

Ángeles Solanes

**HUMAN RIGHTS, IMMIGRATION AND DEVELOPMENT:
A VIEW FROM SPAIN***

1. Introduction

The sheer complexity of migration gives rise to the inevitable stereotypes that often hamper any positive analysis of this phenomenon. Many factors contribute to the biased perception that human mobility is mainly driven by economic motives. The ebb and flow of economies and the tyrannical demands of the marketplace seem to override the study of what really motivates migration, and obscures the intrinsic link between migration and human rights and development

The confused discourse on human development, together with a certain humanist approach to human rights, at times fails to clarify the relationship between human rights and development with migration. Indeed, the confusion between globalization and the universality of human rights (when in fact the logic of the global market is not compatible with the universality of human rights) broadens the debate on migration¹.

The starting point of this paper, within this seemingly unfavourable context, is that the lynchpin of human rights, development and human mobility is (or should be) continuity, such that it is inconceivable for human development and migration to be considered separately from human rights. As the 2009 Human Development Report (UNDP)² indicates, stereotypes of migrants should be de-

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¹ DE LUCAS, Javier, "La globalización no significa universalidad de los derechos humanos (en el 50 Aniversario de la Declaración del 48)", *Jueces para la Democracia*, n° 32, July 1998, pp. 3–9; *Globalización e identidades. Claves políticas y jurídicas*. Barcelona: Icaria. Antrazyt 2003 & "Las globalizaciones y los derechos", *Enrahonar*, n° 40/41, 2008, pp. 55–66.

² UNDP (United Nations Development Programme), *Human Development Report 2009, Overcoming barriers: Human mobility and development*.

nounced at all times and redirected towards development in order to broaden and balance perceptions of migration that reflect a reality that is complex and highly variable in nature.

With this in mind, this paper aims to emphasise the idea of migration not as a national human development strategy (for example, if we analyse the way the European Union seeks to describe it), but as complementary to that strategy which should be taken into account as such on national and international political agendas. The focus must be on human rights if this premise is ever to be put into practice. That is, a state's immigration policy must be based on international human rights law. This paper examines the case of Spain within this theoretical framework to show how the demands arising from a positive link between migrations and human development go unmet when set down in national law, which often fails to adhere to international regulations on the subject.

2. Migrations and human development

This paper does not analyse the highly complex notions of "migration" and "development"³ (which is beyond our study remit), and adopts the nomenclature of the 2009 Human Development Report, taking as its starting point Sen's proposal that sees development as a path to gaining freedom⁴, and adapting it to our study framework.

We consider that migration or international immigration (with no distinction between the two, as stated in the Report) is that which refers to human movement across international borders, resulting in a change of country of residence. The immigrant is an individual who has changed his place of residence by crossing an international border. Human mobility is the capability of individuals, families or groups of people to choose their place of residence.

We also subscribe to a vision of development understood as a process that gives people the freedom to lead their lives as they see fit. This idea of development demands the elimination of the main obstacles that deprive people of freedom, such as poverty and tyranny, but also others such as the lack of economic opportunity, systematic social deprivation, inadequate public services, intolerance and excessive State repression, all of which are root causes of migratory movements. This idea of development linked to migrations also sees human mobility (a person's capability to choose their place of residence) as an essential component of this freedom⁵.

³ Vid. RIST, Gilbert, *El desarrollo: historia de una creencia occidental*, Madrid: La Catarata, 2002.

⁴ SEN, Amartya, *Desarrollo y Libertad*. Barcelona: Planeta, 2000; & SEN, Amartya & NUSSBAUM, Martha (comps.), *La calidad de vida*, Mexico: Fondo de Cultura, 1996.

⁵ *Human Development Report 2009...*, p. 15.

Indeed, as Nussbaum and others maintain, mobility is one of a set of basic human functional capabilities that can be used to assess the effective freedom that individuals possess to carry out their life plans⁶.

We also agree with proposals of authors such as Naïr, when he urges that migration be placed at the very centre of cooperation and development aid policy. The aim is to elaborate a co-development strategy to stimulate a country's social and economical growth by using its own emigrant nationals to provide the main thrust for progress⁷.

