

EQUAL OPPORTUNITY AS THE BASIS FOR SOCIAL-ECONOMIC INTEGRATION OF IMMIGRANTS IN THE EUROPEAN UNION¹

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Abstract: *Equality of opportunities or chances constitutes one of the central notions in the course of approaching the problem of immigration from the perspective of legitimacy. Here, we use the material or substantive concept of equality of opportunities or chances; this is to say that a debate which relies only on the principle of non-discrimination is incomplete. It is indispensable that the immigrant overcomes the original situation of disadvantage; and for this it is indispensable to derive means or measures from the notion of the civil society.*

Keywords: *immigration, equality of opportunities, principle of non-discrimination, civil society, measures.*

If we look to history, Europe “has been a continent marked by very pronounced migratory movements”². Presently, the migratory streams constitute an answer to demands arising at the world-wide level as a consequence of the phenomenon of globalisation. The more globalisation we have, the more migration it produces, but often migrations are not so much of a voluntary nature but the result of oppressive circumstances³. This is due to the fact that globalisation does not appear to be advanced in a responsible or solidary manner, a question which unfortunately is not dealt with thoroughly enough in the present Programme of Stockholm⁴. The combination of an economic crisis and of the global character of the economy has changed the development of immigration streams within the

¹ Paper prepared in the framework of the research project <<Derechos humanos en la era de la interculturalidad>>, DER2008-06063/JURI, of the Spanish Ministry for Science and Innovation, of which I am a member.

² M^a Luisa Casado López: <<Inmigración y políticas de regularización en la Unión Europea>>, *Inmigración y Derechos de ciudadanía*, Colección Monografías, Ed. Fundación CIDOB, Barcelona, 2006, p. 29.

³ Javier De Lucas: <<Las políticas de inmigración en un mundo globalizado>>, *Movimientos Migratorios y Derecho. Anuario de la Facultad de derecho de la Universidad Autónoma de Madrid* 7 (2003), Coedición de la Facultad de Derecho de la Universidad Autónoma de Madrid y de Boletín Oficial del Estado con la colaboración del Consejo General del Notariado y del Colegio Nacional de Registradores de la Propiedad y Mercantiles de España, Madrid, 2004, p. 24.

⁴ European Council: The Stockholm Programme — An open and secure Europe serving and protecting citizens (2010/C 115/01). EU Official Journal of 4-05-2010.

European Union during recent years in line with the objectives of the European Strategy 2010⁵.

Although emigration constitutes a human right recognised in the Universal Declaration of Human Rights in Art. 13.2 it seems to be generally accepted that we are dealing here with one of those rights which do not have a corresponding obligation⁶ on the part of nations or states other than the state of origin to accept the entry of immigrants. Walzer has referred to this situation by presenting the so-called “thesis of asymmetry between immigration and emigration”⁷, a fact that does not fail to create a certain perplexity. What value can we ascribe to the right to emigrate if there is no assured obligation to permit the entry of an emigrant coming from, and being the national of, another state?

If looking more deeply into the phenomenon of migration we discern a sort of *normative uncertainty* which seems to comply with the theoretical supposition widely accepted in the political philosophy of today according to which “justice meets its primary field of action within societies organised in the form of a state”⁸. It can be observed that what is really preoccupying is the fact that there is more positive legal configuration of the principles of justice on the level of the state than in the relation between different societies and between those and individuals who are not citizens. Here we have to go back to authors like Grotius in *De iure Belli ac Pacis* or Kant in *Perpetual Peace* in order to find attention given to these questions from the perspective of natural law.

In general terms, the development of the law of the European Union in matters concerning foreigners can be divided into three great blocks which remind of the way taken in Tampere (1999)⁹: border control, fight against illegal immigration and crime, and integration, which manifestly convey a first impression: in the European Union the level of recognition and protection of the rights of the immigrants varies depending on the concrete legal situation. This has provoked, in my opinion, an unbalanced and asymmetrical debate which preserves security by limiting freedom, attempts the eradication of poverty by restricting a real socio-economic integration (civil citizenship) and ensures non-discrimination by restricting the equality of opportunities or chances.

