

From Human Rights to Civil Rights The Unavoidable Challenges of International Migration

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While citizenship is understood as a broad legal and social framework for belonging to a specific political community delimited by territory, the doctrine of human rights projects this legal framework beyond territorial borders and national sovereignties. This is the big attraction of human rights *vis-à-vis* the exclusionary function of citizenship in a world where opportunities and prosperity are distributed unequally among nations.

The dominant theory of citizenship in political sociology is English writer T.H. Marshall's, even in countries like Mexico, where the welfare state was not based on rights of citizenship but on corporatism and the political patronage system.

For Marshall, citizenship consists of ensuring that within a liberal-democratic welfare state, all members of a community are treated as equals through the adjudication of rights. Marshall created a typology that includes political, civil and social rights, historically defined and adjudicated to different social subjects. The state ensures that, with the guarantee of these three kinds of rights, each citizen feels an equal part of the community and is motivated to participate in it.¹

One problem with this concept of citizenship is membership or nominal citizenship, also known as nationality, which is symbolized by possessing a passport and categorizing individuals in accordance with the name of the state they belong to. Today, nominal citizenship is being seriously questioned as fundamentally state-centric in a world in which this is increasingly irrelevant. The rights associated with residency and

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belonging to a state create a division between citizens and non-citizens, which in turn creates a hierarchy of non-residents at the bottom of which are the undocumented. For those who wish to enter, exclusion continues to be absolute, with no degree of inclusion, given that citizenship serves to keep them out.²

These frontiers separating citizens from non-citizens serve to simultaneously include and exclude even if the emphasis is on the nation-state or the community, and they operate as physical limits and structural and symbolic barriers. These patterns are crisscrossed by gender and race, though in ways that reflect specific national, cultural and historic contexts. From this standpoint, we can identify citizenship as a form of inclusion/exclusion in which migrants are simultaneously excluded from being granted rights, from receiving cultural recognition and from political participation.³

Brysk and Shafir state that globalization has created a context in which many social phenomena are beyond the sphere of states, thus creating conditions for the violation of human rights and different levels of opportunities for claiming them. A “citizenship gap” is being created in which non-citizens (migrants) and second-class citizens (the marginalized and discriminated against) are permanently at risk. However, at the same time, they find a tool for struggle in human rights,⁴ which have become a global political culture, a symbolic international order and an institutional and normative framework that orients and constricts states.⁵

In the case of migrants, some authors maintain that the normative scope of the human rights discourse has already gone beyond national citizenship, so much so that documented and even undocumented immigrants have benefitted from a series of civil and social rights (particularly freedom of expression, of association and of assembly, plus the rights to education, to health and to vote in municipal matters) because the countries in question have different commitments to international human rights legislation.⁶ However, Dunn believes that these views overestimate the scope of the discourse, since what he calls nationalist citizenship unfortunately continues to prevail. However, he says, it must be recognized that

the mechanisms offered by the universal and inter-American rights systems are useful for immigrants.⁷

From a moderate or openly optimistic perspective of the political potential of the human rights discourse for broadening the concept of citizenship, these rights—granted because one possesses *humanity* and not a *nationality*—can be considered an answer to the vulnerability migrants experience, without the rights that could guarantee their social, economic, political and legal autonomy. Human rights are seen as a legal framework that protects persons who decided or were forced to migrate because chance placed them in a nation that did not give them the opportunities for a life.

Based on some of the epistemological overlap between citizenship and human rights (natural, inalienable rights in the civil, political and social spheres and more recently in the cultural sphere), in globalization the human rights discourse has inspired some ideas of citizenship. First off are the proposals that consider it important to preserve the broadest possible gamut of rights for national citizens and give a more limited range to migrants, particularly regarding matters that make them more vulnerable or that are occasioned by economic globalization. So, the priority is put on labor, cultural and/or political rights, as well as a broader range of rights, without being as complete as the Universal Declaration on Human Rights (UDHR).

First, outstanding among the new ways of conceptualizing citizenship emphasizing labor rights are transnational labor citizenship⁸ and flexible citizenship.⁹ Gordon proposes transnational labor citizenship as a new migratory status that would allow free transit to workers. This means that work visas would not be granted by national governments through employers (as is the case with temporary work visas, for example), but through the transnationally organized workers' movement. That is, workers confederations in a country would work together with those of other nations to give this kind of citizenship to those who request it, making sure that employers and states respect migrants' labor and social rights. According to Gordon, this proposal is not simply normative, but is empirically based on the support of European unions for undocumented employees of cleaning companies that contract out the work.

Ong has re-conceptualized citizenship from a neoliberal standpoint as exercised by elite migrants (basically corporation employees and businesspersons) to instrumentally use rights that these privileged strata have access to. According to Gordon, flexible citizenship brings out the accumulation of

transnational practices by elite migrants for enjoying two kinds of advantages offered by economic globalization: 1) different global benefits, like business subsidies, real estate, enrollment in global Ivy League universities, and even social security for their families; and 2) the utilization of business, legal and social goods facilitated by a high degree of mobility. For example, a Japanese citizen may take advantage of English liberalism to invest in Hong Kong, while his wife and small children live in the United States, and he sends his older children to study at Oxford. All this time, the children can take advantage of free British health services, and his wife, of the cultural services offered by a city like New York. Although a rightwing notion, flexible citizenship deals with rights that all international migrants should aspire to, above and beyond the basic rights involved in transnational labor citizenship.

