The contemporary migration between human rights, freedom of movement and right to return

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Abstract

The present paper aims to show the specificity of contemporary migration in light of migrations of previous decades: Migrants today have rights whose implementation is contributing to a re-allocation of State prerogatives due to the principle of disjunction between nationality and citizenship introduced by the Universal Declaration of Human Rights. This disjunction is a determining element in the current redesign of borders, of which the European construction is an archetype.

These migrations are upsetting the balance between the right of the State and the right of the individual. They are also rebuilding individual identities. The right of return was originally defined as a right resulting from the refugee status. Today it has become a modality of migration policy pursued by certain States, such as the new regulations adopted by Spain regarding Jews expelled during the Inquisition, or Turkey's regulations regarding the conflict relating to the status of Cyprus. It is a right that any migrant worker must have. As a result, in spite of an ongoing decline in religious belief, it is religion that will contribute to the formation of borders in the near future.

Keywords: human rights, migration, religion, right of return, nationality, borders

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The migratory phenomena are characterized by the fact that individuals, for various reasons, cross borders. By their demographic importance, migrations modify the social morphology of a country, that is to say, the collective subconscious of the country. Migrations also challenge the principle of rule jurisdiction. To quote the French father of sociology, Emil Durkheim, the infrastructures of a country are dependent on *"whether the population is more or less sizable, more or less dense; depending on whether it is concentrated in cities or dispersed in the countryside; depending on the way in which the cities and the houses are constructed; depending on whether the space occupied by the society is more or less extensive; depending on the borders which define its limits, the avenues of communication which traverse it"* (Durkheim, 1978).

The most significant tool to investigate this kind of social evolution is, for Durkheim, the law that *"…is nothing more than this very organization in its more stable and precise form"* (Durkheim, 1978). In terms of a theoretical framework, this article will adopt the method developed by Durkheim in *The division of labor in society*, comparing the normative structures of societies in order to analyze social changes.

Indeed, the migration process relies on a double interaction: a continuous interaction both between the individuals and the State and between the individuals themselves. In light of these interactions between individuals and the rules within which they evolve, the changes of these rules can legitimately constitute a way of understanding migratory phenomena in the contemporary period and a way to study the national and international responses to these population movements. This article purports to analyze the migratory phenomena by taking into account migration regulations in order to encapsulate the dynamic of the rule of law in the contemporary definition of the identities of individuals and of the frontiers of States. In view of the complex and extensive nature of the subject, we have narrowed our focus to the regulations implemented in the countries of the European Union in light of the United Nations texts.

This socio-legal approach highlights the specificity of contemporary migrations as compared to migrations of previous decades: Presently, migrants have rights the implementation of which is contributing to a reconstruction of State prerogatives due to the principle of disjunction between nationality and citizenship introduced by the Universal Declaration of Human Rights.[1] This disjunction is a key element in the definition of the role traditionally assigned to borders. Thus, borders are no longer delimiting the territorial scope of application of Law. The European construction will appear as an archetype to illustrate this shift.

In this framework, the migratory phenomenon is an ongoing process in the reconstruction of the migrant's identity in which the right of return is the key element. The right of return was originally defined as a right linked to refugee status. Today it has become either a modality of migration policy implemented by certain States, or a right recognized for every migrant worker. That is

one of the reasons why in the near future, borders will presumably depend more on the identification of communities than on that of nation-States.

Contemporary migration in the prism of human rights

When he migrates, an individual dissociates his nationality from its natural framework. This decoupling is at the heart of contemporary issues relating to migratory phenomena through precisely the discussions about the extent of the rights of the migrant on a separate territory from his territory of origin. This is a consequence of a new context marked by the recognition of human rights. In this context, paradoxically, the religion of an individual is treated as a central element of the identity of the migrant.

A context marked by human rights

The fact that the first statements of human rights date back more than two hundred years does not mean that the identity of terms between the statements implies an identity of meaning. There is indeed a specificity of the contemporary legal framework stressed by the adoption of the International Convention on the Protection of Rights of All Migrant Workers and Members of their Families dated December 18, 1990, which became effective on July 1, 2003.