⁵ Isabel Lirola Delgado: <<La inmigración en el marco de las relaciones UE-América Latina: Perspectivas y desafíos>>, XIV Encuentro de Latinoamericanistas Españoles, USC. España, p. 2269. Comisión Europea: <<Informe de la Comisión al Parlamento Europeo y al Consejo, Primer informe anual sobre inmigración y asilo (2009)>>, COM (2010) 214 final, 6.5.2010, p. 11 y <<Europa 2020 Una estrategia para un crecimiento inteligente, sostenible e integrador>>, COM (2010) 2020, de 3.3.2010, p. 20.

⁶ On the theory of the interdependence of rights and duties and their correlation, see Cristina Hermida del Llano: *Los derechos fundamentales en la Unión Europea*, Anthropos, Barcelona, 2005, cita 10, p. 6.

⁷ Michael Walzer: *Spheres of Justice*, Basic Books, New York, 1984, p. 40.

⁸ Daniel Loewe. <<Inmigración y el Derecho de Gentes de John Rawls. Argumentos a favor de un derecho a movimiento sin fronteras>>, *Revista de Ciencia Política*, volumen 27, nº 2, 2007, pp. 23-48.

⁹ Tampere European Council, 15 and 16 October 1999, Presidency Conclusions. In giving a new impulse to the policy in matters of integration, the European Commission presented a new focus on immigration in 2000. See COM (2000) 757 final: Communication from the Commission to the Council and the European Parliament on a common policy on immigration. Brussels, 22 November 2000. This communication establishes, in an exhaustive form, how the decisions and projects adopted by consensus in Tampere should be implemented and applied.

I will briefly refer to the first elements of the debate in order to afterwards concentrate on that element in which we are most interested here: the equality of opportunities or chances.

As concerns the first binomial, “**more security, less freedom**”, it is disputed, since the attacks of 11 September 2001, whether the individual right to freedom must take precedence over the collective right to security, a dispute that turns us back to an already classical problem of legal philosophy since the dispute between Hobbes and Locke: security *versus* freedom. If, in fact, the European identity and that of the Member States of the European Union is constituted by the positive legal configuration of the fundamental rights¹⁰, the particular identity of each one of them and of the European Union as such as an ensemble will be formed or characterized in a different way depending on whether it sides with more or less one of the two values at stake.

The first thing that calls for attention is that the Stockholm Programme (2010-2014) contains the following formulation: “An open and secure Europe serving and protecting citizens”. Security seems to have widely imposed itself as a value on the text to the detriment of freedom, and this notwithstanding the fact that in the “political priorities”, at the beginning of the statement, the two values seem to be in an apparent equilibrium¹¹. In fact, this focus corresponds to a tendency in the European Union which has set as a benchmark that treatment that has been used in the fight against illegal immigration in the framework of the European Union. We have to think of the Directive 2008/115/EC, of the European Parliament and the Council of 16 December 2008, on common standards and procedures in Member States for returning illegally staying third-country nationals which affects about eight millions of illegal immigrants who, according to an estimate, live in the 27 Member of the European Union.

In a similar way, the European Union has adopted other instruments for fighting against irregular immigration which also make evident the type of debate that is centred on the criminal profile of the immigrant; with regard to this issue, we find only policies of a defensive character. I keep referring to Directive 2009/52/EC of the European Parliament and the Council of 18 June 2009, providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. This regulation does not, in principle, recognise special rights of protection applicable to workers in a situation of irregularity (with the exception of economic and social rights deriving from activities of work), but is intended to dissuade any contracts with them, allegedly to avoid situations of exploitation and of defencelessness which these situations might cause.

Thus we can observe two clear cases of the debate, one where the concept of civil citizenship is absent (which, in contrast is more concerned with including – not excluding – the immigrant in the policies of the European Union as a citizen, with the same rights), and another which ignores the effects of that what the institutions do today in augmenting or diminishing the degree of liberty of the person intentionally with regard to:

- 1) the opportunity which a person has for pursuing the things he or she values;
- 2) the role of the person in the decision-making process,

¹⁰ Wolfgang Schmale, Marie-Theres Tinnefeld, *Identität durch Grundrechte, DuD Datenschutz und Datensicherheit*, 1, 2010, pp. 523-528.

¹¹ See Art. 1.1. of the Stockholm Programme, *op. cit.*

3) the immunity which a person enjoys with regard to possible interferences by others¹².

