THE RIGHT TO MIGRATE: BETWEEN A MORAL & A LEGAL RIGHT

Abstract

The aim of this paper is to query about the extent to which the moral right to migrate can be considered a legal right. Described by many as a natural right, the fundamental assumptions about what a natural right is has changed significantly in history - especially in the history of political and legal ideas - and so has the very notion of ‘nature’ which sits at the heart of both classical and modern natural law traditions. Hence, this paper asks what is the notion of nature that is presumed in the moral claim that migration is a ‘natural’ right. In order to respond to this question, I explore the connection between the classical ius migrandi and the modern freedom of movement, or right to free mobility, as the most recent corollary of that ancient principle. Freedom of movement has been hailed as a key aspect of the various human rights regimes that have developed since the Second World War and, overall, as a key component of any understanding of individual freedom and collective emancipation.

Migration studies are witnessing an upsurge of academic interest due to the current flow of migrants arriving from war zones and areas in deep humanitarian crisis. This research trend has also extended to legal studies and international law, where the debate around migration law is undergoing a new stage which demands a different sort of mapping than it did before. Scientific

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contributions to the study of migration are more than ever multiplying both in historical scope and in the variety of social-scientific fields that seek to grasp what is, after all, a millennial social phenomenon. Within migration law alone, approaches to migration vary greatly from the study of the legality of immigration to the study of the relation between the status of migrants and their citizenship rights. In turn, other legal scholars, sociologists, political scientists and philosophers attempt to approach migration not so much in terms of the meaning of migratory movements for demography or for the (re)shaping of the political community, but more in terms of the capacity of specific societies to absorb, integrate and respect foreigners.

More recently, many legal and intellectual historians have delved into the theoretical and legal histories of migration law as well as of classical attempts to juridify the status of migrants. Historical developments on this front are usually read as a symptom of wider and more structural shifts in the affirmation and retreat of state sovereignty, human rights regimes, capitalist expansion, the international state system and even of a potentially global civil society. Migration - and migration law specifically - is therefore assuming a prominent position within the international public policy framework, as much as on the philosophical reflection and scientific agenda of western academia, asserting itself as one of the key themes - if not the key concern - of legal research and social science. Contemporary legal research into migration law has predominantly focused on the legal validity of migratory movements according to international law or on the endless array of statuses of migrants from the viewpoint of national law, whether they are emigrants or immigrants, asylum seekers or illegal aliens, sans papiers or refugees, among other categories.

In the case of minority rights, the right of groups - ethnic and religious mostly - to travel freely and settle in a non-native territory has marked the history of both IR theory and of international law at least since the Peace treaties of Westphalia which took place in mid-17th century. Therefore, some understanding of the right to migrate has been latent, if not explicitly formulated, through the history of the international state system, from diplomatic history to the ratification of international treaties. The ubiquity of migration law in these spheres has to do with the disputed claim that migration is a natural right. This paper also seeks to understand how it has been constructed as such - and if this understanding is still legitimate in view of the literature on the intellectual history of that tradition as well as of that right specifically.

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