HUMAN DIGNITY BEYOND BORDERS: AN ECCLESIASTICAL ARGUMENT FOR THE RIGHTS OF FORCED MIGRANTS

[ESP] *La dignidad humana más allá de las fronteras: un argumento eclesiástico por los derechos de los migrantes forzosos*

Fecha de recepción: 3 agosto 2020 / Fecha de aceptación: 29 septiembre 2020

LUIS R. GUZMAN
Katholieke Universiteit Leuven
(Belgium)
lrgzmn@gmail.com
&
BRITTANY SMITH
Princeton University
(New Jersey)
bnsmith@princeton.edu

Abstract: Following influxes of Latin Americans across the U.S.–Mexico border and similar mass migrations across the Middle East and Europe, liberal democracies are experiencing increased xenophobia motivating states to restrict such movements. In the wake of the international refugee crisis, these sentiments have led to more exclusionary immigration policies and morally problematic treatment of asylum seekers. Given that no international consequence exists for inferior treatment of asylum seekers, states are guided only by moral imperative and domestic law. This lack of international accountability has led states to enact policies contradicting the moral/philosophical principles upon which they are founded. This suggests the question, do states have solely moral or philosophical obligations to grant asylum, or is there an applicable juridic construct? We propose that states proclaiming a Christian tradition may derive such obligations from canon (ecclesiastical) law, which provides a juridical tradition predating and informing modern liberal democracies. With reference to canon law's emphasis on human dignity, we argue that Christian states have a juridical obligation to provide sanctuary to people fleeing oppressive circumstances.

Keywords: Migrants; human dignity; canon Law.

Resumen: Tras la afluencia de latinoamericanos a través de la frontera entre Estados Unidos y México y migraciones masivas similares en Oriente Medio y Europa, las democracias liberales están experimentando una mayor xenofobia que motiva a los estados a restringir dichos movimientos. A raíz de la crisis internacional de refugiados, estos sentimientos han dado lugar a políticas de inmigración más excluyentes y a un tratamiento moralmente problemático de los solicitantes de asilo. Dado que no existe ninguna consecuencia internacional para el trato inferior de los solicitantes de asilo, los estados se guían únicamente

por imperativo moral y el derecho interno. Esta falta de responsabilidad internacional ha llevado a los estados a promulgar políticas que contradicen los principios morales / filosóficos sobre los que se basan. Esto sugiere la pregunta, ¿tienen los estados obligaciones únicamente morales o filosóficas para otorgar asilo, o existe una construcción jurídica aplicable? Proponemos que los estados que proclaman una tradición cristiana pueden derivar tales obligaciones del derecho canónico (eclesiástico), que proporciona una tradición jurídica que precede e informa a las democracias liberales modernas. Con referencia al énfasis del derecho canónico en la dignidad humana, argumentamos que los estados cristianos tienen la obligación jurídica de proporcionar refugio a las personas que huyen de circunstancias opresivas.

Palabras clave: migrantes; dignidad humana; derecho canónico.

1. INTRODUCTION

Nationalistic trends besetting liberal democratic states have resulted in severe and broad restrictions on immigration, extending to individuals seeking asylum from oppressive societies. These exclusionary, nativist sentiments threaten the lives and livelihood of those who are in most need of escape. Xenophobia has a storied history, but the present political trend is unique because it includes asylum seekers and it has permeated liberal democratic societies, which in theory thrive as inclusive communities operating as a bastion of safety from foreign oppressive regimes. Within the context of this political trend, the question becomes, what moral or legal obligations must a state consider when weighing acceptance of asylum seekers? Is it a philosophical imperative or a legal construct? We propose that states proclaiming a Christian tradition should derive such obligations from canon or ecclesiastical law, which provides a wider juridical construct predating the modern state and liberal democratic systems.

Currently, secular international law grants the receiving state discretion to admit asylum seekers. There exists no international legal consequence to the reception of asylum seekers, thus states are guided only by a moral imperative attaching to the liberal democratic ideal. The deficiency is exacerbated by the rise of nationalism and immigration policies, such as detainment practices that are

contradictory to the receiving state's democratic ideals. An alternative must be sought to guide the receiving state's discretion in admitting asylum seekers.