But one could ask oneself: is this excluding and defensive debate which pleads for security as against freedom really efficient? Here, the answer can only be yes. It is all the more so if there exists a context in which the European Union has fought emphatically for an integral and common policy. Now, it is one thing to say that the policy is really efficient and another much different thing to declare that it is the answer to certain exigencies of legitimacy. Moreover, the debate should incorporate the ingredient of legitimacy as a true vertebral element of the policies of the European Union, conscious of the fact that if it does not do so the means that will be adopted will be less efficient.

For all what has just been said, it seems necessary to put into effect an integrative policy and not one that is excluding or defensive and which concentrate the whole discussion on the means to be taken against illegal and inordinate immigration. This change will have to be brought about not only on the international level but also on the national one, since the governments of the Member States have regrettably also emphasised and reinforced the value of security in a strictly repressive meaning, thereby doing serious prejudice to freedom¹³.

The other big hub of the European Union's immigration policy is the question of regular immigration. It is thus of interest to examine the type of debate, in particular on the state level, that manages the determination of the substantive conditions for entry and residence for the purpose of work, as well as the question how to determine today the fixing of the dimension of admission, to a particular Member State, of nationals of third countries for the purpose of looking for work, be it for one's own account or that of another. If the binominal "more security, less freedom" would today put the accent on the criminal condition of the immigrant, the binominal "**less poverty, more social-economic integration**" would present yet another type of reductionism: the configuration of the immigrant as a mere economic agent. This is so up to a point where it turns into a dogma of our politics, "the existence of a canonical type of immigration subject to the model of the *Gastarbeiter*, the only immigrant admissible, the *good worker* who occupies a working position for which we need somebody and fills it out without leaving it during the period of time on which we decide"¹⁴. Let's recall the famous expression of the Swiss dramaturge and novelist Max Frisch: "We look for working hands, but what come is persons." As a proof of this, we will underline how the economic arguments (immigration can be a solution for some labour sectors and for the retirement pension of the workers who are citizens) and the demographic arguments (immigration can be a solution in face of the growing progress of population aging) are present in the latest communications of the European Union. To be specific, the Stockholm Programme recognizes, in Art. 6.1.3, that

¹² See Damián Salcedo: <<Introducción>> to the book by Amartya K. Sen *Bienestar, justicia y mercado*, Paidós, I.C.E. de la Universidad Autónoma de Barcelona, Barcelona, 1997, p. 31.

¹³ Xavier Vidal-Folch offers us some examples in order to illustrate that this is so in: <<La Constitución Europea>>, *Revista Claves de Razón práctica*, nº135, Madrid, septiembre de 2003, p. 28. Similarly, see José Martín y Pérez de Nanclares: <<La inmigración y el asilo en la Unión Europea: presente y futuro>>, *Movimientos Migratorios y Derecho*. Ed. Antonio Remiro Brotóns y Carmen Martínez Capdevila, *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid*, 7 (2003), op. cit., pp. 93-118.

¹⁴ Javier de Lucas: <<Las políticas de inmigración en un mundo globalizado>>, *Movimientos Migratorios y Derecho*. *Anuario de la Facultad de derecho de la Universidad Autónoma de Madrid* 7 (2003), op. cit., p. 26.

“labour immigration (i.e. immigration of workers) can contribute to the augmentation of the economic competitiveness and the vitality.” A central question which undoubtedly is not taken into account in handling regular immigration is the form of integration of the immigrants in the receiving state and the recognition of some basic rights which make integration possible.

Before this certainly disappointing panorama the Commission has undertaken to try and infuse optimism since the year 2000, making efforts for the defence of a debate that relies on the concept of civil citizenship in the face of a poverty that is all-prevailing. In its first annual information or report on emigration and integration in Europe, presented in July 2004, the Commission specified three ways in order to bring about a better integration of the emigrants: improvements regarding access to the labour market, greater knowledge of the language and better education, give the fact that immigration constitutes a social phenomenon which is both general and all-encompassing (work, family, education), all of which making it an obligation to reconsider the traditional legal criteria like the distinction citizen – foreigner, which are not always adaptable to the principle of the rule of law.

It is true that the European Union has actively promoted the exchange of information and of the best practices regarding integration through “national contact points” for integration, created in 2002, and has also established a legal frame for fighting against discrimination, racism and xenophobia, factors which evidently can seriously hamper the process of integration. Yet, this is not enough. It must be taken into account that the immigrant starts from a situation of disadvantage of origin which has to be mitigated in some way if we really want integration to happen. This is what is the objective of the third binomial (“less discrimination, more equality of opportunities or chances”), to which I will turn a little later.

