspended in reference to *nothing*, we are living the age when exception becomes the rule. Agamben argues that it has become so common to suspend law that we do not even know its application from its suspension anymore.[167] Law and exception, inside and outside, the political existence of the citizen and bare life of the man have become indistinguishable. This is the logic, the varied application and non-application of law that underlay the operation of the nation–states of 20th century which made the transformation of democracies into totalitarian regimes and then the same transformation of totalitarian regimes back into democracies possible.[168] This logic, as Agamben asserts, has prevailed, precisely because "the great State structures have entered into a process of dissolution", and therefore nation–states suspend the application of their

[165] Agamben 1998, 171. For this, see also Giorgio Agamben, *Remnants of Auschwitz: The witness and the archive* (Zone Books, 1999).
[166] Judith Butler, *Precarious life: The powers of mourning and violence* (Verso, 2006), 76.
[167] Agamben 1998, 115.
[168] Ibid. 121.

laws to animate the state of exception, trying to preserve their sovereignty.[169] The contradiction is that they can achieve it only through the eradication of the very foundations of their sovereignty.

Agamben's theory is thus radically different from what I have presented as the juridical and biopolitical approaches. He argues that the elementary categories of Western political philosophy are not "friend" and "enemy", but not even that of "life" and "politics", but that of "bare life" and "political existence": the man deprived of all human rights and the citizen.[170] The mutually constitutive relation between law and life, where law presupposed life and life necessitated law, has turned into a new one where law constantly reproduces those factual regularities of life which it addresses as exceptions and applies to through its suspension. In other words, exception has become the rule.

The reason for the strict state regulation on a fundamentally life-related policy area thus comes to light. The modern nation–state, the original project of which was to make bare life and political existence coincide and thus to constantly recreate the foundation of its own sovereignty, was concerned with both the protection of its own way of life as its citizens conceive of it, and also with taking care of the life of its citizens, making sure that every newly born man immediately becomes a citizen, that is, the bearer of sovereignty. The legal category of the nation–state, however, had its factual implications, and people started to define themselves in terms of "nations" at the time of the "national awakening". This self-definition assumed that law, nativity and territory somehow "naturally" converge, legitimating the concept of the nation–state.[171] This was reflected in the process of states regulating the entry of foreign professionals into healthcare. However, with the First World War, when new states were created according to a different understanding of what a nation means, and old states were dissolved in the name of the same understanding, the previously assumed convergence was exposed as a fiction and the conceptual foundation of the nation–state

[169] Ibid. 12.
[170] Ibid. 8.
[171] Agamben 2000, 20.

were irreversibly called into question.[172] In order to preserve its sovereignty and hence to prove that it still has a decisive role in the international realm, the nation–state started to reassert the foundations of its own sovereignty, to which both law and life are both fundamental. This makes it comprehensible in the 21th century, when the economic and political environment is unprecedentedly hostile to nation–states, why states, while trying to safeguard their law and way of life, are also focusing on activities that are directly related to life.

[172] Ibid.

CONCLUSION

Why states act in a certain manner cannot be explained with absolute certainty. States are not persons to attest to us on why they have chosen to do one thing instead of another. Nevertheless, since "theories explain regularities",[173] with their careful application one can make sense of such perceived regularities. The fundamental question remains what one chooses to take as relevant perception and what one refuses to take as such.

In this thesis I aimed to interpret a state practice by the novel combination of existing theories. I have identified blind spots in two approaches to state sovereignty; in the juridical, best reflected in the neorealist thinking in the discipline of international relations, and in the biopolitical, developed by, broadly speaking, critical social theorists. I have shown that both fail to take into account certain characteristics of state practices: the former the importance of healthcare for the state, the latter the prevailing regulations on the strategically important policy areas. I have illustrated with empirics how the concept of public health developed in the 18–19th century in Europe. I have also reconstructed when the French and British governments started to adopt regulations on foreign health workers.

In order to address this empirical puzzle, I have offered a hybrid approach, building on Giorgio Agamben's theory of sovereignty. I have shown that defining state sovereignty as the decision on the relation between law and life can explain this state practice in its complexity. Assuming that states perform sovereignty through various state practices, the offered interpretation has shed light on the very foundations of state sovereignty, a concept which is fundamental to the discipline of international relations. Nevertheless, from Agamben's theory, which the thesis has eventually supported, it also follows that the nation–state is in crisis, and the source of this crisis is, paradoxically, the nation–state itself.

[173] Waltz 1979, 68.

The question remains of what is out there for the nation–states in the 21st century. Referring to Agamben, who seems convinced that law is both unable and unwilling to reflect the diversity of life, one could say that as long as there are men being transformed into citizens, the conceptual foundations of the nation–state prevail. Nevertheless, at the same time, as long as the nation–state keeps producing bare lives, it continues eradicating the foundations of its own sovereignty.

Followed by the conclusive paragraphs above, a topic might emerge as potential subject to further research where the hybrid approach to sovereignty can be challenged by "real world" practice. The ongoing negotiations on the Transatlantic Trade and Investment Partnership pose a sincere challenge to the sovereignty of the European nation–states and that of the United States, as every Bilateral Investment Treaty does.[174] What is problematic here from state's point of view is not the weakening or destroy of *any* regulations, what the Partnership precisely addresses,[175] but the regulations on *life-related* areas, like food safety, animal and plant health. It follows from Agamben's argument that the nation–state, in order to remain a relevant actor in the international political realm, must keep these areas under strict control. The process and the outcome of this negotiation, therefore, appears to be an excellent research area from this respect.

Besides the future of the nation–state, however, this argument has even more serious implications. If we accept that the fundamental category of the Western political philosophy is not that of "friend" and "enemy" or "life" and "politics" – characteristic to the juridical and biopolitical approaches, respectively –, but that of "bare life" and "political existence", we at least need to reconsider what we believed to know about politics.[176]

[174] Prabhash Ranjan, "Using the Public Law Concept of Proportionality to Balance Investment Protection with Regulation in International Investment Law: A Critical Appraisal." *Cambridge Journal of International and Comparative Law*, 3 (2014): 858.

[175] Through the Investor–State Dispute Settlement mechanism. Himaloya Saha, "Critical Analysis of the Commonly Recommended Reforms of Investor–State Dispute Settlement (ISDS)" *Legal Issues Journal*, 4 (2016): 44.

[176] Nevertheless, Agamben goes further than this. According to him, politics "appears as the truly fundamental structure of Western metaphysics", understood here primarily in Aristotelian terms, "insofar as it occupies the threshold on which the relation between living being and logos is realized" (Agamben 1998, 8). Should we choose to accept this contention, it follows that we, meant here as part of the Western politico-philosophical tradition, must reconsider what we believed to know about the world.

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