

# ON THE PARADOX OF DEMOCRACY FOR MIGRANTS

- *Vanessa Barker*<sup>1</sup> reflects on liberal democracies' failure to recognise the human rights of migrants

On May 12, 2012, Europe stood accused of gross human rights violations at Tribunal 12 during a hybrid legal case and dramatic performance staged at Kulturhuset in Stockholm to a rapt audience. Europe stood silent as the prosecution read the charges: “systematic mistreatment of refugees, migrants and asylum seekers” and repeated and serious violations of fundamental rights to life, security, family, movement, and human dignity (<http://tribunal12.org/>). For the next twelve hours, twelve witnesses and eight international legal and academic experts were called to document and explain how it is possible that well over 16,000 people have died trying to cross the border into Europe, how many more are lost at sea, how young children are subject to abuse and exploitation en route to Europe and then upon arrival subject to detention and deportation, and how countless other human beings experience forced deprivation intended to elicit their return “home” and quick exit from Europe. The world-renowned jury listened to the mounting evidence about how current border control practices, the asylum process, and detention and deportation have created a much more selective, restrictive and exclusionary immigration regime that prioritizes security over human rights and results in the criminalization of migrants . Tribunal 12 presented a powerful case against Europe showing how the much admired liberal democracies of the Global North have become illiberal toward the people of the Global South.

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Despite the spread of human rights norms as outlined in the United Nations Declaration of Human Rights across the globe, norms which are now backed by international treaties and international law, there are three major impediments to the realization of human rights in liberal democracies, as identified and agreed upon by a wide range of socio-legal scholars working in this field: (1) the nation-state form of sovereignty (Cornelisse 2010); (2) the paradox of democracy as a bounded community based on universal principles (Benhabib 2004); and (3) the persistence of social hierarchies, which are increasingly racialized (Weber and Bowling 2008). These structural impediments are all compounded by current political and social conditions which favor nationalistic interests over any sense of cosmopolitan or transnational citizenship.

Why is the nation-state a problem for human rights? Although the rights outlined in the UN Declaration of Human Rights are ideally fundamental and universal—everyone has rights on the basis of being human rather than being a member of a particular community by birth, *jus soli*, or by blood, *jus sanguinis*—the way rights are granted, recognized, and enforced is through the nation-state. Human rights are *embedded* in domestic legal systems and the nation-state is charged with upholding those rights for persons within its jurisdiction on its territory. This institutional arrangement becomes problematic, especially in the case of migrants, when nation-state sovereignty (the state's power and prerogative to regulate its population and territory) comes into conflict with or takes precedence over the rights of individuals, particularly individuals who are denied access or rights to the territory itself. The universal human rights of paperless migrants or failed asylum seekers, for example, are supposed to be recognized and enforced by the very same nation-state that seeks their speedy removal from the territory. This vulnerable legal situation has been further compounded by shifts in the criminalization process. By making paperless migrants' presence on a territory a criminal rather than administrative violation, many European governments have not only changed the character of the interaction but justified a more punitive response to it. Moreover, the nation-state is the ultimate rights-granting agency. It is the nation-state that grants one of the most precious of all rights: the right to residency (which in some cases is the functional equivalent of the right to safety, security and to life). There is no universal right to residency. Globalization has caused people to move throughout the world but it is the nation-state that ultimately decides their fate. International law and supranational entities, including the European Court of Human Rights, have been surprisingly weak in the protection of the rights of migrants, particularly the most vulnerable, undocumented migrants.

Democracy itself also poses barriers to human rights protections. This should not be the case. Democracies are based on the fundamental principle that we are all created equal. Democracies actively promote and protect universal principles of equality and freedom for everyone regardless of race, religion, gender, or sexual orientation. Democracies are non-discriminatory – except for the distinction of citizenship. By maintaining the legal categories of citizen, resident, and alien, democracies maintain differential treatment and differential rights for citizens and noncitizens. This distinction creates a legal hierarchy of rights and protections. Although the historical trend has been toward equalizing the rights of noncitizens, there are important areas where this legal distinction remains and has a major negative impact on noncitizens' equality and life chances, namely voting rights and

deportation. Voting rights are not superfluous to civil or social rights but are indeed the most basic rights to self-determination and freedom; these are denied to noncitizens. In addition, all democracies retain the right to deport noncitizens (with the exception of refugees facing torture or death upon return – in theory at least). And by all accounts, nearly all democracies engage in deportation to a lesser or greater scale. By creating fine distinctions between citizens and noncitizens, the practices of deportation, detention, disenfranchisement, restrictive immigration, and even welfare-nationalism (encouraged by far-right parties across Europe) all expose democracy to be inherently exclusionary. As Seyla Benhabib explains, democracies are essentially bounded communities (based on some degree of shared value, procedure or identity) whose members alone (with some invited guests) can enjoy the lofty principles of equality and freedom. If you are not a member of these bounded communities, your legal rights are essentially limited. By leaning on the principle of nation-state sovereignty outlined above, democracies defend their exclusionary rights to the universal.

A final impediment to the recognition of migrants' universal human rights in liberal democracies is the reassertion of racialized hierarchies. The summary deportation of Roma from France in the summer of 2010, the mass detention of North Africans fleeing the violence of the Arab Spring in Lampedusa, Italy in 2011, and in 2010 Australia's bold refusal to rescue Afghani and Iraqi women and children whose boat broke apart at sea are recent examples of the undeniable racial dynamics that inform the restrictive immigration policies of the Global North. The discriminatory treatment and deportation of Roma from EU member states is especially revealing since they are EU citizens effectively denied access to other member states because of their ethnic identity. By limiting ethnic minorities' movement into or across Europe, mobility itself becomes stratified, meaning that only the global elites are truly free to move, to enjoy their universal rights of safety, security and human dignity as they are recognized and secured by domestic and international law. This elitist tendency weakens the character of both democracy and human rights.

#### References:

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