This paper proposes that liberal democracies with a Christian tradition may utilize the concept of human dignity, expressed in canon or ecclesiastical law, to grant sanctuary to a person who seeks to escape oppression in their native state. Through the concept of human dignity, we can identify an overlap between canon or ecclesiastical law and secular law, whether domestic or international. An examination of the areas of this overlap reveals the foundational roots of how states with a Christian tradition are morally and legally obligated to grant sanctuary to asylum seekers on the basis of upholding human dignity. By centering at the concept of human dignity, this paper concludes that concerns and values implicit in canon law are congruent with the concerns of modern liberal democratic states. Moreover, states with a canonical legal tradition should integrate the concept of human dignity into their policy agendas, especially agendas on matters of immigration, which affect vulnerable persons fleeing persecution.

A complete examination of this theory must include counter arguments, all of which are addressed here. Such counter arguments focus on the extent of secularization in a modern liberal democratic state. First, why must a liberal democratic state fall back on religious tradition as a moral source to address modern political or legal issues? Second, must a current political trend dictate an adjustment to identifying a foundational source of juridical action? Last, some may contend that international law's framework functions appropriately so long as procedures for its implementation are followed. However, each of these arguments neglects the practical and political reality of asylum seekers being denied sanctuary from violent and oppressive regimes based on nothing more than political expediency unattached to moral or juridical foundation which would otherwise prompt action by the receiving state.

In conclusion, liberal democracies confronting domestic nationalistic political trends which tend to exclude asylum seekers from gaining admission must rediscover the juridical sources offered by Christian tradition, rather than ignoring or outright rejecting such traditions in a vain effort to achieve a supreme secular state. The concept of human dignity prompts such modern liberal democratic states to grant sanctuary to individuals fleeing oppressive and dangerous societies which have no such moral guidance.

2. The Secular Juridic Approach

Under international law, state discretion plays a key role in determining how asylum seekers are treated by receiving states and how asylum claims are processed. State discretion enables receiving states, such as the United States, to limit the amount of asylum seekers who receive asylum. This gives receiving states significant autonomy to determine what rights asylum seekers maintain on the territory as they wait for their claims to be processed and whether they will be granted admission. Discretion in this context enables national authorities to interpret international law and create domestic policy in correspondence to their interpretation of that law. Thus, once a receiving state admits an asylum seeker onto its territory, the receiving state is given a zone of legality in which they are free to process the claim for asylum as they see fit[1].

Claims for asylum are processed with respect to parameters stated in international law, specifically the 1951 United Nations Convention on the Status of

[1] Shany, Y., «Toward a General Margin of Appreciation Doctrine in International Law?», in *European Journal of International Law* 5 (2005), pp. 907-40.
There are two fundamental principles or elements that comprise the doctrine of margin of appreciation: *Judicial Deference* – When national authorities are granted deference by the courts when they use their discretion to carry out duties under international law; *Normative Flexibility* – When national authorities reach different interpretive conclusions on the same international norm in question.

Refugees, known as the Refugee Convention. The Refugee Convention holds that a refugee is an individual who, "*owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country*". States are given autonomy to interpret what qualifies as *well-founded fear of being persecuted* for the five reasons listed therein.

States vary in interpreting this standard, but the Refugee Convention holds that at the *very least,* a receiving state's internationally recognized responsibility to a forced migrant who presents themselves at the border is to not refuse him entry to their country, if doing so would compel him to return to a country where he might face persecution on any of the five Refugee Convention grounds. This doctrine is called the *principle of non-refoulement. Non-refoulement* entails three possible options for those who receive entry upon claiming asylum: resettlement, grant of asylum from the receiving state[2], or return to the state from which they fled if their status is not legitimized. Resettlement occurs when a state opens its borders to resettle the refugee from a third-party nation or refugee camp. Asylum takes place at the border where the asylum seeker is accepted under this principle of non-refoulement and cannot be sent back to the place of their persecution[3].

