Recognizing the Dignity of Migrants

By

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Introduction

Every day, the media reports another tragedy involving migrants at the border or on the high seas, or uncover cases of criminal exploitation of migrant workers, or discover instances where migrants are deprived of their rights at work, in school, or in the health care system. It is interesting that the media now report this; previously it used to pass unnoticed. But even though we can read of it, it often remains at a safe geographical or psychological distance: either it is happening “elsewhere”, or these migrants are really considered as “others” with whom “we” couldn’t relate. Only when we confront such situations in our own surroundings (work, school, family, friends, etc.), do we realize how close what is happening “elsewhere” really is, how the other is already one of “us”, how we all bear a responsibility for letting this happening under our nose, how – as is the case for every injustice we personally encounter – our own dignity is at stake if we do nothing.

This essay examines how the concept of dignity relates to the condition of migrants. As a general principle, we posit that the able adult’s dignity rests in being an agent of one’s destiny, in having the ability to exercise options regarding one’s own life.

Respecting the dignity of the person is protecting that ability to make personal choices, is recognising the individual as a subject, i.e. a bearer of rights. The ability to exercise one’s rights is often the first step towards a full recognition of one’s inherent dignity.

This essay demonstrates that the voice of the migrants goes often unheard, that whatever wish they express is beyond our listening, that what happens to them is considered beyond our reach, that our governments

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have adopted policies that negate their rights, that our authorities refuse to
empower them with legal tools to defend their rights, lest they use such new
tools to invalidate our migration policies. In effect, the migrant is not
considered worthy of all the attributes of dignity that we have endowed
“ourselves”.

**Migration as an Exercise of Dignity-Seeking**

Migration is essentially in itself an exercise of dignity-seeking,
whatever its reasons (poverty, discrimination, lack of opportunities for the
children, human rights violations, violence, etc.). Most often, migrants can’t
imagine a future (or a good future) for themselves and their children in the
home country, and wish to have better options.

Even if there are collective aspects to most migration (mass flight,
family/clan/community support, use of networks, etc.), migrating is always
also an individual trajectory, a personal quest, requiring human qualities such
as courage, determination and imagination.

We care for those whose dignity we appreciate. Instruments for
protection of the rights of the migrants, particularly the victims of forced
migration, are based on the principle of care. Care comes before protection.
Protection is the legal form of care, which symbolises the dignity we have
recognized in the persons in situation of flux or forced movement.

If we realise for instance that refugee care (protection, assistance,
resettlement and rehabilitation) sits at the heart of an ethics of dignity and
hospitality, we are already moving away from the conventional practices of
charity, and we are raising the question: how can a policy of recognition of
dignity be lodged at the heart of the question of rights? Moving away from
simple pious talk, we must understand that dignity is to be realized only
through recognition of the issue of justice, that is to say recognition of the
“just claims” in inherently contentious circumstances.

At the policy formulation level, it also means checking if, in the
“politics of care”, the person who is to be cared for feature in any way as a
critical element, and how the dignity of the person in a situation of forced
displacement feature in a formulation of the principle of hospitality. Hearing
and listening to the voice of migrants is a key element of recognizing their
dignity: it means considering them as a subject, as a bearer of rights, as an
equal in value and worth.

In the Indian sub-continent, partitioned twice, the politics of
nationhood is built upon experiences of how some became citizens, some
could not, some remained familiar as strangers, some became very near yet
always the unfamiliar ones, and some whose fate was to remain that of the
dreaded alien throughout their existence: that is how they left their mark on
the polity. The State’s care of the subjects’ bodies and souls and its power
over the same is written in these experiences, as if the function of care and
power could be scripted only through events, experiences, and contingencies
of alien-hood. In the experiences of the victims whose dignity was never
recognised but who remained the object of humanitarianism, we have a double imperative of how the State governs, a contradictory logic of power and care, and a paradoxical injunction built in the heritage of rule. Recognising the dignity of the migrant and enforcing their rights would increase our dialogic capacity to negotiate this inherently contradictory situation.