It is one of the major characteristics of these past 30 years: The reference to human rights innerves not only the sphere of political discourse but also the whole set of litigation. This phenomenon appears very clearly through the statistics drawn up by the European Court of Human Rights: Between 1998 and 2008, there were four times more cases submitted than during the period extending from 1959 to 1998 (Council of Europe, 2008). The same phenomenon occurs in domestic law. Comparatively, during the seventies, litigants were not used to referring to human rights in litigation. In other words, there is an impregnation by the human rights of litigation that goes beyond the criminal litigation, the traditional field of application of human rights through reference to the presumption of innocence. We are living in a contentious society, in which all individuals are entitled to benefit from human rights and fundamental freedoms. On account of this, the expression of claims changes in form, or even in nature. Individuals, including migrants, somewhat take possession of rules and gradually change the nature of social relations.

This is the major change: The right to litigate in courts no longer concerns only nationals. The Universal Declaration of Human Rights of 1948, a text from which the European Convention of Human Rights constitutes a regional version, differs from the Declaration of the Rights of Man and of the Citizen of 1789. It breaks the classical link between nationality and citizenship and establishes the principle of non-discrimination as a cardinal rule. In hindsight, the entire Declaration of 1948 may be read as

negating the States' sovereignty and granting direct rights to individuals. For instance, one could read that *everyone has the right to leave any country, including his own, and to return to his country* (art. 13) and that "*everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality*" (art. 15). The implementation of this right to leave has an impact on the State's prerogatives. To quote a research paper published by the United Nations High Committee on Refugees: "*Old assumptions that connect citizenship to residency and seek to limit human mobility do not reflect contemporary economic and political realities"* (Long, 2009). Consequently, the distinctions between two identical situations based on the criterion of nationality are now illegitimate. Therefore, the more human rights are used as a contentious standard, the more States have to renounce their rights to distinguish individuals according to their nationality.

The main difference is as follows: The processes integrating waves of immigration that occurred before and after the Second World War are not comparable. Those who arrived before the First World War did not have rights to legitimize their claims. In the words of Hannah Arendt, they were stateless and without any rights. In contrast, the immigrants of the post-Second World War structure their actions and behaviors more and more from the texts. A reversal of perspectives is operating here: Individuals are the recipients of rights beyond the State prerogatives. The dynamic of the rule of law disqualifies the distinction between a national and a foreigner. It challenges the principle of jurisdiction based on borders. Thus, an alien's right is gauged by the values of a "democratic society". Nation-State is no longer relevant.

The European construction, to a certain extent, exemplifies this rupture. First, it legitimizes a restriction of political prerogatives of States on behalf of the emergence of a new conception of citizenship disconnected from national logic. For instance, the European Court of Justice states that:

> *"The Court considers that withdrawing naturalisation because of deception corresponds to a reason relating to the public interest based on the protection of the special relationship of solidarity and good faith between the Member State concerned and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality. That decision is, moreover, in keeping with the general principle of international law. Concerning the examination of the criterion of proportionality, it is for the national court to taken into consideration the potential consequences that such a decision entails for the person concerned and, if relevant, for his family, with regard to the loss of the rights inherent in citizenship of the Union. In this respect, it is necessary to establish, in particular, whether this decision is justified in relation to the gravity of the offence committed, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality" (E.C.J., C-135/08 Janko Rottmann v Freistaat Bayern, judgment of 2 March 2010, summaries of important judgments, European Commission legal service).*

Second, it combines two categories of rights: the rights based on the principle of freedom of movement and the rights enshrined in the European Convention of Human Rights that it hinged on the same principle— the supremacy of human rights on the national regulations. The result is the emergence of a European citizenship which changed the possibilities for Member States to influence the conditions of attribution of nationality (Corneloup, 2011). As stated by the president of the Council of Europe, "*The time of the homogenous nation-state is over. Each European country has to be open for different cultures. However, we only have one civilization: of democracy, of individual rights, of the rule of law"* (Council of Europe, 2010).

The adoption of the International Convention for the Protection of the Rights of All Migrant Workers and Members of their Families from December 18, 1990 has extended this dynamic, precisely on a global scale. Paradoxically, the more human rights become a key element in the identity of individuals, the more they tend to strengthen the religious dimension of the migrant's identity.