The principle of *non-refoulement* has entered customary international law, rending it binding upon all states, and thus cannot be suspended or set aside, even on express consent of the states[4]. As customary international law, *non-refoulement* binds *all* states regardless of whether they are contracting parties of the Refugee

[2] *Receiving state* refers to the country which grants the refugee entry by complying to the international law of *non-refoulement* and the processes the asylum seekers claim.
[3] SHACKNOVE, A. E., «Who is a refugee?», in *Ethics* 2 (1985), pp. 274-277.
[4] UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES., UNHCR Note on Diplomatic Assurances and International Refugee Protection, (2006), p. 15.

Convention[5]. *Non-refoulement* secures bodily integrity and temporary admittance for asylum seekers. As time passes, however, further obligations to refugees become unclear as their status is determined. This ambiguity creates room for the deprivation of human rights and denial of internationally legitimate claims to international assistance[6]. For example, recent actions by the United States under the Trump Administration violated the law of *non-refoulement*, thus threatening the efficacy of *non-refoulement* in deterring states from refusing admittance to vulnerable persons fleeing persecution. Although this violation of international law falls outside of the direct scope of this paper such actions barring asylum seekers entry exemplifies a negative impact state discretion has had on international norms surrounding human rights.

State discretion plays a major role in determining whether the asylum seekers receive the protected status of a refugee once they are admitted into a country by the principle of *non-refoulement.* This form of discretion is referred to as *discretion in interpretation* because the state's interpretation of customary international law and processing mechanisms are the determining factors in whether an asylum claimant is given permanent refugee status. *Discretion in interpretation* is problematic because it creates a category of displaced persons who do not receive protection under international law or any domestic law. Undefined, displaced persons include those fleeing from their circumstances for reasons other than persecution, those who have fled but not crossed an international boundary, and those who have fled from persecution for reasons other than race, religion, nationality, or social or political membership[7]. Through *discretion in interpretation* these persons are determined to fall outside the scope of international law and placed at the mercy of the domestic policy of receiving countries. Who falls into this category of displaced persons is

[5] Ibid.
[6] SHACKNOVE, A. E., «Who is a refugee?», cit., p. 277.
[7] Ivi, p. 279.

contingent upon the receiving state's broad or narrow interpretation of what constitutes persecution. In the United States, for example, rapid processing procedures and arbitrary, unmonitored definition of *persecution* by individual actors results in the rejection of valid asylum claims. This narrow interpretation leaves vulnerable persons with the option to repatriate to the state from whence they fled from or seek refuge in a different state.

The next stage in which state discretion plays a major role in protecting or neglecting the human rights of asylum seekers occurs while they are *on* the territory waiting for their claim for asylum to be processed. This second form of discretion is referred to as *discretion in treatment. Discretion in treatment* is concerned with the treatment of asylum seekers for the duration of the time it takes for their claim to be processed. This discretion in itself does not pose a moral dilemma, insofar that all law has a sense of discretion. However, discretion in treatment becomes morally problematic in two instances: when the treatment of asylum seekers violates the receiving territory's own political conception and in instances where the treatment of asylum seekers falls significantly short of providing for basic human rights. Detainment, for example, is a form of discretion in treatment that contradicts due process rights firmly established in United States domestic law.

This paper argues that both *discretion in interpretation* and *discretion in treatment* create an international system in which an asylum seeker's human rights are not uniformly protected. Because the Refugee Convention law does not provide a clear standard for refugee status determination procedures or the treatment of forced migrants who do not qualify as refugees but exist on the receiving state's territory, domestic law often dictates the scope of asylum seekers human rights. In its 1967 Protocol Relating to the Status of Refugees, the United Nations established guiding principles of non-discrimination, non-refoulement and non-penalization in asylum law to prevent widely disparate treatment of asylum seekers. In spite of this attempted international check, modern states nevertheless continue to routinely

violate this law through discretionary treatment of asylum seekers, leaving the rights of asylum seekers *globally* to be the sole function of state discretion in the exercise of its domestic law.

