

Shedding light on the concept of irregular migration



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1. Concept:

Migration as a term in itself does not have a negative meaning or significance, on the contrary it is a term that stands for ideas of exchange and mobility in the world, but today it is linked to crime, fear and insecurity.

“Migration” linguistically means “to Leave”, As a legal term it means leaving the state in which one belongs to, to settle in another state permanently or temporarily, the act itself reflects movement of individuals and groups, It may be widespread and including masses, which is called a migration flow.

Migration, which means the movement of individuals to a country other than their own, might be legal, when it is in confor-

mity with the law in force, and might be in stealth, illegal, or irregular, when committed in violation of the law that governs entry and residence of foreigners in the receiving State.

2. Scope:

International law scholars define migration as “ an individual leaving his/her territory permanently to the territory of another country.” From this definition we find that international law jurisprudence has recognized the migrant’s intent, therefore if a migrant left a territory and his intention is to return to it later after any period of time whether long or short, this shouldn’t be considered, from this point of view, migration.

Even if it was referred to by various terms , its implicitly refers to State’s right to protect itself from the arrival of large numbers of migrants, In fact, it is the State’s sovereignty that determines the scope of stealth or irregular migration. The scope of illegality also can easily be determined through rules of law, restrictions on entry and residence, and legal conditions set for entering labor market. If the world was without restrictions on entry and residence, normally irregular migration will not exist.

It is a term that came to life only after the idea of the state and its political boundaries existed, “Stealth migration” is only one of the effects resulted by the restrictions imposed by states on peoples’ movement.

3. Illegal or illegitimate migration?

Since we have already pointed out that migration is an old and natural phenomenon, so it is legitimate and does not violate supreme principles, but it has become illegal by legislation or legislators. “Legitimacy” refers to whatever in accordance with natural law, especially absolute justice, whereas “Legality” refers to whatever in accordance with the imposed law , therefore, Legitimacy is a higher and more supreme principle , not every legal act is necessarily legitimate, , but law may promote injustice or unfairness, this is clearly

1 - Magdi al-Gharsali, The crime of illegal immigration, unpublished master’s thesis, Al-Manar University, Tunisia, Faculty of Law, 2009, p.16

evident in some Statutory laws that protect authoritarian regimes, in contrary not every legitimate act is necessarily legal, a clear example of that is migration, It is a legitimate phenomenon, but some legislation have made it illegal, so we prefer to use the term illegal migration as migration could be violating law in the receiving countries, but these law in itself could be illegitimate.

We also prefer the term "stealth" or "secret, since non-registration in the expatriate system or records of foreign residents is not a result of an act of omission or negligence, but with a clear will and intent to conceal it. And these terms also refer to migrants' situation as they hide their presence within the country either when they cross the border or later on.

In any case, stealth or illegal, it is considered to be a breach or violation of regulations and administrative rules that regulate the flow of migrants by entering through places other than the ones specified for entry or not during the scheduled hours, or without the necessary needed documents, these are cases of deliberate breach of national legal restrictions on entry and residence for foreigners.

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4. Irregular migration and smuggling of irregular migrants:

If the concept of "irregular migration" is a concept that refers to international movement of individuals across borders in violation of laws of the transit State or receiving State, it is appropriate to distinguish between secret migrants according to the means of entry into the country: there is an independent secret migrant who crosses borders individually or within a small group of migrants that depend on their own members abilities, the second type is more dangerous and sophisticated, they are groups of migrants who cross borders through smugglers and criminal gangs supervision and aid, that act fall within organized crime on an international scale.

The first type of migration can be described as "simple irregular migration" in which an independent migrant or a small group of migrants. But when a migrant uses another person or a group for money in return that is called "smuggling migrants", We believe that smuggling migrants should not be seen as synonymous with irregular migration, but as a part of more broad phenomenon. Both terms refer to border crossing in violation of administrative rules governing entry and residence for foreigners, illegal transit or movement, but only when money is involved that is what can be called smuggling migrants.

Consequently, irregular migration is not synonymous with the smuggling migrants, but the latter is only a part of it. irregular migration is broader and more comprehensive. Both terms refer to border crossing in violation of the administrative rules governing entry and residence for foreigners, but assistance for crossing for the purpose of profit constitutes a crime of smuggling.

5. Causes of smuggling migrants:

Everyone agrees that irregular migration is not a recent phenomenon, but high professionalism, careful organization of border crossing and infiltration is what wasn't previously known. migration policy strictness and closure of the borders recently pushed migrants to resort to smugglers as the best offered option, the equation is as follows:

Increase in demand for migration to Europe, Canada, America

+ Tightening conditions for entry and residence = irregular migration + smuggling migrants.

This equation leads us to the following conclusion:

closure of borders does not stop irregular migration but increases the value of migrants as smuggled goods.

6. How valid is criminal confrontation of the phenomenon:

If the criminalization of a conduct in principle is legitimate as long as it works in favor of defending society, it may become an extreme act if it exceeds its basic objective or if the idea of defending society takes a political dimension that is incompatible with legal philosophy [...] as the idea of defending society should not overwhelm other human values, such as preserving human dignity.²

The valid criterion that makes an act a crime is refusal and non-acceptance, a crime is always rejected and socially unacceptable as an act whenever and wherever it is criminalized,³ This fact guides us in our analysis of legislators' practice in various countries of the world to criminalize illegal entry and residence. Is this behavior ejected by society or by the majority, and what values does it affect or contradict with?

In light of the aforementioned and its relation to the subject of this research that analyze issue of criminalizing illegal entry, we find that an important fact about this act, although Illegal entry is a violation of laws, but it does not provoke a violent social reaction or rejection in most societies now , which leads us to say that the legislators' criminalization of this act, even if he has absolute freedom to do so, is unnecessary.

In imposing criminal penalties on irregular migrants and considering him/her a threat to society interests, that a community must protect itself from his/her danger, we see only a reflection of a social defense perspective, which believes that social defense aims primarily to protect the society regardless of any other consideration, Its

2 - Dr. Al Raziqi Muhammad, Criminology and Criminal Policy, Dar Anis, Misurata, Libya, 1995, p. 152.

3 - Dr. Al Raziqi i Mohammed, Criminology and Criminal Policy, p. 32.



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philosophy is based on the elimination of danger, even by arbitrary means, if necessary, in order to preserve the state and society.

Criminal policy according to this jurisprudence requires the removal of criminal threat, relying on a variety of defensive measures that is called "safety measures" which are a set of procedures that aim to mainly ensure the protection of a society.

This form of criminalization is only an application of Criminal law of the enemy theory, an abandoned theory, which came to life again by criminalizing illegal migrants conducts, who represents an enemy threatening society's interests and security.

However, security and interest of a society lies in the political, social, economic values or other values which society is eager to protect and defend. This is the only criterion that can be relied upon to determine the validity of a confrontation of a conduct. If defending those values against a real threat does not exist then any confrontation would be invalid. This leads us to say that migrants are considered enemies against their own will. This confrontation against them is declared by developed countries that use the criminal law and its penalties of detention and forcible deportation as a weapon instead of using bombs and missiles.