Human dignity in a time of austerity: the Rule of Law as a counterpoint to the hostile environment for migrants

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I want to start with two quotes – one from Eleanor Roosevelt, a key architect of the UN Declaration on Human Rights likely to be very familiar to you, and one possibly not so familiar about 'otherness'.

The first is:

"*Where, after all, do universal human rights begin? In small places, close to home - so close and so small that they cannot be seen on any maps of the world ... Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere.*"[1]

Eleanor Roosevelt

[1] *Eleanor Roosevelt, Allida Mae Black (2013). "Courage in a Dangerous World: The Political Writings of Eleanor Roosevelt", p.190, Columbia University Press*

The second is from '***L'Étranger***' by Albert Camus – one of the books which, along with Frantz Fanon's '*The Wretched of the Earth',* I urge on my pupils to read and absorb before they start trying to advocate for migrant rights.

"Mostly, I could tell, I made him feel uncomfortable. He didn't understand me, and he was sort of holding it against me. I felt the urge to reassure him that I was like everybody else, just like everybody else. But really there wasn't much point, and I gave up the idea…"

Albert Camus

Delivering an opening plenary for a conference where so many experts will be giving detailed and practical advice relevant to all your clients' real problems is a bit intimidating.

You want to think of a big idea, a uniting theme – nothing too downbeat – something encouraging. Thought-provoking. Avoid ranting diatribes, or preaching to the choir. But the impact of austerity and its dehumanizing effect on state and public attitudes to migrants and their fundamental needs is inescapable and shameful. The UN Special Rapporteur on Extreme Poverty, Philip Alston's, report[2] on the UK has highlighted that levels of

[2] https://www.ohchr.org/Documents/Issues/Poverty/EOM_GB_16Nov2018.pdf

child poverty were "*not just a disgrace, but a social calamity and an economic disaster*", even though the UK is the world's fifth largest economy.

About 14 million people - a fifth of the population - live in poverty and 1.5 million are destitute, being unable to afford basic essentials, he reports, citing figures from the Institute for Fiscal Studies and the Joseph Rowntree Foundation. He highlighted predictions that child poverty could rise by 7 percentage points between 2015 and 2022, possibly even up to a rate of 40%. Four in 10 children in the UK living below the poverty line in the 21st century.

"*It is patently unjust and contrary to British values that so many people are living in poverty*," said the Special Rapporteur, , adding that compassion had been abandoned during almost a decade of austerity policies that had been so profound that key elements of the post-war social contract, devised by William Beveridge more than 70 years ago, had been swept away, not out of economic necessity but political ideology, resulting in the following state of affairs[3]. He reports

"British compassion for those who are suffering has been replaced by a punitive, mean-spirited, and often callous approach apparently designed to instil discipline where it is least useful, to impose a rigid order on the lives of those least capable of

[3] For those interested in reading how a radical right-wing and corporate ideological agenda is more easily effected in the wake of crises see for example 'The Shock Doctrine' by Naomi Klein. https://www.penguin.co.uk/books/55595/the-shock-doctrine/9780141024530.html

coping with today's world, and elevating the goal of enforcing blind compliance over a genuine concern to improve the well-being of those at the lowest levels of British society."

Against that background, we practitioners strive to secure the socio-economic rights of migrants, 'queue jumpers', the 'unwelcome', the 'illegal'. While local authorities are forced to pare their budgets ever downwards, parsing the cost of incontinence pads as compared with overnight carers for its increasing elderly population who may have spent a lifetime working and paying UK taxes, we press for the rights of those whose access to the barest minimum support to preserve human dignity is constantly disputed and under attack. But the point being made by the Special Rapporteur is that this dichotomy is a result of political choices – it is not inevitable. The following twitter joke which made the rounds a year or two ago illustrates the position well:

A banker, a Daily Mail reader, a Tory MP and a Polish cleaner are sitting at a table sharing 12 biscuits.

The banker grabs 11 of them and scoffs the lot.

The Tory MP leans over to the Daily Mail reader and whispers: "Watch out! That Polish cleaner is trying to steal your biscuit".

A polish cleaner, a refugee, a victim of trafficking. The dignity of all the most vulnerable is subsumed in a politics of victim-blaming.