3. Application of Normative Obligations Derived from Canon or Ecclesiastical Law

The global nationalistic trend combined with the failure of secular international law to more fully protect the asylum seeker from arbitrary refusal to provide sanctuary prompts us to look to other sources of law upon which rely. Canon or ecclesiastical law provides this foundation. Liberal democracies proclaiming a Christian tradition should be guided by canon or ecclesiastical law as much as international law when determining whether to grant asylum to migrants escaping political or religious oppression.

This part of our examination begins with the acknowledgment of the ancient concepts of hospitality and sanctuary. These ideas find their origin in Scriptural and Patristic writings extolling the virtue of giving respite to the stranger and comfort to the afflicted[8]. These value-based concepts are outpourings of the charitable heart given normative life through divine revelation. They are authoritative as divine revelation but lack juridic enforceability. Nevertheless Scriptural divine revelation and inspired Patristic writings give us the core rationale for later application of the twin concepts of hospitality and sanctuary.

We next see writings of a juridic nature giving force to these virtues, requiring closer adherence to the values expressed herein. The Order of St. Benedict, which contains the rules by which members of the monastic order conduct their lives, states, "*Let all guests that happen to come be received as Christ, because He is going to*

[8] Lk. 14, 7-14; Mt. 25, 42-46.

say: A Guest was I and ye received Me"[9]. This Rule was codified in the fifth century A.D. and draws its foundation from Scriptural and Patristic writings which started our examination. Thus, here we have an early expression of a juridic construct encapsulating the normative values found in divine revelation. Further, this juridic construct lends an air of enforceability to these normative concepts[10].

Several hundred years later, and we find the Catholic Church in need of asserting its sovereignty, which included compiling, organizing, and implementing a set of laws. While the basis for that need is beyond the scope of our examination here, we see a concrete juridic construct both giving expression to the Scriptural value of sanctuary but also specific legal implementation of that value. The Pio-Benedictine Code of Canon Law, promulgated in 1917, states, "*The church enjoys the right of asylum, so that any fugitive from justice who has fled into it may not* [...] *be taken out of it without the permission of the Ordinar*"[11]. This is a remarkable assertion of what had been an ancient tradition of providing sanctuary to faithful individuals escaping the civil authorities. Not only does it sustain the Scriptural values of sanctuary to the afflicted and hospitality to the stranger, but it also purports to create a zone of authority exclusive of secular civil power. In other words, it is a rare instance in which an ecclesiastical authority exercises power over a person's physical integrity exclusive from that of the civil security authorities. Typically, canon law defers to the power of civil secular law when said law is not in conflict with canon law. Here, canon law directly challenges civil secular law by asserting for itself the power to contain a person within a sacred space and tacitly proclaiming for itself the power to restrain the secular authorities from entry.

Regardless of this sovereign assertion by the Catholic Church through the Pio-Benedictine Code of Canon Law, the dual values of hospitality and sanctuary

[9] *Rule of St. Benedict*, Ch. 53.
[10] Indeed, countless monastic orders have sprung from the Benedictine Order due, in part, to lax fidelity to the original rules.
[11] *Pio-Benedictine Code of Canon Law*, § 1179.

remain within the sight of the canon law. Over time, this juridic construct morphed into a construct that was simultaneously broader yet less assertive. It is within this context that we begin to find the development of the concept of *human dignity* replacing a wide variety of normative expressions, among them hospitality and sanctuary. Gone are affirmative assertions of the sovereign power of an ecclesiastical authority to the exclusion of civil secular power. In its place we begin to see loftier ideals designed to transcend civil secular power, returning to core Scriptural values which disarms the power of sin and ennobles charity.

Generally, the concept of human dignity has found expression across ecclesiastical and secular forums in two methods. The first is declaratory, wherein the law asserts the importance of human dignity through affirmative declaration, maximizing its efficacy by broadening meaning and application. The second is restrictive - that is, human dignity is implied by laws designed to refrain the power of the secular state.

