

Freedom of movement and its limits, a challenge for democracies

On the occasion of World Human Rights Day on December 10, 2021, the European Conference of Justice and Peace Commissions (Justice and Peace Europe) wishes to share some thoughts on the subject of freedom of movement.

Twenty years ago, the French intellectual Marcel GAUCHET¹ warned us that democracy, having conquered its external enemies, was now facing its most formidable challenge: its own survival. Indeed, the migratory flows in the wake of what has been called the Arab Spring, particularly at the borders of Europe in recent weeks, the tensions of Brexit and two years of the pandemic, show that the exercise of certain fundamental rights can undermine others.

This is the case with the freedom of movement. Guaranteed by Article 2 of the 4th additional Protocol to the European Convention for the Protection of Human Rights, by Article 45 of the Charter of Fundamental Rights of the European Union as also since 1948 by Article 13 of the Universal Declaration of Human Rights, this fundamental right is also a major element of Catholic social teaching, underlined in the Encyclical Letter *Pacem in Terris* of 1963². For several years, however, this freedom has frequently been curtailed on the grounds of protection of human security or because of political tensions and choices.

For European citizens the principle of freedom of movement and choice of place of work, study or life has deteriorated as a result of Brexit. Using the context of the war on terror, or sometimes depending on his mood, Donald Trump declared certain groups of people non-grata on American territory. Yet, beyond the US, all Western democracies have built deadly walls on their borders in violation of their signature of the 1951 Refugee Convention, and in particular of its article 33 on non-refoulement. And this for over 20 years. More recently and in the same vein, in the name of public health, drastic measures were taken by many governments in an attempt to stem the spread of SARS-CoV-2. Almost all the citizens of the world have been forced to limit their ordinary everyday movements. Families have been separated, millions of jobs lost, freedom of worship severely affected, etc.

These examples show the difficult balance to be struck between the exercise of certain rights and the maintenance of other rights (e.g. access to health care, or public security). We had almost forgotten how much they are taken for granted, though they are actually offered,

¹ M. GAUCHET (2002), *La démocratie contre elle-même*, Gallimard, Collection Tel.

² Encyclical letter *Pacem in Terris* (1963) N° 25 "Every human being has the right to freedom of movement and of residence within the confines of his own State. When there are just reasons in favor of it, he must be permitted to emigrate to other countries and take up residence there. The fact that he is a citizen of a particular State does not deprive him of membership in the human family, nor of citizenship in that universal society, the common, world-wide fellowship of men."

guaranteed and implemented by our States. While it is common to see restrictions on freedom of movement in countries where the democratic tradition seems fragile or recent, the question is particularly delicate for our more mature democracies, since they must configure these restrictions within the framework of the rule of law. This presupposes and requires respect for legislative and constitutional procedures on the part of governments, the possibility for citizens to express their views (with respect for public order) and to take legal action and not least the limitation in time and place of these measures to a minimum.

In this regard, jurisprudence is essential because the work of justice helps us to discern. For example, the European Court of Human Rights, has underlined that the protection of citizens can require restrictions on this freedom of movement in countries where democracy is firmly established³. On the occasion of the Covid-19 pandemic, and the strict containment measures taken to combat the spread of the virus and the endangering of populations, it ruled that such a measure, put in place by Romania, is not akin to deprivation of liberty or house arrest, despite its strong impact on freedom of movement.⁴ By contrast, when an Italian citizen complained about an Italian law allowing a court to pronounce preventive measures against people whose behavior was deemed dangerous, it found in favor of the complaint. Indeed, with these measures, a citizen could become the subject of a measure of surveillance or house arrest, whilst the complainant had seen this sentence given on the basis of a "tendency to delinquency". The European Court of Human Rights ruled that such a vague measure bordered on the arbitrary and did not justify the restriction on freedom of movement.⁵

While the reasons for reducing the effective exercise of our freedom of movement multiply ("protection of the population", "protection of national security", "territorial integrity", "sovereignty"), intense parliamentary debates, court decisions taken calmly and after due deliberation, as well as informed journalism are essential to help the rulers and the ruled to stress-test the legitimacy of such decisions.

It is in this context, and through the exercise of calm adversarial debates, that the proportionality and legitimacy of the measures can be assessed. Territorial integrity and respect for national sovereignty are thus invoked to limit access to the UK for EU workers and students and likewise in the other direction. Even if we regret this situation, we accept it as the situation that prevails post Brexit. On the other hand, some current access restrictions to enter Belarus are being rejected on the grounds that no legitimate reason is given to justify them. In times of pandemic, a stronger restriction on freedom of movement has been widely accepted because it is based on the right to life, guaranteed by Article 2 of the European Convention for the Protection of Human Rights. The European Court of Human Rights has recalled the existence of a positive obligation incumbent on states to take measures to protect the health of their population.⁶

Human Rights are therefore to be held in balance and a balance must be sought and found collectively in the face of cross-border threats. In addition to the proportionality of the restrictions on rights and freedoms, their limitation in time is essential. Serious risk pertains

³ ECHR, case BAUMANN vs France, 22 August 2001

⁴ ECHR, case TERHEŞ vs Romania, 13 April 2021

⁵ ECHR, case TOMASSO vs Italy, 23 February 2017

⁶ ECHR, case LOPES DE SOUSA FERNANDES vs Portugal, 19 December 2017

to the transformation from a state of emergency to a normal state, or when transposing measures relating to a state of emergency into daily life. Finally, and above all, it is up to democratic states to develop a coherent long-term policy, a strong policy which gradually establishes a hierarchy of standards favoring respect for human dignity, at the center of which is the protection of life.

The right to life, and the responsibility of our rulers in this regard have been invoked to justify reducing the enjoyment of freedom of movement. However, it is the protection of their lives, those of their children, and their thirst for democracy that drives many exiles to the gates of Europe. Used as weapons by unscrupulous neighboring governments, vilified by populists in search of electoral attention, they drowned, starved, and froze outside our barricaded doors. By denying our responsibilities in these tragedies, by letting people who only ask to contribute to our values and our collective wealth die in atrocious conditions, European democracies are not only in contradiction with their international commitments but also incoherent in their approach to fundamental rights. When European democracies allow themselves to be manipulated by fear, they deny their own values. This is a dangerous game that can lead to the self-destruction of our institutions.

It therefore seems essential to us to reassess the links between all of our rights, including the right to emigrate and the right to immigrate. It is just as important to do so in a concerted and responsible manner, in spaces of respectful contradictory debate. There is no point in the sterile pitting of one right against another. Rather, setting them in context and thinking about their inter-relationships can help to re-establish a shared hierarchy of norms that we may have forgotten. Our rights are fragile and complex and we must hold them together: let us remember especially that while life certainly deserves protection, freedom of movement sometimes aims to protect it.

Paris, December 10, 2021

The Executive Committee of Justice and Peace Europe