The nature and extent of the effects of immigration depend on many factors, and a brief analysis yields several viewpoints in its favour. The country of origin receives a sharp boost in income in the form of remittances⁸, which also helps bring about changes in the social structure. The countries that take in immigrants see economic output increase at little or no cost to locals. There may be broader positive effects, for example, when the availability of immigrants for childcare allows resident mothers to work outside the home⁹. All of which can be viewed as positive. Yet although some of these evaluations can be taken as accurate, also depending on whether the economy is growing or in decline, they amount to nothing more than a simplification of the complex reality of the migratory phenomenon.

After decades of taking in low-skilled migrant workers, the latest proposals from the European Union for a common global policy on migration includes the notion of attracting professional elites from overseas, tacitly approving of highly skilled labour migration.

This competition to attract highly skilled workers is nothing new, in fact it is widely practised in the USA, Canada, Australia and New Zealand. Even within the EU Great Britain and Germany have long since offered incentives to highly skilled workers from overseas. The difference is that it has now been taken up by the EU as part of a campaign to make the Community a more attractive place to work for foreign professional job seekers who might be considering other destinations. This does not amount to a complete recasting of the selection processes currently in force, among other reasons because each Member State still retains powers to regulate the entry and residence of third-country nationals in its territory as long as these powers conform to the minimum standards stipulated by EU directives¹⁰.

⁶ Vid. NUSSBAUM, Martha, *Women and Human Development: the capabilities approach*, Cambridge: Cambridge University Press, 2000.

⁷ NAÏR, Sami, *Y vendrán... Las migraciones en tiempos hostiles*, Barcelona. Bronce/Planeta, 2006.

⁸ Vid. MORÉ, Iñigo (Dir.), *Inmigración y remesas informales en España*. Madrid: Documentos del Observatorio Permanente de la Inmigración, Ministerio de Trabajo e Inmigración, 2009.

⁹ *Human Development Report 2009...*, p. 3.

¹⁰ Cfr. SOLANES, Ángeles, "La apertura selectiva: nacionalidad y mercado frente a la movilidad humana", DE LUCAS, Javier y SOLANES, Ángeles (ed.), *La igualdad en los derechos: claves de la integración*. Madrid: Dykinson, 2009, pp. 67–96. Vid. MALGESINI, Gabriela, "Evo-

This tendency led to the approval of the Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment¹¹, which was transposed into Spanish law in Act 2/2009¹². One of the biggest problems arising from this type of measure is how to stem the brain drain from developing nations since, as the International Labour Organisation among others has pointed out, there is a clear link between such initiatives and the departure of talented professionals abroad¹³.

One should mention at this point that there is no clear, direct dynamic link between an immigration policy whose aim is to attract highly skilled workers and the promotion of a circular immigration that must take into consideration the dangers of a brain drain.

In fact, as Wihtol de Wenden¹⁴ adds, the notion of preventing a brain drain and encouraging professional elites to come home is arguable. In principle, the States that generate immigration earn considerable remittances from those who have left. And if these highly qualified professionals have no chance of working in their chosen field at home, for example due to the nature of the regime in power, then the numbers returning to their native country will be limited. There-

lución de las políticas europeas y española de migraciones, codesarrollo y cooperación al desarrollo, con especial atención al Ecuador”, PÉREZ, Nicole y VALLE, Alex (eds.), *Los Derechos Humanos en la movilidad humana: del control a la protección*. Quito, Ecuador: Ministry of Justice and Human Rights, 2009, pp. 261–280.

¹¹ Council Directive 2009/50/CE, 25 May 2009, Official Journal of the European Union 18.6.2009.

¹² The current Spanish Immigration Act consists of an initial law from 2000 with various reforms and a new Application Law which was approved on 15 April 2011. When we talk of the Immigration Act, we refer to Constitutional Law 4/2000, 11 January 2000 on the rights and freedoms of foreigners in Spain and their social integration, Constitutional Law 8/2000, 22 December 2000, Constitutional Law 11/2003, 29 September 2003, specifying measures on citizen safety, gender violence and social integration as regards foreigners, Constitutional Law 14/2003, 20 November 2003 and Constitutional Law 2/2009, 11 December 2009.

¹³ Martin says “emigration countries hold most of the keys to their economic futures, and their policies on issues ranging from providing economic opportunities to graduates to their adherence to human Rights are usually the major factors that determine whether PTK (professional, technical, and kindred or related (PTK) workers) migrants emigrate, remit, and return. Sending countries may have only limited abilities to offer the educational and research opportunities needed to keep PTKs at home in the short- to medium-term, and industrial countries that accept highly skilled migrants from poorer developing countries should agree to replenish the human capital they acquired via migration, MARTIN, Philip L., *Highly skilled labor migration: sharing the benefits*, International Institute for Labour Studies, Geneva, May 2003 and *Managing Labor Migration: temporary worker programs for the 21st Century*, International Institute for Labour Studies, Geneva, September 2003, p. 30.