How religion is becoming a central element of the identity of migrants

The International Convention on the Protection of Rights of All Migrant Workers and Members of their Families is considered the culmination of the conjunction of three international texts: the Universal Declaration of Human Rights of 1948, the Convention to Eliminate all Forms of Discrimination Women, and the Convention on the Rights of the Child. Its adoption coincides with the report issued at the Vienna conference in December 1990, which advocated the recognition of minority rights beyond individual rights in order to facilitate, in particular, the respect for cultures and religions of migrant workers.

For the first time, not only the distinction between nationals and immigrants has been challenged but the distinction between regular migration and irregular migration has also been challenged. Remarkably enough, this convention states in its Preamble:

> *"Bearing in mind that the human problems involved in migration are even more serious in the case of irregular migration, and convinced therefore that appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights"* (Preamble, International Convention on the Protection of Rights of All Migrant Workers and Members of their Families).

This is one of the reasons why the principle of non-discrimination prohibits that the criterion of the regularity of the presence on the ground of a State legitimizes separate regulations. Not surprisingly, most of the countries that ratified this convention are all source countries—meaning countries where migrants come from, rather than immigrate to. No Western migrant country has ratified the convention, even though the majority of migrants live in Europe and North America.

This does not mean that this convention is not having an impact on all of the countries. As soon as the text is adopted, it becomes part of international law, even if it has not been ratified by a country. That is the specificity of the legal speech. A legal speech act is different from an everyday speech act in that it "*invokes the rules and conventions of the law and carries with it a certain legal force. That is, legal speech acts create obligations, permissions, and prohibitions. In a word, deontic states that are made obligatory by law*" (Fiorito, 2006). For instance, in 1948, the Universal Declaration on the Human Rights was adopted by all countries but was not considered a binding text. In brief, all texts have, in the current legal practice, a performative effect. Due to this performative effect, the International Convention on the protection of the rights of any migrant worker is often quoted in domestic law by lawyers and even by members of the Parliament. In sum, in the future, it is not certain States will be able to maintain the difference between the national and the foreigner, between the alien in a regular situation and the one in an irregular one. Then, even the idea of border will no longer be relevant. In short, the freedom of movement is more effective than the restrictions that States could decide upon.

Conversely, this movement acknowledges religion as an integral part of the identity of the migrants beyond their nationality. The individual migrant is to free itself from its nationality, or at least to no longer be determined by it. Furthermore, the International Convention on the Rights of Migrant Workers grants a special place to the right to freedom of thought, conscience, and religion. First, the individual can adopt a religion but cannot renounce it; he is linked more to his community[2] or minority than to humanity as a kind. Second, the arrival of migrants, in a regular or irregular situation, is supposed to compel the host country to allow him to practice his religion without any restriction. The Convention stipulates that:

> *"States Parties to the present Convention undertake to have respect for the liberty of parents, at least one of whom is a migrant worker, and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions"* (Article 12.4 of the Convention).

To sum up, the individuals migrate from their native country with their culture and their religion, not only with their nationality.

The existence of this corpus of rules does not mean, however, that the situation of the immigrants or persons in an irregular situation can be regarded as satisfactory. But through the process of recognition of human rights, the issue of migration seems today to have the consecration of a right to return as a corollary. Its effectiveness illustrates the ambivalence created by the application of extra-territorial human rights within the framework of the nation-State (Sayad, 1983).

The right to return as a right of all migrants

That some migrants aspire to return to their country of origin is a sociological fact. From this perspective, migratory phenomena are compatible with State's prerogatives. But the recognition of a right to return for all migrants tends to create a new sociological fact. It is essential to state clearly what the expression "right to return" means in international law before outlining its impact on the migratory phenomena.

The right of return was originally bound to the refugee's statute. Today, it is now explicitly recognized for all migrant workers and members of their families. This mutation is not without consequence on the exercise of this right. That is why it is legitimate to use the expression "right *to* return."

Indeed, for the United Nations, the refugees form a special category of migrants due to the fact that their departure is independent of their will and that, contrary to their aspirations, the refugees may not necessarily return to their countries of origin. The initial draft of Article 14 of the Declaration provided that everyone has the right to seek and be granted asylum (Prévost, 2005). However, the final version of Article 14 merely refers to everyone's right to seek and enjoy asylum from persecution in other countries (Prakash Sinha, 2011). Had the first version been adopted, a convention relating to the status of refugees would not have been necessary. Indeed, giving individuals without any nationality or citizenship a right to be granted asylum—i.e., a right to be granted a nationality and citizenship—would have solved the refugee issue. In some ways, this is the spirit of the International Convention on the Protection of the Rights of All Migrant Workers. That is why the more that migrants are granted rights, the more the refugee status loses its consistency and, by that same token, the scope of the original right of return.