In Canada, treating the familiar as an "other" also has a long history: aboriginals were, up till recently, treated as non-citizens, and the social condition of their communities is still the object of loud criticisms on the part of international human rights treaty bodies. It is only recently, through the decisions of the courts, that Canadian federal and provincial governments have been forced to recognise their rights. Similarly, non-citizens have traditionally been treated according to an administrative law principle of sovereign discretion: migrating to Canada was considered a privilege, not a right, and the legal status of the migrant was utterly tainted with this discretionary margin of appreciation on the part of State authorities. It is only recently as well, that courts have implemented the rights defined for "everyone" (for example in the Canadian Charter of Rights and Freedoms) in favour of foreigners present on national territory, thus limiting the discretionary powers of the State and the frequent arbitrariness of administrative practices

Humanitarianism is Insufficient: Justice is Needed

Today, two issues have come closer. On the one hand, migration often takes the form of mixed up, messy population flows confronting desperate governmental methods, and, on the other hand, humanitarian methods, functions, institutions, and principles are being rapidly transformed.

Governments have discovered that people move not only because of violence, threat of violence, torture, and discrimination (the traditional causes for refugee status), but also due to natural disasters, climate change, resources crisis, environmental catastrophes, manmade famines and floods, developmental agendas, and the like. The humanitarian response has accordingly grown in range: “complex emergencies” are often the modern scenarios to which governments have to gear up.

We are now witness to a situation where each year huge chunks of population worldwide are receding beyond the pale of visibility and beyond the gaze of citizenship. Law lags behind in reinforcing their rights, and mere humanitarian feelings are of little use. For countries of the Global South and North alike, displacement now signifies what a limited democracy characterized by forces of property, globalization, ethno-centric vision, xenophobia, and poor state of management capacity to cope with developmental-environmental disasters does to de-colonized societies.

In India, disabled and dispossessed of means of survival and social security by displacement, large bands of unemployed labour – men, women,
and yes, children – move from town to town, from mine to mine, and construction site to another site. Pockets of hunger and endemic poverty also mark societies characterised by massive displacement. All this often culminates in violence, conflicts, hatred, and ethno-centric politics, leading to further displacement. If we are not going to be satisfied with short-term humanitarian measures, coping with displacement means eliminating root causes.

Simultaneously, the responsibility to protect the victims of forced migration must be wrested away from its “humanitarian roots” and located anew in the context of rights, justice and the politics of claim-making, that are the constitutive elements of dignity which we are forced to recognise because of the emergence of the migrant as the subject. Unfortunately, the discourse about root causes is too often used to delay taking action now about protecting migrants’ rights.

Clearly, modern democratic governments cannot allow uncontrolled forced migration to continue. Scenarios of destitute armies of roving labour (whether crossing international boundaries or not) are scary for conditions of modern civility. Democracy institutes a space of rights to create the autonomous citizen subject, but simultaneously tries to control them through the laws and mores that had made their emergence possible in the first instance. Humanitarian policies have therefore a double edge: they create rights and these rights must be implemented by the legal tools of modern governmentality.

Additionally, there are governmental strategies to remove sections of population beyond visibility. Nobody will talk of the displaced, no history can be written of them (of course you can write single, isolated ethnographic accounts), no canopy over their graves, no epitaph over their loss of citizenship: they are what Eric Wolfe called long ago people without history, be they persons displaced to urban slums by development projects in the Global South or irregular migrants feeding the competitiveness of the shadowy edges of developed economies.

The dignity of the migrant is therefore not the first item in the agenda of policy-makers, North and South alike.

The Human Rights Regime did not initially Encompass Migrants

The founding fathers of the international human rights system never really envisaged that human rights would apply to migrants: it was build to frame the relationship between citizens and their State institutions. Migration was (and still is mostly) considered as a transient anomaly of the “normal” sedentary system. We only have to consider our collective contempt for nomad peoples (Bedouins, gypsies, aboriginals, etc.) and our difficulty of accommodating their difference and recognising their rights.

The above-mentioned paradox of the “contradictory logic of power and care” is well exemplified by the conduct of the host state with regard to
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the migrants. On one hand, States have built an elaborate arrangement of international instruments relating to fundamental rights. On the other hand, the reality of the figure of the migrant is that of an “abnormal” person, as illustrated in international relations and governmental narratives. As the colonial and post-colonial histories show, this figure is an outcome of conquest, violence, law, and racism, the foundational features of modern politics. Therefore, modern constitutionalism (which can often be called “colonial constitutionalism”) accommodates both rights and settled fruits of conquest, racism and domination.

Constitutionalism defines and stabilises structures of rule and governance “at home”, which also means a permanent deficit of rights and dignity for the outsider, the migrant, who becomes a stranger, an alien, an “abnormal”. Thus, a democratic post-colonial system may avoid daily large-scale violence, but engages in incessant securitisation of life through making legal standards and forging administrative (including policing and military) practices to prevent an “invading” army of aliens. In fact, these governmental measures towards territorial reorganisation, restructuring labour markets, reinforcing immigration controls, strengthening grip over the subjects through ethnicisation of politics, produce the migrant as the abnormal figure. This is the image of the stable government facing unstable (and therefore threatening) populations. Otherwise, come to think of it, in the words of Daniel Warner, “we are all refugees”, “we are all migrants”, and the State population cannot be precisely defined.