¹⁴ WIHTOL DE WENDEN, Catherine, “Algunas reflexiones sobre la ley francesa de inmigración e integración de 24 de julio de 2006”, *Revista Española del Tercer Sector*, nº 4, September-December 2006, pp. 261–266, in particular p.263.

fore, the idea of circular immigration does not seem to fit in with the notion of attracting highly skilled workers.

The strategy to attract professional elites to Europe runs alongside the energetic offensive against immigrants who do not possess good job qualifications. This manifests itself in two instruments designed to “confront” the flow of undesirable migrants: the Directive on common standards and procedures in Member States for returning illegally staying third-country nationals¹⁵, and the European Pact on Immigration and Asylum¹⁶.

The first of these drew serious criticism as it clearly meant a step backwards in immigrants’ rights that are more or less established, and by doing so questioned the very legal foundations of the State. Indeed the Directive can violate basic rights, as De Lucas and others have mentioned, by encouraging procedures that withdraw freedom whenever an administrative infringement is committed; by authorizing periods of detention of up to 18 months in conditions of internment that resemble prisons; by allowing for the possibility of detaining unaccompanied minors whose expulsion does not guarantee that they return to their families, or by permitting expulsions to a third country even though it is not the immigrant’s country of origin¹⁷.

As this doctrine makes clear, the European Union must change its discourse and its practices as regards irregularly residing third-country nationals¹⁸. Calling such persons “illegal” is unhelpful as it brings criminal law sanctions and a discourse to bear on social issues which are not normally susceptible to coherent criminal law approaches. European Union mechanisms need to be designed to

¹⁵ Directive 2008/115/CE of the European Parliament and the Council, 16 December 2008, Official Journal of European Union 24.12.2008, which has been transposed into Spanish law by Act 2/2009.

¹⁶ European Council. *European Pact on Immigration and Asylum*. Brussels, 24.09.2008, 13440/08.

¹⁷ Vid. DE LUCAS, Javier, “La inmigración y la lógica de <Estado de sitio> (A propósito de algunas claves recientes de la política europea de inmigración”, DE LUCAS, Javier y SOLANES, Ángeles (ed.), *La igualdad en los derechos: claves de la integración...*, pp. 21–40; y “Dos test sobre la consistencia del Estado de Derecho. Ante los proyectos de reforma de asilo y extranjería”, *Jueces para la democracia*, nº 64, 2009, pp. 15–23.

¹⁸ Ilies asserts: “zero migration is not an attainable goal, but irregular migration might be reduced through a combination of border and internal controls, and the creation of legal migration channels, particularly for economic migration. So far, the ‘measures at all stages of irregular migratory flows’ focus on prevention, control and deterrence – on security and not so much on the economic aspect–. For those who follow developments at the European level in the area of immigration, the assertiveness of the Community on legal migration is the signal that the EU is ready to have a comprehensive immigration policy at all stages of the migratory flow”, ILIES, Maria, “Irregular Immigration Policy in the European Community: Action at all Stages of the Irregular Migration Flow (WP)”, *Working Paper* 38/2009, 17/7/2009, Elcano Royal Institute, Madrid – Spain, p. 24.

reduce the irregularity of third-country nationals, such as measures to ensure that third-country nationals' residence does not become irregular exclusively as a result of the processing time which the authorities take to deal with applications; persons in respect of whom there is no reasonable possibility of return need to be given residence permits, albeit for temporary stay, and not counted among the 'illegally residing' third-country nationals¹⁹.

In terms of the European Pact on Immigration and Asylum, the basics of European immigration policy have hardly changed despite the various connotations that arose from the differences between Member States. Externalization in the form of frontier protection and the dislocation witnessed in recent years²⁰ continue to be uppermost.

In the European Pact on Immigration and Asylum, the European Council makes five basic commitments, in particular:

1. To organise legal immigration to take account of the priorities, needs and reception capacities determined by each Member State, and to encourage integration²¹.

