

IMMIGRATION AS AN ENGAGEMENT OF COLLECTIVE HUMAN RIGHTS

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Summary. 1. Immigration and collective rights. The migration movements. 2. Some rules. 3. The problems. 4. Some conclusions.

I. Immigration and collective rights. The migration movements

One of the key features of the literature on multiculturalism is its emphasis on the need of according collective rights, as human rights, to minority groups. A theory that integrates individual and collective rights can eventually provide a better account for many of the policies and institutions¹.

On the other hand, one of the most important current questions to be tackled in the field of collective rights is that referring to immigration. This phenomenon gives rise to problems in terms of recognizing and guaranteeing the rights of immigrants, as collective rights, to freedom of thought and expression, freedom to pursue different ways of life, and freedom to create, maintain and develop their own culture. To these we could add the right to autonomy, and the

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¹ See *Neus Torbisco*, *Group Rights as Human Rights. A Liberal Approach to Multiculturalism* (Springer, 2006), 19 and 82, and the references to *Will Kymlicka*, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, 1995); *Will Kymlicka*, “Liberal Individualism and Liberal Neutrality”, *Ethics* 99 (4) (1989), 883-905; *Charles Taylor*, *The Politics of Recognition*, in: Gutmann (ed.), *Multiculturalism and “the Politics of Recognition”*. An Essay by Charles Taylor (Princeton University Press, 1992), 25f.; *Iris Marion Young*, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, in: Philips (ed.), *Feminism and Politics* (Oxford University Press, 1998).

right to cultural differentiation and freedom, as in addition to a framework of freedom, action by the state is needed to remedy marginalization².

The reference to migration movements is becoming more interesting, the Host Countries are divided into two big areas which vary concerning the existence of more or less tradition. In order to solve the current conflicts, the acceptance of the other by means of tolerance and non-exclusion, recognising the diversity within the unit, is urgently needed. This means that we should not succumb to the risk of a mere juxtaposition, creating a legal systems conglomerate, nor elude the diversity trying to result in a standardization process³.

II. Some rules

Nowadays, the matter of legal pluralism is a subject of great relevance. We live in a world which moves towards an heterogeneous pluralism that must be harmonized as an expression of globalization and, more specifically of phenomena such as the creation of the European Union, Mercosur or the Free Trade Agreement. The migratory movements and the resurgence of nationalisms make the situation become more complex, with certain consequences in sovereignty's traditional concept, in Law's production sources and in the creation of new jurisdictional bodies⁴.

Thus, legal norms should recognise and approve both the variety and differentiation, assuming and appreciating them in a positive way, with the limit of respect to their inherent human dignity and inviolable rights. To sum up, the

² *Javier de Lucas*, Algunas propuestas para comenzar a hablar en serio de política de inmigración, in: De Lucas and Torres (eds.), *Inmigrantes ¿cómo los tenemos? Algunos desafíos y (malas respuestas)* (Talasa, 2002), 23-48.

³ *M. José Fariñas Dulce*, *Globalización, ciudadanía y derechos humanos* (Dykinson, 2000), 52f.

⁴ *Pilar Allegue Agüete*, Pluralismo normativo, soberanía y diversidad cultural, *Anuario de Filosofía del Derecho* (Spain) XIV (1999), 169f; *Massimo Corsale*, *Alcuni nodi del modello pluralistico*, *Sociologia del Diritto* XXI (1) (1994), 15f. On the other hand, see: *Ruth Rubio-Martín*, *Immigration as a Democratic Challenge: Citizenship and Inclusión in Germany and the United States* (Cambridge University Press, 2000); *Ángeles Solanes Corella*, *El espejo italiano: un estudio de la normativa sobre la inmigración en Italia* (Dykinson, 2001).

most correct thing is that the social integration of the difference is to be carried out by means of its recognition and acceptance as legal-political principle. The open society implies a constant opening to the change, allowing the comparison with other ways of acting or thinking, that can enrich and improve ours⁵. The content depends on the state's principles, the institutional structures, the economic-social situation and the cultural tradition. For example, according to the political tradition of each area, we have: a) The social-democrat model; b) the corporate model; c) the South European or catholic model; and d) the British model. The regulated types are inscribed in the "liberal market", "progressive liberal" and "institutional welfare" models⁶.

Its limits include the principle of equality, the prohibition of arbitrariness and the right to assistance and/or sufficient benefits for needy situations, that ought to be progressively reevaluated to compensate for losses of purchasing power⁷. The legal action adopted by the official authorities becomes an integration factor.