An other interesting proposition seems to me to be to institutionalize programmes which, going beyond mere bilateral or multilateral cooperation in the handling of those migration streams, make possible a co-development through immigration, that is to say which bind together the receiving countries with the countries of origin and transform immigration into a factor that benefits both sides as well as the immigrants. The relationship between immigration and development forms part of the “Global Aspects of Immigration”, adopted by the European Council meeting in Brussels of 15 and 16 December 2005, and which has been developed through various communications of the Commission, as recalled) in the Stockholm Programme (Art. 6).

It is necessary, as I insist to state, to go ahead with concrete actions which permit to reinforce, in an effective manner, the positive impact that can arise between migration and development. A first means would be the inclusion, in the Association Agreements, of a regulatory benchmark in this matter, as it was done in some Association Agreements concluded by the European Union with certain states¹⁵, where it was stated that priority should be given to actions destined to “make more favourable the conditions of life, the creation of employment and the development of formation, especially in the zones of emigration.” However, as Liralo Delgado has put it more precisely, “the inclusion of a regulatory benchmark in the Association Agreements is not sufficient if it is not

¹⁵ We think of the Euro-Mediterranean Agreements (with Tunisia, of 17.07.1995; with Morocco, of 27.02.1996; with Algeria, of 22.05.2002; with Lybia, of 17.06.2002) and of the Association Agreement ACP-EC, of 23.06.2000.

accompanied by an increase of instruments of cooperation that set in march a global focus on migration”¹⁶.

Thus we come to the binomial **“Less discretion, more equality of opportunities or chances”**. Equality of opportunities or chances presently is a central piece for approaching the problem of immigration from the perspective of legitimacy. Here we embrace the material or substantive concept of equality of opportunities or chances which goes beyond the formal concept inasmuch as the latter centres on the principle of anti-discrimination while the former implies, as Roemer has said, a “before” and an “afterwards”: “Before the opportunities are equal and after they have become so, if ‘the field of the game’ played by the competing individuals has to be designed in such a way as to make competition fair”¹⁷. In fact, in order to assure equality of opportunities or chances, an interventionist conduct on the part of the state’s institution is needed in order to correct the disadvantages which arise in connection with historic-cultural circumstances or with pure arbitrariness.

When I here refer to arbitrary action, I think of what Rawls has called “the arbitrariness of fate”; and I believe that it should not depend on this arbitrariness of fate whether or not individuals have or do not have access to the primary goods. Rather on the contrary, access to this kind of goods should depend on the fulfilment of certain moral characteristics which must be considered to be relevant. If we follow Rawls, being a moral personality constitutes a sufficient condition for being regarded a subject of justice and therefore of law. If we speak of a “moral personality”, this is defined in relation to two moral capacities: 1) the capacity to form a concept of the “good as such”, and 2) the capacity of thinking along lines of justice, that is to say the desire to act in accordance with the principles of justice¹⁸. But, as Loewe says, “if all those who have these capacities are subjects of justice, there is no reason to suppose that we have to limit our obligations of justice to those subjects who happen to live in our society. From this perspective of a cosmopolitan interpretation, an interpretation coherent with the theory of Rawls would also tend to take the form of a theory of global justice”¹⁹.

It is clear that it is inevitable that the arbitrariness of fate imposes on us a particular citizenship that may turn out to be more or less privileged, depending on the state in which we were born or to which we belong. Therefore, it seems to be reasonable to think that the possibility to immigrate turns into a legitimate expectation for those who decide, because they find themselves in a situation of disadvantage, to take upon themselves the high costs of a displacement in the hope to reduce the inequalities of opportunities and to improve (or – as may be true for some of them – even start to draft) their plans of life. We have to take

¹⁶ Isabel Lirola Delgado: <<La inmigración en el marco de las relaciones UE-América Latina: Perspectivas y desafíos>>, XIV Encuentro de Latinoamericanistas Españoles, USC. España, op. cit., p. 2276. See the proposal contained in the Working Document on migration in the relations EU-ALC, Working Group on migration in the relations between the European Union, Latin America and the Caribbean, Euro-Latin-American Parliamentary Assembly, Doc. DT/802519ES, de 25-01.2010.