2. To control illegal immigration by ensuring immigrant return to their countries of origin or to a country of transit.

3. To make border controls more effective.

4. To construct a Europe of Asylum (this is clearly a work in progress although the various phases of the Common European Asylum System are being implemented after some delays²²).

¹⁹ 1st Dutch-Spanish Conference on EU Migration and Asylum Law, *Recommendations on European Immigration and Asylum Law for the Spanish Presidency of the European Union*, University of Huelva (Spain), 26–27 November 2009.

²⁰ Cfr. FERNÁNDEZ, Cristina & MAZKIARAN, Mikel, *Frontera Sur. Nuevas políticas de gestión y externalización del control de la inmigración en Europa*, Barcelona: Editorial Virus, 2008.

²¹ Cfr. AÑÓN, María José, “Integración: una cuestión de derechos”, *Arbor*, n° 744, July–August 2010, pp. 625–638.

²² The CEAS is a legal system that defines EU obligations on asylum and centres mainly on seven Secondary Law norms that include a mechanism for sharing responsibility among Member States for examining an asylum application (the Dublin II Regulation and EURODAC); minimum standards on procedures in Member States for granting or withdrawing refugee status (Procedures Directive), and the definition of four protection statuses (conventional, subsidiary, and temporary): the status of the asylum seeker (Reception Directive), the status of the refugee and that of the beneficiary of subsidiary protection (Qualification Directive), and the status of the beneficiary of temporary protection in the event of mass influx (Temporary Protection Directive). This system is backed financially by the European Refugee Fund (ERF). Vid. ARENAS, Nuria, “The Southern Border of Europe: “Right to asylum between Seas and Fences”. The Spanish Position relating to the Transposition of the Procedures Directive”, *The Procedures Directive: Central Themes, Problem Issues and Implementation in Selected Member States*, (Karin Zwaan, ed.), Wolf Legal Publishers, Nijmegen, The Netherlands, 2008, pp. 75–85.

5. To create a comprehensive partnership with the countries of origin and transit in order to encourage the synergy between migration and development.

Despite the Pact's apparent intention to foment integration and development, it is each Member State's principle of sovereignty and security that is at the root of this common project to manage migrations. For example, the integration debate is still not very prevalent in Spain²³.

With these instruments, the formula proposed for satisfying job market requirements is to use case-by-case regularisation rather than generalised regularisation; the push to make immigration disappear by returning those who are no longer wanted and the speeding-up of the arrival of international elites who are very much wanted. The price to pay is in rights and guarantees (affecting some foreigners more than others) such that procedural guarantees and free legal aid vanish, since the international obligations assumed by the Member States through various international instruments are not invoked, as we will discuss further.

This policy, both in its low-skilled migrant worker dimension and its enticing of highly skilled workers seems to be a throwback to hard-line neo-liberal economics in the way it views migratory flows from the *laissez-faire* concept of the Western economy at the start of the 20th century, which chose not to regulate international migrations for the positive effect it would have on job markets²⁴. This thinking has been reformulated to allow the State to exercise its sovereignty to arbitrate measures to control irregular immigrants or those in asylum on its territory while at the same time resorting to policies to attract foreigners to cover skills shortages.

So, returning to the initial reasoning, it is too simplistic to criticise *per se* the current tendency to foment the migration of highly skilled labour, questioning the right of these workers to leave their country, instead of attacking the root of the problem, that is, the implicit structural dilemmas such as low salaries,

²³ However as pointed out by Arango and Finolletti "it is true that Spanish society exhibits a very low level of tensions and conflict, it is also true that increasing family reunion and the increasing birth rate of foreigners poses the question of thesecond generation challenge. A serious debate on this issue would help to formulate a rationalintegration policy as well as a task-oriented use of the available financial resources. As some academics have already suggested, it would be helpful to change the finance model between the state and the autonomous communities in order to provide those communities with the highest immigration rates with more financial support. In this way, Spanish society might avoid the development of an integration deficit, which presently represents the most urgent challenge for "old" immigration countries in Europe, ARANGO, Joaquin & FINOTELLI, Claudia, "Past and future challenges of a Southern European migration regime: the Spanish case", *IDEA Working Papers*, nº 8, May 2009, p. 40.

²⁴ FANJUL, Gonzalo, "Migraciones internacionales: las consecuencias de gobernar el siglo XXI con políticas del siglo XIX", Área: Demografía, Población y Migraciones/Cooperación y Desarrollo, ARI 56/2010, Real Instituto El Cano, 23/03/2010.

inadequate financing and weak institutions, all of which put the brakes on human development.