This false dichotomy is not a preserve of the UK. Nils Muizneks, Council of Europe Commissioner for Human Rights has pointed out that the problem is Europe-wide[4]:

"*The criminalisation of migration and repressive policies of detention and expulsions of foreigners seriously affect the protection of the basic social rights of irregular migrants, not least because they create a general climate of suspicion and rejection against irregular migrants among those who are supposed to provide social services.*"

That means the language that the state uses is all important. Floods, swarms, scroungers. We also remember the price paid by Jo Cox and her family and by our democracy.

The Commissioner continues "*Migrants in an irregular situation are too often seen as cheats, liars, social benefits abusers or persons stealing the jobs of nationals.*"

He points out the insidious impact of the creeping tendency to extend immigration enforcement roles to public authorities whose primary functions are to care for and protect the vulnerable, not police them:

[4] https://www.coe.int/en/web/commissioner/-/without-papers-but-not-without-rights-the-basic-social-rights-of-irregular-migrants

"To guarantee access to basic social rights for irregular migrants, basic service providers such as medical staff should never be placed under an obligation to report irregular migrants to law enforcement authorities."

To that end it is important to remember that some victories have been secured this year. The campaign supported by strategic litigation brought by Against Borders for Children and Liberty secured a climb-down by the government bent on using schools to gather information which could be used to target migrant families. However, there is still a campaign being waged to delete information already gathered and to ensure that such information cannot be used for immigration enforcement purposes.

Similarly, Migrants Rights Network has also managed, as a consequence of a legal challenge, to secure a reversal of NHS data sharing practices to protect patient confidentiality. 'NHS Digital' has confirmed it will withdraw the secret data-sharing arrangements made between itself, the Department of Health and the Home Office. Statutory duties to victims of trafficking, discrimination law and duties to address modern slavery have all been successfully deployed to defeat the shaving away of subsistence support for the most vulnerable[5].But the Commissioner has also highlighted the impact on migrants of a failure to recognize the inevitable – that migrants with rights are here to stay, they have skills, energy and

[5] **[2018] EWHC 2951 (Admin)**

knowledge and often superhuman determination. Instead, government policy adheres to a fiction – that net reduction in migration targets plucked out of the air to appease the rise of far-right politics in the wake of the banking crisis are firstly achievable, and secondly in the national interest in any event. Philip Alston describes the government as in a state of denial of the impact of austerity on poverty – especially child poverty. The same may be said about the suppression[6] of accurate – but politically inconvenient - reports and statistical analysis on the net benefits to the UK of immigration. As Commissioner Muizneks has put it:

"*Access to basic social rights can also be impeded by protracted situations of legal limbo such as that experienced by rejected asylum seekers who cannot be expelled … I consider that in situations where return is impossible or particularly difficult, states should find solutions to authorise the relevant person to stay in the country under conditions which meet their basic social needs and respect their dignity*."

So that brings me back to my starting point – what role does dignity have to play in using the law to secure access to services, to minimum economic and social rights and to resist the persistent attempts by public authorities with shrinking budgets to salami slice away already minimal support levels and to deny and avoid support on technical and legally inadequate grounds? How can universal concepts of human dignity and common

[6] https://www.huffingtonpost.co.uk/entry/theresa-may-suppressed-nine-reports-showing-migrants-dont-undermine-jobs-wages-cable_uk_59b01cd0e4b0354e440e95fa

humanity defeat the systematic 'othering' and dehumanization of vulnerable migrants?

It is my suggestion that the fundamental value of human dignity or alternatively, seen from the perspective of the decision-maker, 'common humanity', is inherent in the same rule of law that we use to vindicate migrants' rights to support and healthcare, and that alongside statutory and human rights it is an effective underlying principle inherent in the common law with a role to play. But if so what does 'common humanity' mean as a fundamental legal value? What weight does it carry? What can it add?