One can ask: why is it difficult to institutionalise dignity so that rights are better protected, and justice is recognised? The answer has to be found in the way unruly bodies are treated by governmental regimes of power. Partly, the answer lies also in our notions of care, which often means imposing our values on others whom we protect: caring gives the care-giving person/institution power, and, in the last analysis, the process strengthens governmental control over the subject. Yet, the subjectivity of the migrant remains unruly, defying categorisation, mixing up all kinds of flows and compositions, and remaining possibly the biggest question mark in the plan of reorganising the global and national political, economic and strategic spaces. It is against this non-dialogic world of the humanitarian control that we must counter pose the principles of dignity and justice in the form of recognition of the migrant as a subject.

Therefore, it was an unsaid premise of the human rights regime that migrants would have their rights recognized in their own country, the old one or the new one, but mostly as citizens. And if they were not happy with the treatment they received in the host country, they could always go back “home”.

In effect, as regards migrants, the new human rights paradigm had not really replaced the old territorial sovereignty paradigm. It was rather inserting itself within the parameters of the territorial sovereignty paradigm.

It is only recently that courts have started to consider that the human rights paradigm could prevail over the territorial sovereignty
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paradigm, using the express language of the human rights instruments. In effect, the *Universal Declaration of Human Rights* provides rights for “everyone”, with the only limitations of the right to return to one’s “own country” (art. 13), the right to take part in the government of one’s own country, directly or through freely chosen representatives, and the right of equal access to public service in one’s own country (art. 21). The *Canadian Charter of Rights and Freedom* reserves to the citizen the rights to vote and be elected (art. 3), to receive an education in a minority language (art. 23) and enter and stay in Canada (art. 6). All other rights are for “everyone”, including the right to life, freedom and security of the person, the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment, and, most importantly, the right to equality and freedom from discrimination which, if interpreted generously, is pregnant with a huge equalization potential in the comparative conditions of the citizen and the migrant.

The dignity of the person, which forms the ethical basis for the human rights regime, is therefore within reach for migrants. The conceptual tools and intellectual reasoning have been forged for other categories of vulnerable individuals. What is lacking is the political will to fully apply the human rights framework to the situation of migrants.

The Foreigner is not considered a Complete Legal Subject

Still today, States insist that migration is a privilege and not a right, and subtly derive from that the unsaid axiom according to which the legal status of the migrant is based on privileges that can be withdrawn at will, not on rights that must be respected. Several centuries of nationalism have ingrained the idea that nationality is a radical marker of identity, which supersedes all others, the supreme allegiance to a national political framework. In that sense, the foreigner is the ultimate other, the one definitely outside of the political community: the migrant cannot be – is not worthy of being – “one of us”.

The foreigner is also often conceived as being outside the circle of the Rule of Law, as not being a complete legal subject, as having no complete legal personality: the irregular migrant is close to having no legal personality at all (this is reflected in the language that conveys the idea that a person, and not an act, can be “illegal”), and others migrants have gradually more of a legal personality as the status of migrant gets closer to the condition of the citizen: each country establishes its own scale and decides where the seasonal agricultural worker, the live-in domestic worker, the foreigner on a temporary work permit, the permanent resident (to take only a few examples) will be on that scale.

This situation is close to that experienced in their times (and in good part still today) by the industrial worker, the woman, the aboriginal, the detainee, the gay or lesbian. For them not to be excluded on account of their “difference” and to be recognised as full members of our society, it took
decades of activism on the part of civil society and community organisations. It also often meant the intervention of the courts where the politicians were still reluctant to recognize that both our own dignity and the dignity of the “others” imply treating them as equals.

The same process awaits the migrant. Several examples can be given of that legal “otherness”:

- Anecdotally, one leading journalist of the Canadian Broadcasting Corporation expressed much surprise at the idea that the Canadian Charter of Rights and Freedoms applied to irregular migrants. Their description as “illegal” manifestly meant for him that they could not invoke any legal protection. That a prominent opinion-maker would hold such beliefs reflects the utter misinformation of public opinion generally on the issues relating to migration: in many cases, the idea of the dignity of the migrant seems entirely meaningless.