As the UNDP Report reminds us, international immigration, even if well-managed, does not amount to a national human development strategy. With few exceptions, immigration is unlikely to shape the development prospects of an entire nation. Immigration is at best a way that complements broader local and national efforts to reduce poverty and improve human development.

International cooperation, especially through bilateral or regional accords, can lead to better migratory management, greater protection of the rights of migrants and an increase in contributions that these workers make to their native as well as to their host countries.

So it is that the UNDP Report places human development firmly on the agenda of those authorities responsible for formulating policies that seek to gain the best possible results from the patterns of human movements. Specifically, it proposes six individual pillars which together offer the best chance of maximizing the human development impact of migration:

1. Liberalizing and simplifying regular channels that allow people to seek work abroad.
2. Ensuring basic rights for migrants.
3. Reducing the transaction cost associated with immigration.
4. Improving outcomes for migrants and destination communities.
5. Encouraging the benefits of internal mobility.
6. Making mobility an integral part of national development strategies²⁵.

Two ideas at the heart of this proposal stand out in terms of human mobility, policies regarding which can certainly be improved: admission and treatment, in other words, the way in which immigrants legally enter a country and the legal statute that protects them once inside the country.

We will see how these two ideas develop and fit in the international (from the international human rights law) and national spheres (Spain) from the legal standpoint, in the way it affects, regulates and determines the lives of immigrants, with direct repercussions for the connection we have established between human mobility and human development.

3. Human Rights and development in a migration context

When we speak of human rights in terms of a phenomenon such as immigration, it is as if we are talking of parallel realities, as if the human rights discourse (including the positive viewpoint of immigration and human development) were

²⁵ *Human Development Report 2009*..., p. 95–125.

compatible with all the differentiations that exist in the Immigration Act. The immigrant is caught between these realities and becomes invisible as a subject of the Law, and becomes its object.

Principles such as the inherent human dignity that distinguishes us from other species and makes us different²⁶, non-discrimination, equality, equity and universality are all among these human rights. The universality and inalienability of human rights are two essential pillars at the base of the international system of human rights, and in this sense they are rights that are linked to human dignity. This emphasis on the “human” nature of these rights is an essential step in the internationalization (still unfinished) of human rights²⁷.

As we will see, this human rights-centred approach implies that governments carry out basic obligations based on specific principles. For example, Dworkin lays out two core principles that citizens should share: each human life is intrinsically and equally valuable, and, that each person has an inalienable personal responsibility for identifying and realizing value in his or her own life. He goes on to show the effect on human rights of adhering to these principles, the place of religion in public life, economic justice, and the character and value of democracy. Dworkin argues that more tolerant conclusions flow most naturally from these principles²⁸.

The international human rights law can be seen as “that part of international law that aims to develop a legal and institutional framework for the protection of the individual in the international sphere, guaranteeing enjoyment of and respect for certain values deemed to be common (“human rights”) by the entire international community”. In this context, “human rights” can be understood as having a precise meaning in international law based on a specific regulatory code (the international code of human rights) consisting of procedural and substantive rules that have launched a wide range of institutions that currently work on international human rights law.

There are two key pieces of legislation that initiated the development of this international law:

1. The United Nations Charter (1945), whose article 1.3 recognizes the universality of human rights, indicating that one of the purposes of the United Nations was “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promot-

²⁶ Vid. FUKUYAMA, Francis, *Our Posthuman Future: Consequences of the Biotechnology Revolution*, New York NY: Farrar, Straus & Giroux, 2002.

²⁷ Vid. PECES-BARBA, Gregorio, *La dignidad de la persona desde la Filosofía del Derecho*, Madrid: Dykinson, 2002.

²⁸ DWORKIN, Ronald, *Is democracy possible here? Principles for a New Political Debate*, Princeton University Press, 2008, p. 54 & fol.

ing and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.

2. The Universal Declaration of Human Rights (1948), which established the same principle of human rights. Article 1 alludes to the dignity of the human race, since “all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”. It cannot be forgotten that this benchmark text allows for differentiation in some cases when this can be reasonably and objectively justified.