We can find examples of both methods in modern secular legal statutes. The preamble to the Universal Declaration of Human Rights States, in part, "*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*"[12]. Contained within this language are expressions of the norm of human dignity and protection of physical integrity. This is indeed a broad, lofty declaration of human dignity as one of the foundational cores of a universal expression of human rights.

The Constitution of Spain contains similar language, presenting human dignity among a declaration of fundamental rights of its citizens. It states, "*The dignity of the person, the inviolable rights which are inherent, the free development of the personality, the respect for the law and for the rights of others are the*

[12] *Universal Declaration of Human Rights*, Preamble.

foundation of political order and social peace"[13]. Indeed, as we see the Spanish Constitution does not limit application of this declaration to its citizens, but rather to all persons. As with the Universal Declaration of Human Rights, this expression of human dignity by the Spanish Constitution attempts to reach beyond the legal limitations and the physical boundaries of the state.

The Constitution of the Italian Republic makes a declaration of human dignity, though it frames the expression in terms of citizenship and equality. It reads, "*All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions*"[14]. Here, this fundamental equality is dependent on citizenship, which of course in turn could be broadly defined but nevertheless adds a caveat to its application.

By contrast, the United States Constitution takes the refrain approach. Instead of declaring the importance and inviolability of human rights and human dignity, the statute restricts government action in certain areas of human life. For example, the United States Constitution states, "C*ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof*"[15]. Thus, the approach in the United States is to prohibit the enactment of laws encroaching upon human dignity. There is no declaratory statement which purports to have force and application of the concept of human dignity.

The Catholic Church's modern expressions of hospitality and sanctuary have been declarations with universal application, but do not purport to maintain strict enforceability, leaving such assertions to, on one level, actions of the secular state, and on another, individual acts of human charity. The Second Vatican Council's constitutional documents, and the Revised Code of Canon Law born from the

[13] *Spanish Constitution*, § 10.1.
[14] *Constitution of Italian Republic*, Art. 3.
[15] *United States Constitution*, Amendment 1.

Council, contain normative expressions and juridic constructs, respectively, of the concept of human dignity. First, "*God, who has a parent's care for all of us, desired that all men and women should form one family and deal with each other as brothers and sisters*"[16]. Thus, the Second Vatican Council establishes the broad outline comprising the concept of human dignity, which, as we will see, not only becomes the foundation for a canonical expression of the same concept but may also serve as a juridic construct with broader application.

The Revised Code of Canon Law, promulgated in 1983, states, in relevant part, "*From their rebirth in Christ, there exists among all the Christian faithful a true equality regarding dignity and action by which they all cooperate in the building up of the Body of Christ according to each one's own condition and function*"[17]. Here, we see elements of the Second Vatican Council and the Universal Declaration of Human Rights. We see that it is broadly worded and somewhat preambulatory in nature in the sense that it is designed to encompass a wide range of human activity and does not attempt to assert itself in manner exclusive of the power of the secular state, as we saw with the 1917 Code. We also see notions of equality as the basis of dignity, i.e. one cannot be treated with dignity if one is unequal with another, and citizenship, in the sense that those reborn in Christ (baptized) come under the power of the Code. This is logical considering that *Gaudium et Spes* maintained no such citizenship standard, referring to *all men and women* under God. Thus, the 1983 Code attempts, without the assertiveness or specificity with which the 1917 Code treated the subject of sanctuary, to create a juridic construct in which human dignity may exist among the Christian faithful.

It is not without coincidence that the declaratory methods of expressing human dignity derive from liberal democratic states with strong foundations in Christian tradition and canon law. Nevertheless, attacking the problem of

[16] PAULUS PP. VI, «Gaudium et Spes Constitution», in *AAS* (1964), art. 24.
[17] CIC 17, can. § 208.

nationalistic trends hindering the acceptance of asylum seekers or forced migrants from the core humanitarian value of human dignity serves as an effective launching point for a broader application regardless of the faith traditions of the receiving state. Even relying on the declaratory method of juridic expression of human dignity, particularly those utilizing broad definitions permitting wide-range application, can be useful when a state is searching for a construct within which to exercise discretion outside that of international secular law. Reference to canon law's treatment of human dignity and its similarities with the civil secular declarations of fundamental human rights should prove useful to a state's rationale in accepting asylum seekers. In short, for those states proclaiming a Christian tradition, the canonical notion of equal human dignity among the faithful can serve, at the very least, as a supplemental juridic construct, or, what is more, a faith-based moral imperative, to receive individuals seeking asylum.

