

Robert A. Selig

## The Idea and Practice of the *Ius Emigrandi* in the Holy Roman Empire from the Reformation to the French Revolution

Ever since the Great Revolution of 1789, Western democracies have used the presence, or absence, of what were then defined as "human rights" as a criterion for judging the fairness and openness of political systems. Freedom of movement within a territory as well as the irrevocable privilege to leave that territory, i.e., to emigrate, for them always represented an integral component of the body of human rights, which also includes freedom of speech, religion and conscience. States which deny their citizens the right to emigrate are considered to be not much more than huge jail cells, a fact keenly felt by all those suffering behind its bars. Consequently the call for freedom of movement was one of the most important demands of the people of Europe in the early sixteenth century as well as in Eastern Europe in the fall of 1989. The purpose of this paper will be to trace the development of the *ius emigrandi* as it changed from an emergency right of the Protestant Reformation to the human right of the French Revolution, and to show some of the discrepancies that existed between the "idea" and the "reality" of the right to emigrate between roughly 1555 and 1789.<sup>1</sup>

The origins of the modern concept of emigration are closely connected with the rise of the early modern European state. Ulrich Scheuner pointed out in 1951 that the Middle Ages did not know our concept of emigration. The *Personenverbandstaat* was not based on the idea of the territorially defined, impersonal state: loyalty was owed the ruler independent of the place of residence. Only with the evolution of the concept of a territorially rather than personally defined sovereignty did migration from a community of people become a legal issue. It was quickly demanded as a right and privilege by the free burghers of the medieval cities.<sup>2</sup>

Once they had paid their emigration tax or *Nachsteuer*, free citizens were at liberty to move wherever and whenever they wanted to, and the

expansion of this concept from the burgher of the city-state to the citizen of post-1789 Europe began in the sixteenth century. Despite severe attacks during the Age of Absolutism it was endorsed and advanced by the *philosophes* of the Enlightenment and became one of the cornerstones of a free society. But the modern idea of freedom of emigration can only be understood within the context of the fundamental political, social, and religious changes which took place in Germany during the sixteenth century.

By the sixteenth century, the struggle between the centrifugal and centripetal forces in the Empire had been decided in favor of the princes. As the princes tried to consolidate their powers, to mediatize competing authorities and to penetrate the thicket of medieval liberties, rights and privileges, they faced serious adversaries in their estates, who demanded participation in the decision-making process of the realm. In practice this meant a say in the levying of taxes, which included taxes on emigrants and their property, and manumission fees for unfree peasants.<sup>3</sup> Using medieval charters as a model, however, the estates increasingly also demanded "liberties" in the modern sense, including freedom of movement, as their due on the basis of what they considered a reciprocal relationship between ruler and ruled.

Where the princes were weak or beset by domestic and/or foreign policy problems, the estates were successful. Taking advantage of the pecuniary crisis of Duke Ulrich of Württemberg and the turmoil surrounding the peasant revolt of the *Armer Konrad*, the estates of Württemberg were able in 1514 to force the duke in the *Tübinger Vertrag* to grant all his subjects *freyer Zug* within twenty years. But in 1520 already all emigration taxes were abolished, and many historians have seen in this treaty, which was in effect into the nineteenth century, the first constitutional guarantee of free emigration.<sup>4</sup>

A few years later, in 1525, the peasants of southwestern Germany rebelled. They felt their legal and economic position threatened by the attempts of the lords to increase their financial obligations, curtailing their use of the commons and forests, and to undermine their legal status. When the peasants demanded proof of all existing financial obligations and labor services, the creation of a new order based on divine and natural law, and the abolition of all servitude as contrary to the Bible, they not only threatened the existing political order. The prominent place of the demand for a society of free people, including freedom of movement, among the peasants' grievances in 1525 threatened the social structure of society as well. "Christ redeemed and bought us all with his precious blood, the lowliest shepherd as well as the greatest lord, with no exceptions. Thus the Bible proves that we are free and want to be free."<sup>5</sup> The inhabitants of the cities had gained their freedom in the Middle Ages, but in the countryside, the traditional relationship between ruler and

ruled was still based on bondage, on *Unfreiheit*, and would remain so for centuries. The Peasants' War ended in failure and by 1526 the rulers had wreaked terrible vengeance. But the issue of freedom of movement, demanded by the peasants as a divine and natural right, had to be dealt with in great detail by the Diet of Speyer the next year. At that time the Empire decided not to take action, but what was denied in 1525, the rulers were forced to grant in 1530.