¹⁷ John Roemer: <<Equality and Opportunity>>, *Meritocracy and Economic Inequality*, ed. K. Arrow, S. Bowles and S. Durlauf, Oxford University Press, Oxford, New York. 2000.

¹⁸ John Rawls: *A Theory of Justice*, Cambridge, Mass: Harvard University Press, 1971.

¹⁹ Daniel Loewe. <<Inmigración y el Derecho de Gentes de John Rawls. Argumentos a favor de un derecho a movimiento sin fronteras>>, *Revista de Ciencia Política*, op. cit., pp. 29-30.

into account that the well-being of a person, the so-called “freedom of well-being”²⁰, is closely connected to his or her capacity of “realisation”, (i.e. of realising one’s plan of life,)²¹ taking this term in its broad sense, thereby following Amartya K. Sen.

According to an allegation made by Rawls²², the necessity to immigrate disappears if all societies organize themselves according to an internal structure that is liberal and decent. However, it seems to me to be an error to believe that the “problems” which are posed by immigration, and with it the human right to emigrate, would disappear in an international community of well-ordered societies because the reasons for immigration would not exist anymore, as there are: ethnic or religious persecution, political oppression, famine or the pressure of population growth. If the rights are really inalienable (Ferrajoli), the individual would not – even in the absence of these grounds – lose the title to the right to emigrate, because this does not depend on purely historic-cyclical-economic reasons or on political pragmatisms, like the development of public politics. It is not the success or failure of public politics that mainly gives rise to the right to emigrate, because precisely the latter derives from moral premises which accompany a person as a human being and which are – I insist on this – inalienable from the active and passive point of view.

When we ask about the theory of arguable or defensible justice from the point of view of legitimacy, in the context of immigration it seems obvious that this theory does not go together with the concept of justice as mutual benefit²³ because, as Barry²⁴ reminds, this perspective invites a fight for the most favourable position, a fight which ends up – using the word of Trasymachos, in “The state” of Plato – in that “justice is nothing but what benefits the strongest”²⁵. In other words: “Justice as mutual benefit clearly fails up to now to bring about something that we normally expect from a concept of justice, namely the means to prepare a moral basis for the vindications of those who are relatively powerless”²⁶. In fact, this theory of justice seems to have played an important role at the roots of the approbation of the second moratorium of last July 2011 for the Romanian immigrants in Spain. Consequently, it seems to be necessary to recall the words of H.L.A. Hart to those who gave green light to this new regulation when he said: “Although every rational person must know that in order to live a life that is at least tolerable he or she is obliged to live in a political society with an orderly government, no rational person who would negotiate with others on an equal footing would accept to be forced to obey the laws of any government if his or her freedom and basic interests – those which Mill calls the fundamentals of human existence – do not receive protection or are not given priority over

²⁰ According to the explanation given by Amartya K. Sen in his book *Bienestar, justicia y mercado*, Paidós, I.C.E: de la Universidad Autónoma de Barcelona, Barcelona, 1997, pp. 85-86.

²¹ See *ibid.*, p. 77.

²² John Rawls: *The Law of Peoples with “The idea of Public Reason Revisited”*, Harvard University Press, Cambridge, Massachusetts, p. 9.

²³ A defender of justice as mutual advantage (OR: benefit) is David Gauthier, *Morals by Agreement*, Clarendon Press, Oxford, 1986, p.294. For this author, morality turns into an ensemble (OR: body) of restrictions useful for all those who join in their common observation.

²⁴ Brian Barry, *La justicia como imparcialidad*, Paidós. Estado y Sociedad, Barcelona, 1997, pp. 68-69.

²⁵ Platón, *La República*, 338 c. Quoted on page 13 of the edition translated and edited by Raymond Larson (Arlington Heights, Ill.: AHM Publishing Corp.1979).

²⁶ Brian Barry, *La justicia como imparcialidad*, *op. cit.*, p. 77.

the mere growth of global well-being, even if the said protection cannot be an absolute one”²⁷.