Perhaps the best starting point for an illustration of humanity as an essential component part of the rule of law is the judgment of the Court of Appeal in the JCWI challenge to the removal of entitlement to financial support for asylum-seekers. This pre-HRA 1996 judgment articulated a bedrock common law principle which has been overtaken by the HRA but which I suggest still has a role to play in holding public authorities to account and securing access to basic services. See Lord Simon Brown's reliance on fundamental values he described as 'implicit' in relevant legislation:"…the Regulations necessarily contemplate for some a life so destitute that to my mind no civilised nation can tolerate it. So basic are the human rights here at issue that it cannot be necessary to resort to the *European Convention of Human Rights* to take note of their violation.

Nearly 200 years ago Lord Ellenborough, C.J. in *R. v. Inhabitants of Eastbourne (1803) 4 East 103* said this:

"*As to there being no obligation for maintaining poor foreigners before the statutes ascertaining the different methods of acquiring settlements, the law of humanity, which is anterior to all positive laws, obliges us to afford them relief to save them from starving*."[7]

What form of legal principle was that 1803 judgment drawing upon? Recent judgments in the Supreme Court have drawn upon both British legal history and academic support for reliance on concepts of humanity and human dignity.

Writing in the Columbia Law review, Jeremy Waldron describes this form of common law fundamental tenet as a "legal archetype" which he explains is a

"*particular provision in a system of norms which has a significance going beyond its immediate normative content, a significance stemming from the fact that it sums up or makes vivid to us the point, purpose, principle, or policy of a whole area of law.*"[8]

[7] R v SS Social Security ex p JCWI (1997) 29 H.L.R. 129

[8] Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House" (2005) 105 Columbia LR 1681–1750

Waldron – and the common law's rejection of torture - was cited by the House of Lords in A (No.2)[9] in outlawing the use of evidence obtained by torture to designate foreign nationals as a national security risk and detaining them indefinitely.

We see recourse to such 'legal archetypes', considered to have their roots in a historical tradition which over time has formed part of the British psyche, in a range of contexts defending the vulnerable individual against the might of public authorities. For example in *Osborn v Parole Board*[10], a case in which the Supreme Court ruled on whether a prisoner had a right to an oral hearing before the Parole Board, Lord Reed also cited Jeremy Waldron in drawing attention to fundamental rights which 'soak and permeate the common law':

"justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken. As Jeremy Waldron has written ("[2012] CLJ 200, 210"):

[9] A (No.2) v Secretary of State for the Home Department [2006] 2 A.C. 221, HL.

[10] [2014] H.R.L.R. 1

"Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with. As such it embodies a crucial dignitarian idea – respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves."

In modern international law, perhaps the most influential encapsulation of the presence of human dignity within the rule of law is expressed by Sir Hersch Lauterpacht in his "General Theory of International Law" thus:

"*The principle that the rights and duties of States are but the rights and duties of man is of importance in that it lends emphasis to the idea … that the individual human being is the ultimate unit and end of all law, national and international, and that the effective recognition of the dignity and worth of the human person and the development of human personality is the final object of law*."[11]

Now, I am not engaging in a form of future-proofing against potential repeal of the HRA by drawing these authorities to your attention, still less am I proposing any sort of hierarchy of principles as between incorporated human rights instruments of supra-national origin and British common law history.

[11] International Law: Collected Papers of Hersch Lauterpacht, Vol. I General Works (Cambridge University Press, 1970), p.149.

Indeed, the Strasbourg Grand Chamber has, in *Bouyid v Belgium*[12] (the article 3 slapping case of a minor in police custody) given the positive duty to protect human dignity—especially for those who are detained—a fairly enthusiastic endorsement with extensive reference to human dignity in international law since 1945, from the preamble to the United Nations Charter and Universal Declaration of Human Rights to article1 of the EU Charter of Fundamental Rights and Freedoms. Despite not being mentioned anywhere in the text of the ECHR, the court held in *Bouyid* that "*respect for human dignity forms part of the very essence of the Convention*" [89].[13]

What I am however suggesting is this: that in everything you do for your clients and in everything you hear today in this conference your client's human dignity and the common humanity of our British society informs and nourishes your legal arguments. Be robust and rigorous, be technical when it works but do not let your decision-maker, public authority, court or tribunal off the hook. What is at stake is your client's human dignity and our common humanity.

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[12] (2016) 62 E.H.R.R. 32

[13] See also Pretty v United Kingdom (2002) 35 E.H.R.R. 1 at [65].