In 1517, Martin Luther's ninety-five theses had sounded the beginnings of the Reformation. By 1530 the unity of the Christian occident was a thing of the past. After the interlude of the rebellion of the imperial knights and the peasant unrest, both of which had greatly enhanced the princes' power, the rulers of Germany were forced to address the question of dissenting Christians within their territories. Once they had granted themselves the right to determine the faith of their subjects in the *ius reformandi*, they faced the problem of what to do with those who did not want to share the faith of their rulers. Almost immediately they realized that the recognition of the principle of the *cuius regio, eius religio* had to be accompanied by the granting of the *ius emigrandi* as an emergency right to avoid domestic unrest and possible civil war. The princes' *ius reformandi* had to be accompanied by the *beneficium emigrandi* for the subjects.<sup>6</sup>

By 1530 the Diet of Speyer had granted Catholics the right to emigrate from territories whose rulers had converted to Protestantism. In 1544 this privilege was revoked, but reinstated in 1548. In 1555, the Peace of Augsburg guaranteed the perpetual right of emigration for religious reasons in paragraph twenty-four, dependent upon the "zimlichen billigen Abtrag der Leibeigenschafft und Nachsteuer, wie es jedes Orts von alters anhero üblichen herbracht und gehalten worden ist." This included the unfree, even if the peace treaty confirmed the right of the lords "der Leibeigenen halben, dieselbigen ledig zu zehlen oder nicht, hiedurch nichts abgebrochen oder benommen seyn."<sup>7</sup>

After 1555, the right to emigration could no longer be denied, but given the concurrent legalization of the emigration tax, German princes as well as cities and the nobility, weary of the danger of mediatization by powerful neighbors, wasted no time in introducing it in their own territory. Such a tax provided a convenient way to define the territorial affiliation of a community, enhanced the financial fortunes of the state, and proclaimed the independence of those able to collect it. As early as 1556, Bishop Melchior von Zobel of Würzburg ordered a new, state-wide emigration tax to be collected from all subjects, "welche vnverfrembde, vns vnverwandte Herrschafften vnd gebiet ziehen."<sup>8</sup> This practice clearly defeated the ends of the law of 1555, which had only spoken of older, municipal, and already established fees and taxes, but the *Steuerhoheit*

became a "Kriterium der Landeshoheit, der sich auch die mediaten Herrschaften nicht entziehen konnten."<sup>9</sup>

But the reformers, too, demanded the right to emigrate as a safety valve. Martin Luther, John Calvin, and Huldrych Zwingli all rejected resistance to the God-given authorities as evil. Luther especially became a strong supporter of the right to emigrate when he said in one of his table talks in 1535: "Wo die Obrigkeit feindlich ist, da weichen wir, verkaufen wir, verlassen wir alles und fliehen von einem Staate in den andern, denn um des Evangeliums willen ist nicht durch Widerstand leisten Unruhe zu verursachen, sondern man muß alles ertragen."<sup>10</sup>

In the seventeenth and eighteenth centuries, the right to emigrate came increasingly under attack by the state. Even though in 1648 the Treaty of Westphalia had confirmed in article thirty-six the right of free emigration, the Age of Absolutism placed the interests of the state above those of the individual. Whether a subject could emigrate or not was decided from now on by the *Staatsraison*. Since a large population and a positive balance of trade were considered beneficial for the wealth and power of a state, it was more than inclined to prohibit any emigration outright. As early as 1583, Jean Bodin took it for granted that a magistrate had the right to prohibit emigration.<sup>11</sup> In 1516, Thomas More called for the punishment of those who left their bounds without permit,<sup>12</sup> and a few years later, in 1625, Hugo Grotius upheld the right of governments to forbid emigration and to levy taxes on emigrants.<sup>13</sup> Thomas Hobbes in 1651 knew only two possibilities for emigration: "either by permission, as he, who gets license to dwell in another Country; or Command, as he who is *Banisht*."<sup>14</sup> Throughout the eighteenth century, philosophers like Christian Wolff (in 1721) denied the right of people to emigrate on the grounds that this might hurt the interests of the community as a whole.<sup>15</sup>