Equally, it does not seem to be a good alternative to rely on the theory of justice as reciprocity because this permits the exclusion of those who cannot offer benefits to the others (as applies, e.g., to those born with a handicap.) We have to take into consideration that according to this theory the criterion of justice is mutual benefit, and that, consequently, any mutually benefitting or profitable agreement that is concluded has to be considered to be just²⁸. Actually, this conception of justice has the structure of the dilemma of the prisoner. What is in my interest is that all the others cooperate and that I break the rules to which previously all have adhered if doing so will supposedly bring me a personal advantage.

In agreement with Barry, a good theory of justice should be capable of telling us the motive to act in a just manner and the criterion for a body of just rules. It should at least be capable of explaining how to go about both questions. It is from this point of view that Barry proposes as an alternative the concept of justice as impartiality. In accordance with this theory, the motive to respect the exigencies of certain just rules is the desire to act in an equitable manner. “Just” rules would be those which are freely approved by the people on an equal footing (i.e., on the basis of equality)²⁹, what reminds of the analysis of Rawls of the concept of equity making use of a hypothetical situation (the “original position”) in which the individuals choose or select principles of justice in an original state of equality. As Amartya K. Sen has stressed: “Rawls derives his principles of ‘justice’ from his criterion of equity. His concept of ‘justice as equity’ expresses the idea that the principles of justice are those which would be chosen in an original situation that would be based on equity”³⁰. It is worthwhile to recall here the summit of Tampere of 1999, where the European Union declared that it is necessary to give an “equitable” treatment to the nationals of third countries who legally reside in the territory of the Member States and to work out a more decided policy of integration, as well as the Hague Programme of 2005 where it signalled as an objective the maximization of the positive effects) of immigration³¹.

If we analyze the main (i.e. most important) directives concerning the immigrants residing within the European Union, we find that the debate not only abandons the concept of equity but also the notion of the civil society and centres on treating the immigrant as if he or she were a subject with the same opportunities as the national citizen, ignoring the disadvantages resulting from his starting point due to his or her very condition of an immigrant³².

²⁷ H. L. A. Hart: <<Utilitarianism and Natural Rights>>, in: Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 181-197, in particular: p. 195.

²⁸ See *ibid.*, p. 82.

²⁹ See *ibid.*, p. 85.

³⁰ Amartya K. Sen: *Elección colectiva y bienestar social*, Alianza Universidad, Madrid, 1976, p.167.

³¹ See Communication from the Commission to the Council and the European Parliament of 10 May 2005 – The Hague Programme: ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice [[COM\(2005\) 184](#) final – Official Journal C 236 of 24.9.2005].

³² *Inter alia*, we think of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term resident of 25 November 2003; of Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals

In this context, it is possible to show how far it becomes discriminatory that the European Union is promoting a selective and qualified immigration being aware of the high proportion of migrants who are either illiterate or without higher education, knowing that these people constitute a group with a situation of original disadvantage and therefore inferior to that of other subjects who are not in the same position. In contrast, the European Union would have to concern itself with the adoption of measures of a horizontal character which regulate, in a general manner, the entry and the residence of immigrants with regard to work. In this context, the Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, approved by the European Parliament in March 2011, which has created more than justified tensions between this institution and the European Council, leaves open many wishes³³.

A directive that still helps us to better understand the present panorama is the Directive of the Council 2003/86 of 22 September 2003 on the right to family reunion³⁴, which entered into force on the day of its publication in the Official Journal, i.e. 3 October 2003³⁵. It was the first legal instrument approved by the European Union in the area of legal immigration. Of course, it made it quite clear that the debate was again excluding and insufficient because it was putting the accent on the labour aspect of the immigrant. Though it is quite clear that the text seemed to respect the fundamental rights and to observe the principles recognised by article 8 of the Rome Convention and by the EU Charter of Fundamental Rights, it established the exercise of the right of family reunion more as a necessary condition for true integration of the immigrant, “as a problem, as a way not sought by the pseudo-immigrants (for it is the family members of the worker, of the true immigrant who is the worker)”³⁶. The directive did not take into account that family reunion, in addition to constituting a mechanism of integration of nationals of third countries in the Member State, could also help to promote economic and social cohesion, a fundamental objective of the European Union. The European Parliament reacted immediately to the exigencies of the directive, asking that various provisions contained therein be annulled, considering that they violated fundamental rights and, in particular, those relating to family life and to non-discrimination. The case was resolved by a decision of the Court of Justice of 27 June 2006 on the request for annulment brought by the European Parliament against the directive (case C-540/03). The Court rejected these

who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities; of Council Directive 2004/114/E of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service; of Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment. The same can be said with regard to Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research.