- Most western countries have tried to argue in courts that a foreigner arriving by plane at an airport, but who has not yet cleared the customs control, should not be considered as being in the country and should not benefit from the protection of the law. The pervasive idea that there exist an “international zone” (as there are international waters), where the national security forces could operate but where the foreigner would not yet be on national territory, is enduring, despite having been defeated in many national tribunals. The issue of dignity does not seem to be envisaged by State authorities in such a context.

- Many national authorities of the Global North – such as Canada in 1994 in the Khan case – have reacted angrily when condemned by the UN Committee against Torture for attempting to deport certain foreigners. They have often argued that the system had never been meant to be used for such cases and that this is an infringement on their capacity to manage migrations. In 2003, Prime Minister Tony Blair even threatened to withdraw the United Kingdom from the European Convention on Human Rights on the issue of asylum seekers, if their number wasn’t reduced. This send out the message that migrants’ rights are not inherent, i.e. based on the dignity of their simple humanity, but are dependent on the State’s political will.

- Not one single country of the Global North has ratified the 1990 International Convention on the protection of the rights of all migrant workers and members of their families. This convention operates essentially a restatement of the human rights regime as it applies specifically to migrants. In doing so, the convention recognises rights to all migrant workers (essentially to be treated in all equality with other workers on many issues) and recognises more rights to migrant workers who have a legal status: it is thus clear that the former set of rights also applies to irregular migrants. States of the Global North have up till now utterly rejected the idea of recognising rights
to irregular migrants: the dignity of the migrant is not part of their vocabulary.

In effect, it is quietly considered that the foreigner is not worthy of justice. The Canadian case is topical. In the Canadian Immigration and Refugee Protection Act, all de jure appeals have been removed. Judicial review has remained, because the Legislator could not constitutionally remove it, but it is filtered by the granting of a leave to ask for judicial review. The refugee determination decision is the only one in the Canadian justice system that can lead to the death, torture or arbitrary detention of the individual, and there is still no appeal mechanism. And providing the asylum claimant with a coast-to-coast adequate legal aid regime hasn’t been considered a priority either.

All the legal issues relating to immigration, including detention and deportation, are traditionally considered part of administrative law. This branch of the law clearly imposes less constraints upon government action than criminal law, even when such action can have consequences as grave as (or now graver than) those possible under criminal law. The most dangerous mafia boss is nowadays recognised the right to enjoy all the legal guarantees of the fair trial, as developed over several centuries of criminal law. This is not because one likes such criminals, but because this has been considered as the only mechanism that can ensure the validity and legitimacy of the criminal process. In contrast, the inoffensive asylum seeker, who may risk life, freedom or bodily integrity if returned to her country as a consequence of the rejection of her claim, is not recognised the same guarantees. This result of the distinction between administrative and criminal law is absurd when the potential consequences of the proceedings on the rights and freedoms of the person are similar.

In particular, the right to equality is one that most governments (and public opinions intuitively) would deny to migrants. States have generally argued that distinctions made on the basis of nationality were perfectly acceptable in many legal regimes that they created. And courts have often accepted, in one way or another, that the immigration status “tainted” many other fields of legal protection. Examples of blatant discrimination against foreigners can be given that illustrate the lack of respect for the inherent dignity of the migrant and the urgent need to review our interpretation of the legal entitlements under the human rights regime.

- For example, in Quebec, a foreign domestic worker with a specific live-in care giver’s visa is not covered by the provincial Act respecting occupational health and safety: what would not be acceptable for any other person becomes acceptable if the person is not a citizen.
- In Canada, indefinite detention is possible for foreign terrorism suspects pending deportation, but not when they are prosecuted under criminal law as citizens would be.
- In Australia, mandatory detention of illegal migrants (including families and children) for years in rough camps in the desert has been the rule between 2000 and 2008, in the absence of an
Australian constitutional protection of rights and freedoms. This indicated an absence of respect for the dignity of the person that is usually expressed in the idea that any deprivation of freedom must be specifically justified, either by the danger posed by the individual or by the fear that they will evade further proceedings\textsuperscript{11}.

- In many countries, in law or in practice, the rights of the child of irregular migrants are not respected. Access to school or health care can be erratic. This situation manifests an absence of respect for the dignity of children who cannot be held responsible for the administrative situation of their parents\textsuperscript{12}.

- There is a steadfast refusal to accept that irregular migrant workers are economic, social and cultural actors of society, that they contribute to the creation of material and intangible wealth and that they have rights. Their criminalisation and the correlative fact that their employers are rarely prosecuted show a lack of respect for the dignity of a full-fledged member of the workforce.