In the seventeenth century, treaties had still contained stipulations upholding the freedom of emigration for religious reasons,<sup>16</sup> but in the eighteenth century no more than lip service was paid to the law, despite vehement opposition by jurists like Johann Jacob Moser and the attempts of the *Reichshofrat* to uphold the *ius emigrandi*. Decrees like the one in 1723, which stated that "es wider der teutschen Freyheit lauffe, den Unterthanen das auch außser des westphälischen Friedensschlusses im Römischen Reiche zugelassene *ius emigrandi* zu nehmen," could not be enforced against the king of Prussia.<sup>17</sup> Even princes like Duke Ernst von Sachsen-Hildburghausen argued that "es großen Anstoß verursachen würde, wenn denen Unterthanen zu ieder zeit und nach ihrem bloßen wahn oder auf solche art, daß einem landsherrn dadurch nachtheil zuwächse, frey stehen sollte, ihre subiection zu verändern."<sup>18</sup> Some fifty years later, in 1764, Prince-Bishop Adam Friedrich von Seinsheim of Würzburg asserted that it "in des Unterthanen freyer Willkühr keineswegs

steht, sich dem seiner Höchsten Landes=Herrschaft schuldigen Gehorsam eigenes Gefallens zu entziehen."<sup>19</sup> Starting in France in 1669, a flood of decrees prohibiting emigration, filled with threats of gruesome punishment for recruiter and emigrant alike and exorbitant fees and taxes on the property of those emigrants who received permission to leave, swept across Europe in the eighteenth century, culminating in an imperial decree in 1768. But when the decree was renewed in 1786, not even the new prince-bishop of Würzburg, Franz Ludwig von Erthal, published it any more.<sup>20</sup>

In the Age of Enlightenment, the idea of human rights and the concept of the social contract placed the question of emigration on a completely new foundation. Men were understood to be free and equal individuals, who formed a community of their own free will with the purpose of protecting their rights. Arguing from the context of natural law, Samuel Pufendorf declared in 1688 that people reserved for themselves the right to emigrate when they voluntarily joined a state.<sup>21</sup> On the basis of this assumption John Locke concluded in 1690 that at least once in their lives people should be given the choice to leave their home state.<sup>22</sup> In 1776, Adam Smith denounced restrictions on emigration as "contrary to the boasted liberty of the subject, . . . which is so plainly sacrificed to the futile interest of our merchants and manufacturers."<sup>23</sup> While Jean Jacques Rousseau was still voicing opposition to free emigration as late as 1775,<sup>24</sup> Germans like Johann Christoph Fresenius stated unequivocally in the year of the American Revolution: "Der Staat ist eine freiwillige Gesellschaft, und niemand begibt sich in den Staat, um Slave zu werden."<sup>25</sup> A few years later, Johann Jacob Cella was demanding the right to emigrate as the symbol of freedom: "Ist nicht die Freyheit, einen Zustand nach belieben verändern zu können, die Summe aller menschlichen Glückseligkeit?"<sup>26</sup> But when Heinrich von Berg wrote in 1799, "der freie teutsche Unterthan ist nicht an die Erden gebunden," he did not yet speak for all Germans.<sup>27</sup>

Within the next few years, however, the Holy Roman Empire of the German Nation came to its end under the onslaught of the Napoleonic armies, who brought with them the achievements of the French Revolution, including freedom of emigration as a human right as guaranteed in the Constitution of 1791.<sup>28</sup> Servitude, manumission fees, and state and local emigration taxes disappeared within the reorganized Germany. With them went the restrictions on emigration, which were also forbidden by the German Confederation.<sup>29</sup>

It took almost three hundred years, from the Protestant Reformation to the French Revolution, for the citizens of Germany and Western Europe to gain free passage to and from their homelands. Grown from the dual root of medieval city law and the emergency right of the Reformation, it was under constant attack during the Age of Absolutism, which did not

know a *de facto* right to emigrate, imperial law notwithstanding. Only when the ideas of the social contract and natural law provided an additional intellectual foundation did the movement for freedom of emigration as a human right gain momentum. But it took the American and French Revolutions in 1776 and 1789 as well as *Glasnost* and *Perestroika* in the year of the French bicentennial to change this idea into a reality for all of Europe to enjoy in 1990.