Secondly, the proposal that emphasizes cultural rights is transnational citizenship, based on the idea that globalization produces cultural and social identities that transcend national frontiers, thereby generating multiple, differentiated forms of belonging. The survival of democracy, says Castles, depends on finding appropriate ways to include individuals and their multiple identities in a broad range of political communities both above and below the nation-state.¹⁰

Bauböck points out that, taking into account the new social phenomena involved in the globalization of migration, the following possibilities must be considered: broadening out political rights for simultaneous participation in the country of origin and the country of residence; sweeping inclusion of cultural rights bringing in the importance of factors like preserving one's language, customs, traditions, religion, etc.; and the collective exercise of these and social rights. This approach denies that establishing rights and membership goes beyond the nation-state and must be implemented by a global state. The nation-state is seen as the entity in charge of carrying out the practice of the formal, substantive contents of citizenship, but, in accordance with the content of international human rights legislation.¹¹

Third, according to Barry, citizenship that favors political rights is external. Transnational citizenship focuses on the exercise and enjoyment of rights migrants have in their countries of origin instead of in receiving countries. Barry underlines the growing recognition by sending countries of their citizens living abroad given their economic contribution and the political and cultural leadership they assume in their communities. Based on this, governments have negotiated with their emigrants different forms of incorporation that are recon-

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figuring national citizenship, giving it an external dimension. This happens in three key areas: 1) the economy, through remittances and capital flows; 2) the legal sphere, by recognizing that a person may hold two or more citizenships; and 3) politics, through voting abroad.¹²

A more complete proposal that does not, however, argue the universality of rights is that of civic citizenship, which is already being implemented in Europe, though unevenly in each country. Civic citizenship guarantees certain basic rights and obligations that resident, documented immigrants can gradually acquire so that they may be treated as the equals of nationals of the host state, even if they have not taken on national citizenship. These rights are the following: freedom of movement and residence; the right to work; access to services; the ability to vote and run for office in elections for the European Parliament and the municipality where they live; diplomatic and consular protection; and the right to petition, to information and to non-discrimination for reasons of nationality. According to the defenders of this position, this is a way to “de-nationalize” citizenship.¹³

Then there are views known as “migration without borders,” that hold that the way to respect the UDHR is to respect the right to migrate/emigrate of all persons, and that, as a result, all human rights of all persons must be recognized regardless of where they are. According to Soysal, there are two positions in this group: 1) that of those who reformulate citizenship based on human rights; and 2) that of those who refuse to apply adjectives to citizenship and as a result, try to justify the existence of rights to mobility emanating from the right to migrate granted by the UDHR.¹⁴

The first group includes Soysal's influential proposal of a post-national citizenship, which establishes that, while states insist on closing their borders and restricting migration, there is a growing universalization of rights due to the imposition of legal regimens like that of human rights, which are leading to new, more universal, inclusive notions of civic belonging counterposed to the idea of citizenship limited by state sovereignty. The weakening of national sovereignty and the growing importance of international human rights regimes

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lead Soysal to propose a citizenship that goes beyond the idea of national identity and assigns rights as a function of the status of “human being.” She says that post-national citizenship is nothing more than the recognition of rights already being exercised by immigrants who do not have national citizenship, but participate in the political and social community, and that they are universal because the migrants themselves demand them as human —not only civil— rights.

In addition, there is the proposal of a global or cosmopolitan citizenship, inserted into the normative framework of cosmopolitanism, which refers to a global policy model in which relationships among individuals transcend the nation-state and are increasingly regulated by global legal institutions and regimes, including, significantly, that of human rights. Cosmopolitanism suggests that there must be a distinction between citizens’ rights and nationality and that people should enjoy civil, social and even political rights in more than one country, which would constitute the right to be treated equally.¹⁵ This approach takes on board all these values and, in addition, incorporates activism in transnational social movements as a central factor. According to Carter, this activism’s central objective is to defend human rights and democratize supra-national institutions in order to build a truly democratic global state.¹⁶

For their part, Pécoud and De Guchteneire propose the recognition of the right to mobility as a contemporary reinterpretation of Articles 13 and 14 of the UDHR, which establish the right of moving from one country to another (the right to emigrate) and the right to asylum (the right to immigrate).¹⁷ Both these rights were formulated and interpreted in the context of the holocaust and the Cold War, which means they should be reinterpreted in light of the socioeconomic and environmental consequences of globalization. In this context, the right to migrate is also a reinterpretation of the right to freely choose a job and to enjoy an appropriate standard of living, both of which are recognized in the International Charter of Human Rights.

Lastly, we have Vitale’s proposal of *ius migrandi* (the right to migrate).¹⁸ This view justifies the existence of a right to mi-

grate that goes beyond the nationalist basis, no matter how much it is questioned and reconfigured. Vitale uses a cosmopolitan argument to justify that it be guaranteed based on international human rights statutory law. Only by upholding the right to migrate it will be possible to overcome the nationalism that embraces the idea of citizenship and to affirm the revolutionary, non-criminal nature of migration. ■■■

NOTES

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- ¹¹ R. Bauböck, *From Aliens to Citizens: Redefining the Status of Immigrants in Europe* (Aldershot: Avebury, 1994); *Transnational Citizenship: Membership and Rights in International Migration* (Aldershot: Edward Elgar, 1994); “Cultural Minority Rights for Immigrants,” *International Migration Review* 30 (1996), pp. 203-250; and “Towards a Political Theory of Migrant Transnationalism,” *International Migration Review* 37 (2003), pp. 700-723.
- ¹² K. Barry, “Home and Away: the Construction of Citizenship in an Emigration Context,” *New York University Law Review* 81 (2006), pp. 11-59.
- ¹³ J. de Lucas Martín, “La ciudadanía para los inmigrantes: una condición de la Europa democrática y multicultural,” *Eikasía* 4 (2006), p. 19.
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- ¹⁸ E. Vitale, *Ius migrandi* (Barcelona: Melusina, 2006).