III. The problems

The problems become manifest in the area of reconciling integration and differentiation within states where immigration is rising. In this context groups arise which have distinguishing features and exist as independent entities with relationships of interdependence among their members. The search for a new answer also leads us to support the idea that there are two meanings to universal citizenship: universality as generality, i.e. what citizens have in common and what makes them different; and universality in the sense of the rules and standards that ensure equal treatment for all, applied across the board without considering individual or group differences. In all, the model should aim to achieve certain objectives synthesized as follows: fundamental rights for all citizens, by way of a policy of universalization that allows integration whilst

⁵ *M. José Añón*, "La interculturalidad posible: ciudadanía diferenciada y derechos", in: de Lucas (ed.), *La multiculturalidad* (General Committee of Judicial Power, Spain, 2001), 219f.

⁶ *Juan Botella*, "La opinión pública ante el "Welfare State" ¿oferta o demanda?", in: Giner and Sarasa (eds.), *Buen gobierno y política social* (Ariel, 1997), 191-199.

⁷ *Franz Schultheis*, "Affaires de famille-affaires d'État: des visions et des divisions inter-culturelles d'une réflexion sociologique", in: De Singly and Schultheis (dirs.), *Affaires de famille, affaires d'État* (Est Publishers, 1991), 7f.

respecting certain inalienable minimum elements; differential rights for all through a policy of recognition that does not clash with the previous point; and minimum conditions of equality for dialogue through a policy that includes actions to create equality and incentives for cultural exchange, preventing homogenization or assimilation by the more powerful majority or minority⁸.

There are more and more political communities that act as interpreters; there is a new perception of reality. In the same way, there is a contrast with manipulation and marginalization, and the use of new domains of emancipation is pursued. Radical needs are a result of daily emancipatory practice, which is why the method itself is based on radical subjectivity. We need a new theory of subjectivity that shows that we are before a complex network of growing subjectivities. The growth of the market makes the role of altruistic actions less important, and may make it become the setting for capitalist production⁹.

Finally, there is an underlying problem in ensuring that the management of immigrants' rights should be satisfactory from a cultural perspective, as there are situations in which people belonging to a particular group suffer inequalities through marginalization and consequent poverty. To overcome this problem, difference should be treated via the recognition of rights, or through provisions within the framework of affirmative actions that transform the root causes of these disadvantages, which lead to a situation of weakness, oppression, and lack of opportunities for a decent life¹⁰.

IV. Some conclusions

We have to mark out is to find a legal-political method of inclusion and integration in which the rules of the game are established and must be complied with, considering how we should value difference and identity, how they should be married with equality, what is the route to obtaining mutual and equal respect

⁸ *Iris Marion Young*, "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship", cit., 402f.

⁹ See *Boaventura de Sousa Santos*, "Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality", in: *Sousa Santos and Rodríguez Garavito* (eds.), *Law and Globalization from Bellow: Towards a Cosmopolitan Legality* (Cambridge University Press, 2005), 58f.

¹⁰ *Michel Rosenfeld*, *Affirmative Action and Justice. A Philosophical and Constitutional Inquiry* (Yale University Press, 1991), 42f.

between all the cultural groups, and where we should situate the point of cohesion in a socio-political context¹¹. The new form of homogenisation implemented by globalisation supposes the interested use of the legal principle of formal equality, the sense in which legal universalism and the discourse of liberal and individual laws serve to provide a foundation for formal legitimacy¹².

In this way, social rights constitute subjective rights, representing a programme of distribution of goods through a balance between public, collective and private interests. This results in a singular structure with a special mechanism by which the State has to provide assistance and services, and create, strengthen and promote the conditions allowing individuals and groups to satisfy their needs. Thus their obligations are also related to the prerequisites for exercising positive liberty. The main point of departure is that individuals are moral subjects endowed with dignity. It defends the idea that we all have real capacity for choice and that we all direct our existence towards certain aims in life¹³.

¹¹ *Alison Brysk*, *Globalization and Human Rights*. Berkeley (University of California Press, 2002); *Masaji Chiba*, *Legal Pluralism in the Contemporary World*, *Ratio Juris* 11 (1998), 228-245.

¹² *M. José Fariñas*, *De la globalización económica a la globalización del Derecho: Los nuevos escenarios jurídicos*, *Derechos y Libertades* 8 (2002), pp. 188-189; *Stephen Gill*, *New Constitutionalism, Democratisation and Global Political Economy*, *Pacific Review* 10 (1) (1998), 23-38.

¹³ See *Gregorio Peces-Barba*, *Curso de derechos fundamentales. Teoría general* (University Carlos III of Madrid-BOE, 1999), 21-25 and 36-38.