Hope College  
Holland, Michigan

### Notes

<sup>1</sup> Karl Graf Ballestrem, "Zur Theorie und Geschichte des Emigrationsrechtes," in *Grund- und Freiheitsrechte im Wandel von Gesellschaft und Geschichte: Beiträge zur Geschichte der Grund- und Freiheitsrechte vom Ausgang des Mittelalters bis zur Revolution von 1848*, ed. Günter Birtsch (Göttingen, 1981), 146-61, 146. See also Klaus Gerteis, "Auswanderungsfreiheit und Freizügigkeit in ihrem Verhältnis zur Agrarverfassung: Deutschland, England, Frankreich im Vergleich," *ibid.*, 162-82; Peter Blickle, "Von der Leibeigenschaft in die Freiheit: Ein Beitrag zu den realhistorischen Grundlagen der Freiheits- und Menschenrechte in Mitteleuropa," *ibid.*, 25-40; Rudolf Möhlenbruch, "Freier Zug, Ius Emigrandi, Auswanderungsfreiheit" (Jur. diss., Bonn, 1977); and Francisco A. Prieto Gill, *Die Aus- und Einwanderungsfreiheit als Menschenrecht* (Regensburg, 1976).

<sup>2</sup> Ulrich Scheuner, "Die Auswanderungsfreiheit in der Verfassungsgeschichte und im Verfassungsrecht Deutschlands," in *Festschrift Richard Thoma* (Tübingen, 1950), 199-224, and Möhlenbruch, 20ff. This does not mean that there were no restrictions on migration before that time, but they were of a different legal nature and based on a different legal justification. See Robert von Keller, *Freiheitsgarantien für Person und Eigentum im Mittelalter* (Heidelberg, 1933) and Klaus Arnold, "Freiheit im Mittelalter," *Historisches Jahrbuch* 104, (1984): 1-21.

<sup>3</sup> Georg Ludwig von Maurer, *Geschichte der Städteverfassung in Deutschland*, 4 vols. (Erlangen, 1869), 1:392ff.

<sup>4</sup> On the *Tübinger Vertrag* see Walter Grube, *Der Tübinger Vertrag vom 8. Juli 1514* (Stuttgart, 1964). Other states introduced the *Freizügigkeit* through bilateral treaties, e.g., Mainz and Würzburg in 1593; manumission fees were set at 1 percent of the exported property. See Robert Selig, *Räutige Schafe und Geizige Hirten: Studien zur Auswanderung aus dem Hochstift Würzburg im 18. Jahrhundert und ihre Ursachen*, Mainfränkische Studien, no. 43 (Würzburg, 1988), 69. In 1215, the Magna Charta brought in paragraph forty-two temporary exit permits except in times of war. Only one year later this provision was cancelled again for good. Not until 1870 was the idea of the perpetual allegiance owed to the crown by an Englishman legally abolished (Gerteis, 174).

<sup>5</sup> Article three of the Twelve Articles of the Upper Swabian Peasants of February/March 1525 as quoted in Peter Blickle, *The Revolution of 1525: The German Peasants' War from a New Perspective* (Baltimore, 1981), 197. See also Winfried Schulze, "Der bäuerliche Widerstand und die 'Rechte der Menschheit'," in Birtsch, 41-56.

<sup>6</sup> Klaus Schlaich, "Ius Reformandi," in *Handbuch zur deutschen Rechtsgeschichte*, (Berlin, 1973), 2:498ff. See also Heinrich Scholler, "Zum Verhältnis von (innerer) Gewissensfreiheit zur (äußeren) religiösen Bekenntnis- und Kulturfreiheit," in Birtsch, 183-204.

<sup>7</sup> The text of the 1530 decision can be found in *Sammlung der Reichsabschiede*, Johann Jacob Schmauss, ed., 4 vols. (Frankfurt, 1747), 3:315, that of 1555, 4:15.

<sup>8</sup> For Würzburg see Selig, 10-44; a survey of the financial aspects of emigration from Würzburg, *ibid.*, 45-84, Zobel's decree on p. 57.

<sup>9</sup> Thomas Heiler, "Die Finanzen des Hochstifts Würzburg im 18. Jahrhundert," *Würzburger Diözesangeschichtsblätter* 47 (1985): 159-89, 163.

<sup>10</sup> Martin Luther, *Kritische Gesamtausgabe*, 84 vols. (Weimar, 1883ff.), 1:560. See also Hermann Jordan, *Luthers Staatsauffassung* (Erlangen, 1917), 83ff.; William J. Bouwsma, *John Calvin: A Sixteenth-Century Portrait* (New York, 1988), 191ff.; W. Peter Stephens, *The Theology of Huldrych Zwingli* (Oxford, 1986), 282ff.; and Möhlenbruch, 57ff.