This is the launch pad for international human rights law which can be defined as “the system of laws and principles that regulate a sector of relations of institutionalized cooperation between States of unequal socio-economic development and power, whose objective is to promote respect for human rights and universally recognized basic freedoms, as well as the establishment of mechanisms to guarantee and protect those rights and freedoms which are classified as being of legitimate concern and, in some cases, of vital interest for today’s international community of States”²⁹.

It is essential to focus on the legal-regulatory definition of these rights in the international field, and this definition, by ratification of pacts and accords by States, becomes binding and thereby sets legal obligations that these States must adhere to.

What we could call the international code of human rights is made up of more than 150 international treaties and protocols that specify the obligations that signatories must comply with in terms of human rights. This code has been backed up with declarations and sets of principles, etc, that many consider to be *soft law* in that they are non-binding in themselves and merely provide guidelines for conduct that States should follow. In the United Nations’ context, Spain has ratified various international treaties that are relevant to the protection of the human rights of migrants³⁰.

However, it is noteworthy that Spain has not ratified the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, adopted by General Assembly resolution 45/158 on 18 December 1990, revealing how some States continue to exercise considerable discretion in this area³¹.

²⁹ Vid. VILLÁN DURÁN, Carlos. *Curso de Derecho internacional de los derechos humanos*. Madrid: Trotta, 2002, pp. 85 & fol.

³⁰ VILLÁN DURÁN, Carlos, “Los derechos humanos y la inmigración en el marco de las Naciones Unidas”, VV. AA., *Derechos Humanos de los Migrantes*, Mexico: Cooperation Programme on Human Rights-European Commission, 2005, pp. 53–104.

³¹ Vid. DE LUCAS, Javier, RAMÓN; Consuelo & SOLANES, Ángeles, *Informe sobre la necesidad y oportunidad de la ratificación por España de la Convención Internacional de la*

All these measures are designed to remind the State of its obligations regarding human rights, for example, the duty to respect, protect and ensure the exercise of these rights, as well as guaranteeing and promoting them.

These human rights treaties must also be interpreted in accordance with specific principles of international human rights law³², among which are:

1. The principle of *pro homine* (or in this context *pro personae*), in terms of the hermeneutic criterion that characterizes all international human rights law, according to which the law and its interpretation must be applied as broadly as possible when recognizing rights, “always in favour of the person” with the burden of justifying any restrictions falling on the State, not on the migrant.

2. The principle of non-discrimination: recognized as a cornerstone of international law (*ius cogens*) and which cannot be challenged or derogated. This principle vetoes any distinction, restriction or denial of the recognition and exercising of a human right based on “prohibited reasons” or “suspicious categories” like race, ethnic or national origin, age, gender, economic circumstances, etc.

3. The principle of the dynamic interpretation of human rights: this includes progressivity understood as the increasingly broad protection of rights in the national and international dimension; dynamism and non-regressivity, which refers to a State’s obligation to not adopt measures that could reduce the degree of recognition and protection of human rights within its national jurisdiction.

4. The principle of *pacta sunt servanda*, referring to the obligations States acquire when they sign a treaty (even taking into account *rebus sic stantibus*), which their national legal system has to put into effect.

One of the main obligations that States acquire through international pacts on human rights is to adopt measures (legislative or other types) to adjust their legal systems to the provisions of the treaty. They also have to set up, advance and direct the development of policies so that their implementation enables all subjects under the States’ jurisdiction to exercise fully the rights recognized in these treaties.

organización de Naciones Unidas de 1990 sobre la protección de los derechos de todos los trabajadores migratorios. Barcelona: DIM Catalunya. Generalitat de Catalunya. Departament d’Acció Social i Ciutadania. Secretaria per a la Immigració, 2008. Vid. ALBA, Francisco, “La Convención Internacional sobre los Derechos de los Trabajadores Migratorios: algunas implicaciones”, & GRANGE, Mariette, “Importancia e impacto de la Convención internacional para la protección de todos los trabajadores migratorios y de sus familiares”, both in VV. AA., *Derechos Humanos de los Migrantes*, op. cit., pp. 35–41 & pp. 43–52.