³³ COM (2007) 638 final de 23.10.2007.

³⁴ See Official Journal of the European Communities of 3 October 2003.

³⁵ Time limit for transposition by the Member States: 3 October 2005.

³⁶ Javier de Lucas: <<Las políticas de inmigración en un mundo globalizado>>, *Movimientos Migratorios y Derecho. Anuario de la Facultad de derecho de la Universidad Autónoma de Madrid*, op. cit., p. 28.

allegations, considering them to be unfounded and leaving a considerable margin of appreciation to the Member States for resolving these questions.

For this reason, it seems to me to be inevitable to apply, in an effective manner, the principle of equal treatment to immigrant with a legal status and the recognition of a minimum standard of rights for these immigrants. This is to say that to base the debate on the principle of non-discrimination is insufficient. It is indispensable to derive concrete means or measures from the notion of civil citizenship. What is needed, then, is an integrative debate which equilibrates and balances positions and not a debate that excludes and in which the differences – which are evident and which cannot be ignored – are accentuated rather than mitigated.

As long as it seems to be possible that the states exercise their discretion in deciding whether they would limit the application of the right of equal treatment in areas like those relating to the conditions of labour, the freedom of association, the social advantages and the granting of social security (with the exception of unemployment aid) and of the rights of workers which are already employed, it will be impossible to advance a real integrative “civil” policy. The inclusion – by means of equality of treatment and of the policies against discrimination – means to fight for a real equal treatment of the immigrants with respect to the rest of the citizens, conscious of the fact that “if they have the same rights they meet with difficulties in the practical exercise of these rights for reasons of sex, colour of the skin, culture, religion, and in general for factors which do not depend on the will of the person but on the particularities of his birth”³⁷.

Presently, in order to establish whether or not a true policy of egalitarian integration is lacking in the European Union, it would be useful to refer, in the context of equality and non-discrimination, to Directive 2000/43/CE of the Council, of 29 June 2009, relating to the application of the principle of equality of treatment of persons independently of their racial or ethnic origin.

We should be aware that – as Zapata-Barrero has pointed out – “the dichotomy of inclusion and exclusion has as a point of reference the access or lack of access to the public sphere. We have to start from the realisation that there exist people who have difficulties to have access to, or have literally been left outside, the public sphere or who, while being able to enter and to act in the public sphere, yet cannot exercise their rights and their identity as the others”.

The present situation seems to be the direct consequence of the prevailing tendency to construct a “public European identity” in opposition to the “others”, the “non-Europeans”, the “non-citizens”, far away from the desired “intercultural” democracy, respectful to the fundamental European rights and distant to the multicultural paradigm³⁸. “Interculturality” (or the attempt to be “intercultural”) has to pay attention to the fact shown by numerous investigations that “to give up the well-known physical, social or symbolic space and to establish conditions of relations with other cultural configurations does not necessarily imply that the immigrant abandons the social structure in which he or she has been socialised and which legitimated his nor her social actions until the decision

³⁷ Ricard Zapata-Barrero: <<Los tres discursos de la inclusión de la inmigración en la UE: pobreza, discriminación y desigualdad de derechos>>, *Ekonomi Gerizan XIII*, Federación de Cajas de Ahorros Vasco-Navarras, p. 207.

³⁸ On this see Ricard Zapata-Barrero: <<Política de inmigración y Unión Europea>>, en *Claves de razón práctica*, nº 104, Madrid, julio-agosto 2000, pp. 28 y 32.

to emigrate”³⁹. In my opinion, and as I recall the special rapporteur of the United Nations Organisation for the rights of migrants⁴⁰, in her report presented in the Commission for the rights of the migrants, “the gap existing between the recognition of the rights of the migrants by the international law of human rights [on one hand] and reality [on the other] constitutes one of the major challenges posed by international migrations.” For all of what has been said before, we can conclude by saying that in the field of immigration – as it also occurs in other areas of life – law follows in the wake of social reality.

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³⁹ Montserrat Soronellas Masdeu: *Familias en la migración. Emociones, solidaridades y obligaciones en el espacio transnacional*, Icaria/Desarrollo Rural, Barcelona, 2010, p. 166.

⁴⁰ Gabriela Rodríguez Pizarro.

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