This is the main characteristic of the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons*:*

> *"All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal"* (Principle 2).

In the first part of the provision, the United Nations Principles recall the fundamental character of the right of return. In the second part of the provision, the Principles state that the flow of time justifies that today, the realization of this right is through financial compensation: "*Displaced persons may only receive compensation in lieu of restitution if it is factually impossible to restore their land as determined by an independent, impartial tribunal"* (Principle 21)*.*

To sum up, the refugees have a particular status granted by the States, the right of asylum. The refugee is, therefore, a migrant whose rights depend on State prerogatives whereas the migrant has rights that are in opposition to the State's

prerogatives. In parallel, the recent movements of populations following the Arab Spring have shown that it is becoming increasingly more difficult for the States to distinguish between the refugees who have come on account of political events and migrants who have come on account of economic reasons. This is the main difference: The refugee status is an accurate picture of an international order founded on the nation-States; the migrant is now contributing to the construction of a legal autonomous order. In this new order, refugees are losing their right of return. Once more, it is justified to quote the International Convention:

> *"The present Convention shall apply during the entire migration process of migrant workers and members of their families, which comprises preparation for migration, departure, transit, and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence*" (Article 1.2).

For this reason, one of the last articles of the Convention stipulates: "*States Parties concerned shall co-operate as appropriate in the adoption of measures regarding the orderly return of migrant workers and members of their families to the State of origin when they decide to return*." This provision "*when they decide to return*" constitutes a paradigm shift: It is not the States but the individuals who decide on migration—when it begins and when it ends. The right *of* return for the migrant is changing to a right *to* return. In spite of the principles mentioned above, the right of return for the refugee is becoming a right to compensation. That is, for instance, the solution adopted by the European Court of Human Rights in the Cyprians' refugee issue:

> *"At the present point, many decades after the loss of possession by the then owners, property has in many cases changed hands, by gift, succession, or otherwise; those claiming title may have never seen, or ever used the property in question. The issue arises to what extent the notion of legal title, and the expectation of enjoying the full benefits of that title, is realistic in practice. The losses thus claimed become increasingly speculative and hypothetical"* (European Court of Human Rights, 1 March 2010, req. 46113/99 and 21819/04).

That is also the new migratory policy in Australia: The media has recently reported that Cambodia is close to the signing of a refugee deal with Australia in which 1,000 genuine refugees will be sent from Australia to one of the world's poorest countries.

The individual, either a refugee or a migrant, now has the right to either return to his or her place of origin, or to re-create the conditions of life of his own community of origin as a result of the emerging statute of minorities. This movement coincided with a process of privatization of the nationality: From a media point of view, individuals feel they have a right to renounce their nationality and citizenship; from a legal point of view, an arbitrary refusal to grant citizenship in Europe can, under certain conditions, pose a problem from the angle of Article 8 of the Convention because of the impact of such a refusal on the privacy of the individual (European Court of Human Rights, 4e Sect. October 11, 2011, Genovese *v. Malta,* Req. no. key in ' 53124 ' /09, Â§

30). As a result, by a simple pendulum effect, the more people claim their right to worship freely, the more likely they contest the national regulations inspired by the majority culture. By the same movement, they claim their attachment to their former nationality where religion is a key factor. Religion is a common denominator because of the specificity of the right to manifest one's religion compared to other rights: First, the more people complain that this right is not implemented, the more they challenge national legislation inspired by the dominant culture; second, in many states, religion is a component of citizenship. Thus, migrants can be committed to their religion without renouncing their citizenship.

In order to describe this phenomenon we can use the common expression of *imagined communities.* In its original meaning, this expression refers to nations defined as something "*imagined because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion*" (Anderson, 2006, p. 5). In a different sense, from the context, it means that the individual is now entitled to be a member of a minority.

And that is the last point: the States contribute to maintaining this momentum through the definition of migration policies precisely centered on the migrant's right to return.