All in all, one cannot be equal if one is a stranger, one cannot be a complete legal subject. The meaning of “foreignness” seems to be coextensive to a discriminatory status, where the discretionary nature of the power exercised by the political authorities prevails over the inherent dignity of the person that the principle of equality embodies.

**The Securitization Process Erases the Migrant’s Voice**

In this contentious milieu, we must pull back our attention on to the question of responsibility, wrenching it away from humanitarianism and placing it firmly in the context of claims, contentions, and justice. Do we have any count as to how many migrants die each year – in the belly of the containers, on rocked and drowning boats, or perishing on snowfields, or in confinement camps? More importantly, why are these movements considered as irregular in the international literature on migration? Again, here we can see that the onus is on the migrants to prove that they are regular (that is codified) migrants. The humanitarian agencies consider these population movements as irregular only because they lack requisite documentation, and fall short of rules of the official regime of documentation, which decides what is regular and not. Flows are mixed not only because moving persons of various categories (refugee, immigrant, asylum seeker, illegal immigrant, trafficked person, escapee of various types) are mixed up in the eyes of an inadequate protection regime, but also because the causes of moving are mixed up. The reason of governmentality of course remains blind to this, as it takes the logic of administration further by joining the chorus for a new architecture of superintendence over moving populations. As one UNHCR document\textsuperscript{13} recently suggested, Effective approaches to the dilemmas of mixed movements
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will inevitably depend upon full cooperation amongst the key actors concerned: affected states, governmental bodies, regional and international organizations with relevant mandates (e.g. UNHCR, OHCHR, UNICEF, ILO, and IOM) as well as local and international NGOs. Hence, a first step is to identify and convene such actors in an appropriate forum so that they can exchange information and establish terms and conditions for cooperation and coordination. The convenor of such a forum would preferably be one or more of the affected states but an international organisation can also play a ‘good offices’ role in this respect. (Article 1)

The plan also suggests data collection and analysis, and

Such data should typically include information relating to conditions in countries of origin, motivations for movement, and modes of transport, transit routes and entry points. An international or regional organization may be well placed to offer support for this function. (Article 2)

With this being once again an inter-governmental body, such a migration-watch tower can be only another name for intelligence gathering. The nature of the suggested architecture of security (in name, “human security”) gets clearer when the plan calls for mechanisms for “profiling and referral” (Article 5). It can be for profiling vulnerability and vulnerable groups, groups deprived of the rights enshrined under the two International Covenants: the data will be of enormous importance to state parties, inter-governmental policing bodies, and the cordon-regimes of the first world. Likewise, the plan calls for an “information strategy” (Article 10), and once again calls for “expeditious return” of “non-refugees” and “alternative migration options”. As we all know from the experiences in South Asia and elsewhere, “expeditious return” generally means “forcible return”. Conversely, in many cases, escapees want to return but have no “right to return”, enshrined under the international human rights regime (the cases of the Palestinian and Bhutanese refugees come to mind). Thus, return remains the most arbitrary subject in national and international governance of population flows. The fundamental question remains: where does the voice of the migrant figure in all these? Such policies effectively treat the migrant as a commodity that can be packaged, warehoused and transported anywhere in the world, or as a threat that can be identified, categorized, processed and dispatched: individual considerations seldom count, their voice seems irrelevant and the dignity of each person is lost in the rush to “process” the mass.

Conclusion

Irregular and vulnerable migrants are still often considered as having no choice but to accept the “generous” treatment that is offered by the host states or international organisations. If they are not happy, they are “free” to go back home. In that sense, host State authorities use a political filter to downgrade the legal guarantees provided for everyone. They know very well that non-citizens do not form a political community or a pressure group. They also know that they can score political points in their electorate...
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when playing the xenophobic tune: public opinion has not yet warmed to the concept of the dignity of the migrant through the respect of their rights, especially when those are presented as competing with the local population’s interests. Simple electoral logic often drives the refusal to recognise the rights of migrants. Courts are often resisting such trend and they can, at times, confront government authorities. Their rhetorical logic can be most effective, when it requires the authorities to justify the differences in treatment between citizens and non-citizens. But their action is limited to countries with effective rule of law mechanisms. Political pressure to have the voice of migrants heard will remain essential, if their dignity and thus their rights are to be recognized.

[This chapter is a work in progress, merging the evolving thoughts of a lawyer from the Global north and a political scientist from the Global south: the seams may often be visible. Canada and India are generally used as examples.]

Notes


References