<sup>11</sup> Jean Bodin, *Les Six Livres de la République* (Paris, 1583), 1: chap. 6.

<sup>12</sup> Thomas More, *Utopia and A Dialogue of Comfort* (London, 1910), 2:65. "If any man of his owne head and without leave, walke out of his precinct and boundes, taken without the princes letters, he is broughte againe for a fugitive or a runaway with great shame and rebuke, and is sharply punished." More's *Utopia* was first published in 1516.

<sup>13</sup> Hugo Grotius, *De Iure Belli ac Pacis libri tres* (Paris, 1625), 2: chap. 5, paragraphs 24-27.

<sup>14</sup> Thomas Hobbes, *Philosophical Rudiments concerning Government and Society* (London, 1651), Howard Warrender, ed. (Oxford, 1983), 116.

<sup>15</sup> During the Middle Ages the cities had used the same argumentation to justify the levying of an emigration tax since any emigration diminished the tax base of the community. Christian Wolff, *Vernünfftige Gedanken von dem gesellschaftlichen Leben der Menschen und insonderheit dem gemeinen Wesen* (Halle, 1721), par. 9.

<sup>16</sup> See art. 10, par. 10 of the Treaty of Partitioning of the Duchies of Jülich and Cleve in 1672, quoted in Johann Jacob Moser, *Von der Landeshoheit im Geistlichen* (Frankfurt, 1773), 843.

<sup>17</sup> *Reichshofratsconclusum* of 3 March 1723, in response to a complaint by King Frederick William I of Prussia, printed in *Europäische Staats-Cantzley* 49 (1727): 463. See also Johann Jacob Moser, *Von der Landeshoheit in Ansehung der Personen und des Vermögens* (Frankfurt, 1773), 216.

<sup>18</sup> In a letter to the prince-bishop of Würzburg in *Bayerisches Staatsarchiv Würzburg*, Bestand Gebrechenamt IV W 597, dated 13 April 1711.

<sup>19</sup> In a decree dated 10 February 1764, printed in Philipp Heffner, *Sammlung der Hochfürstlich Wirzburgischen Landesverordnungen*, 2 vols. (Würzburg, 1776), 2:799-800.

<sup>20</sup> A brief list of decrees can be found in Ballestrem, 148, and Möhlenbruch, 102; a detailed description in Selig, 38ff. For the imperial decrees of 7 July 1768 and 18 April 1786 see Möhlenbruch, 108ff., who considers the decree contrary to imperial law.

<sup>21</sup> Samuel Freiherr von Pufendorf, *De Iure Naturae et Gentium libri octo* (Amsterdam, 1688), 8:chap. 11, par. 2.

<sup>22</sup> John Locke, *The Second Treatise of Government* (London, 1690), chap. 8, paragraphs 99-122.

<sup>23</sup> Adam Smith, *An Inquiry concerning the Nature and Causes of the Wealth of Nations* (Oxford, 1975), 620.

<sup>24</sup> "L'émigrant fait du mal aux autres par le mauvais exemple qu'il donne . . . De toutes manières c'est à la lois de la prévenir." Jean Jacques Rousseau, *Oeuvres* (1775), quoted in Möhlenbruch, 16.

<sup>25</sup> Johann Christoph Fresenius, "Gedanken über die Rechtmäßigkeit der Nachsteuer," *Meditationen für Rechtsgelehrte* 2 (1776): 91.

<sup>26</sup> Johann Jacob Cella, *Über Auswanderungssucht und Auswanderungsfreiheit der Deutschen* (Ansbach, 1786), 36. On p. 28 he declared: "Die bloße Geburt verpflichtet keinen Menschen, Mitglied und Unterthan eines Staates zu sein." See also the discussion in Ballestrem, 153ff.

<sup>27</sup> Heinrich von Berg, *Handbuch des Teutschen Policeyrechts*, 6 vols. (Hannover, 1799), 2:51.

<sup>28</sup> Ballestrem, 150. For political reasons the National Assembly limited this right in the 1790s, but the principle remained.

<sup>29</sup> This only applied to the members of the German Confederation. Other restrictions like acceptance in another state and the obligation to perform military service or pay a *Militäremissionssumme* also remained. See par. 18 of the *Bundesakte* of 1815. For the future development of this right in Germany see Hans-Jürgen Strauch, "Die Freizügigkeit im Wandel der Zeiten (seit 1806)" (Jur. diss., Heidelberg, 1954).