The right to return as an element of the migration policies of the States

On the one hand, States refuse to take into account that now the process depends on the migrant. That is why States are more used to speaking about expulsion. But even in this case, it has become an accepted practice to refer to the consent of the migrant and to help him financially.

For instance, French law provides for such a provision both for regular and irregular migrants. Belgian law is experiencing a similar provision without making a distinction between migrants, refugees, and asylum seekers, thereby virtually reinforcing the rapprochement between the two statutes. By comparison, English law provides some aid to regular migrants who want to return to their country of origin. But there is a common rule: In all cases, the migrant is allowed to receive financial aid only if he returns to his country of origin, e.g. the country that grants him nationality. This is a kind of inter-State cooperation policy. We are, therefore, clearly observing a contest between borders, nation-State, and territoriality of the rules.

On the other hand, other States' regulations place the emphasis on the migrant's right to return because of the links it has with the country. The Israeli legislation, which recognizes the right of any Jew to come and settle in Israel, represents the most famous case or has even been used as a model inspiring recent regulations.

The Law of Return is somewhat peculiar. The first article of the Law of Return grants every Jew the right to come to Israel as an *oleh* (immigrant) and the second article implements and delineates the scope of this right. In that sense, Israel is like any other country: The Law of Return defines no more than Israel's immigration policy. The sole—but perhaps major—difference from other countries is that it ties religion to nationality (Orgad, 2010). From a historical context, it can be read, in retrospect, as a national response to an international problem: the existence of thousands of persons deprived of their nationality and therefore of their rights at the end of the Second World War or in a way that is less tragic, after decolonization. However, the Law of Return is not as unique as it is commonly claimed to be. First, countries have the right to impose ethnic criteria. For instance, Germany adopted a similar criterion (being born in Germany) at the end of the Second World War for a very simple reason: It had to solve an important refugee issue. Given the circumstances, some scholars have qualified the German Nationality Law as a humanitarian gesture to rescue co-ethnics from "oppression" under Soviet rule.

Second, contrary to the Zionist myth, Article 2—rather than Article 1—of the Law of Return served as the foundation of Israel's immigration policy, allowing Israel to choose who is allowed entry into its territory. Similar to every other country, Israel may refuse entry to a Jew with a criminal past on the basis of the Law of Return. In our time, the resurgence of this issue resulted in proposals to reform this text in order to reduce the automatic character of the right of return, which would stress the expression of the will of the migrant and, paradoxically, alleviate the weight of his own religion (Ernst, 2010). We observe through this debate the failure of a statist approach over an individual approach.

From the example of the Jewish legislation, we can distinguish the following situations: First, it is common today to talk about a Chinese Diaspora or an Armenian Diaspora. This means that these persons form communities in their countries of residence and that they maintain the desire to return to their land of origin, even if several generations have elapsed between those who have left the country and their descendants who continue to imagine that they have natural links with this country. As a matter of fact, some countries have recognized some benefits to these individuals who wish to immigrate. They use the formula of right to return. For example, Spain has recognized a right to return to the Jews (Bordes-Benayoun, 2012) who could demonstrate that their ancestors had been deported on account of the Inquisition. This is not an imagined community but a kind of idyllic community in progress.

Second, other States define selective immigration policies in agreement with this right, this aspiration to return. For instance, in Japan, resident status is granted to any person able to prove that he is a third generation Japanese (Perroud, 2007; Tinguy & Wihtol de Wenden, 2010). In sum, the individual never loses his roots despite the passage of time. The borders exist here more as expressions of administrative formalities than as a constitutive element of a national identity. In brief, the effectiveness of the right of return is no longer an Israeli issue; the effectiveness of the right of the refugee is now a question of compensation.

Notes

1. Citizenship is fundamentally a Western political and legal concept; it is also a concept relevant specifically to a national polity. By contrast, human rights have been promoted as universal rights since their formal proclamation in 1948. The relationship between the social rights of national citizenship and the human rights of the Declaration provides a useful case study in which to discover whether sociology can provide concepts and theories that function across conceptual boundaries and territorial borders. Furthermore, human rights discourse may prove to be the primary candidate for sociology to operate as an effective discourse of global social reality (Turner, 2009).

2. The category of community, once conceptualized away as a doomed relic of pre-modem past, makes a triumphant comeback, this time as the principal frame of reference for social analysis (Bauman, 1992, p. 694).

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