4. Potential Challenges

Utilizing canon law as a juridic construct for the acceptance of asylum seekers draws two readily identifiable critiques, both based upon modern secularizing trends. First, in a modernizing world which eschews religiosity, why is it that we must rely on an ecclesiastical tradition for moral obligations? Surely, such moral obligations can be derived from political-philosophical sources. However, this argument has been posited even as the refugee crises has escalated. In *The Refugee and Migrant Crisis: Europe's Challenge*, late last year the President of the Conference of European Jesuit Provincials, John Dardis SJ, issued a call to action, stating,

While asylum and migration are certainly complex issues, the simple fact is that, in the end, people are dying. At this defining moment, we can and we must reach out... There has been debate in recent years about the Christian roots of our

continent. This is a time to show that this is not a debate only about language and terminology. Let us together try to help our continent and our societies move forward, to show that we are Christian not just in name but in fact, to show our love not just in words but in deed.

These words exemplify the idea that the problem we encounter is a humanitarian one, which requires a humanitarian solution, not a philosophical or political solution.

Secondly, must a current political trend dictate an adjustment to identifying a foundational source of juridical action? Our society is pluralistic but that does not mean we should exclude all moral doctrines to receive guidance in addressing inherently ethical or moral issues, like that of human dignity and protecting vulnerable populations fleeing persecution. There is an argument to be made for inclusion of moral doctrine in secular pluralistic discourse: The current crisis is not one that must use religion as a necessary condition to reconcile injustices in forced migration, but there is significant reason to believe that as the international refugee crisis intensifies states should look to multiple, pluralistic-oriented normative sources. Our modern era debates about ethics are often separate from the moral foundations from which they are grounded, and this modern discourse on ethical/moral dilemmas (abortion, issues of migration, etc.) are fragmented. Both sides of these moral debates frame their respective arguments using moral fragments: our debate has devolved into a repetitive exchange of slogans rather than a comprehensive exchange of ideas from philosophical, religious, or ideologically sound perspectives. Christians and other religions have refrained from using moral convictions or looking at any moral comprehensive doctrine when discussing these issues and this limitation severely limits the scope and worth of our moral debates. Society has lost the intellectual context and original intelligibility from which their argument derived any force or validity. For this reason we argue it is worth looking at a moral/ religious historical tradition in cannon law.

Last, some may contend that international law's framework functions appropriately so long as procedures for its implementation are followed. The application of international law in this area results in a gap-creating category of vulnerable persons that do not qualify as refugees, but exist on receiving territories and are subject to human rights violations due to a lack of international oversight. This gap exists between what international law requires of states which abide by international law of non-refoulement and how recieving states treat vulnerable persons in their charge. Domestic law is thus often used to treat asylum seekers differently on a territory by territory basis resulting in a lack of uniform humanitarian treatment. To fill this gap, it is important to introduce the notion of human dignity through the juridic construct of canon law.

5. Conclusion

There is indeed a problem at the borders of many countries, but it is not one of religion, race, ethnicity, or gender. It is a humanitarian problem requiring a humanitarian solution. Those in need of charity should, as Christ teaches, be received with charity. A secular juridic construct bound between the two ends of declaration and restraint, and one in which discretion by the receiving state is the prevailing mode of implementation of fundamental human rights to those seeking asylum, leaves little room to advocate for a broader application of human dignity. Canon law may serve as an effective juridical construct enabling liberal democratic states proclaiming a Christian tradition to base acceptance of asylum seekers on a moral foundation separate from secular international law and thus escape from its shortcomings in light of the current nationalistic trend.