³² Cfr. DE VERGOTTINI, Giuseppe “Jornadas con motivo del 60 aniversario de la Declaración Universal de Derechos Humanos. Ponencia inaugural”, *Revista Europea de Derechos Fundamentales*, nº 11/1st semestre, 2008, pp. 17–38; CANOSA, Raúl, “Igualdad y discriminación en el derecho internacional de los derechos humanos”, *Revista Europea de Derechos Fundamentales*, nº 11/1st semestre, 2008, pp. 39–66

To cite just some examples of the rights established in these international accords, and which should be respected and guaranteed by the State signatories, there is the Universal Declaration of Human Rights. In article 2, it states that everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 7 proclaims that all are equal before the law and are entitled without any discrimination to equal protection of the law; while article 8 mentions the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 30 reduces the possibility of restrictive interpretations: “nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein”.

Therefore, Spain takes on obligations at the international level once it ratifies the conventional laws. Once they are published in Spain’s Official State Gazette, the laws become part of Spanish legal system. Article 10.2 of the Constitution clarifies any possible contradiction between international and constitutional laws by stating that the latter “will be interpreted in accordance with the Universal Declaration of Human Rights and with the international treaties and agreements on human rights that have been ratified by Spain”.

Consequently, the internal organs of the State (from the courts to the various tiers of administration) are forbidden from restrictively interpreting the scope of rights recognized by international human rights law. Spain’s Constitutional Court considers that the rights set down in the European Convention on Human Rights must be interpreted in accordance with the jurisprudence developed by the European Court of Human Rights.

However, as the doctrine points out, despite the guarantees to which we refer, we have to acknowledge that international human rights law is not invoked and applied as frequently as desired since it often goes unnoticed, even though it is undoubtedly an invaluable complement to the national legal system of the protection of human rights³³.

4. Spain: the rights of immigrants with regard to human rights

We can make a brief analysis of the case of Spain by taking into account these obligations and principles, among which non-discrimination naturally fig-

³³ VILLÁN DURÁN, Carlos, “Los derechos humanos y la inmigración en el marco de las Naciones Unidas”..., p. 62.

ures, that link the Spanish State as signatory to these agreements on human rights on an international scale, and by examining the admission and treatment of migrants as fundamental for human mobility and its link to development.

In article 1 of the Spanish Immigration Act, foreigners are considered to be, for purposes of implementing the Immigration Act, those persons who do not have Spanish nationality. Nationals of EU Member States and those to whom the Community scheme applies will be governed by the rules contained therein, being applicable those aspects of the Act that are most favourable to both nationals and non-nationals³⁴.

Successive modifications to the Spanish legal system have left loopholes in the law regarding exclusion, which have only been closed after continuous reminders from jurisprudence, in the shape of the Constitutional Court. It points out that there exists the possibility that the conditions for exercising rights can be modulated according to nationality such that the difference in treatment between Spanish nationals and foreigners could be unequal if not entirely so.

And also with regard to the international dimension, while affirming respect for these principles linked to international human rights law, this possibility of instigating different treatment for “reasonable and objective motives” is presented as a justification for such treatment of foreigners³⁵.

In the case of the Constitutional Court, still strictly sticking to the traditional three branches of human rights as the thrust of its argument (differentiating between those rights relating to the dignity of the person that must be recognized both in nationals as in foreigners; those which respond to the constitutional mandate of the legal configuration, and those rights which accrue to nationals, the recognition and guarantee of which is denied to foreigners), has indicated the sphere of activity in which legislators can operate when specifying the legal statute on nationality. Sentences passed down on appeals of unconstitutionality pending on Act 8/2000 embodied the possibility of the legal configuration of foreigners with regard to various limits³⁶:

³⁴ Vid. MENDOZA, Natividad & CABEZA, Jaime (coords.). *Tratamiento Jurídico de la Inmigración*, Albacete: Bomarzo, 2008; & VV. AA., *Extranjería y derecho de asilo. Análisis de la LO 2/2009, de reforma de extranjería, y de la nueva Ley 12/2009, de asilo*, Barcelona: Bosch, 2010.

³⁵ BONET, Jordi. *Las políticas migratorias y la protección internacional de los derechos y libertades de los inmigrantes. Un análisis desde la perspectiva del ordenamiento jurídico español*. Bilbao: Universidad de Deusto, 2003, pp. 23 & fol.

³⁶ Vid. STC 236/2007, 7 November 2007. Appeal of unconstitutionality 1707–2001. BOE, 10 December 2007 and successive issues that reiterate it, Vid. VIDAL, María del Camino, “La jurisprudencia del Tribunal Constitucional en materia de derechos fundamentales de los extranjeros a la luz de la STC 236/2007”, *Revista Española de Derecho Constitucional*, 85, Year 29, January/April 2009, pp. 353–379.

1. The extent of the connection of specific rights to the guarantee of human dignity.

2. The mandatory content of the right, taking into account that the Constitutional Court can hand down direct recognition that foreigners have this right. Respect both for international treaties and the constitutional guidelines is the irrefutable basis for the legal configuration of the rights of foreigners resident in Spain. In order to specify those rights that must be linked to human dignity and also to demarcate the essential content, it will also have to contain that which is established in constitutional jurisprudence and in the minimum standards that figure in international treaties, with the corresponding jurisprudence that arises from them, and which is often taken up the Constitutional Court³⁷. The fact that these are legally configured basic rights does not mean they lose their constitutional character. So, the legislator cannot tailor this right to his own liking, nor undermine its essential content even though it applies to nationality.

3. The exercising conditions as set forth in the law must be intended to preserve other rights, goods and interests protected by the Constitution, maintaining an appropriate proportionality with the objective in mind.

If we return to the two central ideas we mentioned earlier relative to the legal entry of immigrants and the legal statute that covers them (to foment good practices in relation to migration and to promote migration as a strategy of human development) we can now examine what Spanish immigration laws have to say on the matter.

The legal entry of immigrants into Spain is restricted to a minimum by means of the collective management of country-of-origin contracts and the catalogue of difficult-to-fill jobs, with a twin policy whose aim is to protect jobs at home³⁸: a) temporary or seasonal immigration for low-skilled work; b) encouraging the arrival of well-qualified immigrants.

In the case of so-called economic migrants, meaning unskilled labour, if we examine some of the rights we previously mentioned as forming part of the Universal Declaration of Human Rights, we see how Spanish immigration laws limit

³⁷ AJA, Eliseo, “Veinte años de doctrina del Tribunal Constitucional sobre los derechos de los inmigrantes”, VV. AA., *La democracia constitucional: estudios en homenaje al profesor Francisco Rubio Llorente*, Volume I, Congreso de los Diputados, Madrid: Centro de Estudios Políticos y Constitucionales, 2002, pp. 439–456.

³⁸ It is important to note that Spain has also participated in the externalising borders, for which Ilies says: “The idea of externalising borders through cooperation with third countries went even further in 2003 and 2004, when the British, German and Italian governments backed the idea of creating transit detention camps in North Africa under EU supervision for wouldbe asylum seekers. The aim was to stop irregular immigrants from reaching the EU, an idea reminiscent of Australia’s ‘Pacific Solution’”, ILIES, Maria, “Irregular Immigration Policy in the European Community: Action at all Stages of the Irregular Migration Flow (WP)”, *op. cit.*, p. 17.

these rights from the legal configuration, diminishing the legal statute in accordance with its administrative situation.

Although the principle of equality before the law is the starting point for interpreting the law, as we have seen, the rights are reformulated by focusing on the subject for whom these rights are intended (the foreigner). Thus a differentiation is arrived at which, although fictitious, seems “almost natural”. The best response is to remember that it is the restriction of rights that has to be justified, not their application in accordance with the *principio pro homine / pro personae* of which we spoke before)³⁹.

Even the anti-discriminatory clause in Article 23.1 of the Immigration Act, which matches the concept of discrimination as established at international level in the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), adopted by the UN General Assembly in 1979 for example, is qualified by the reference in Article 23.2 to foreigners whose situation is regular.

Foreigners whose situation is irregular have also been a determining factor in the exercising of social rights. The treatment received by foreigners as a lynchpin of development is reflected in the Act 4/2000 which marks a precedent in the recognition of these rights of irregular migrants although exercising them has been conditioned by the municipal register⁴⁰.

By linking rights to inscription in the municipal register as a result of the Act 4/2000 and the cutback that followed the Act 8/2000, the importance of this local administrative list of residents has grown considerably. Basic fundamental rights on integration, such as health care, depend on municipal registration if the foreigner is to enjoy the same rights and in the same conditions as Spaniards. The municipal register is also used to verify length of stay in any possible extraordinary process of normalization, and for information on any town hall social insertion report of the place where the irregular migrant has his residence,

³⁹ DE LUCAS, Javier. “Ciudadanía, Extranjería y Derechos”, BETEGÓN, Jerónimo, DE PÁRAMO, Juan Ramón, LAPORTA, Francisco J., & PRIETO, Luis (coord.), *Constitución y derechos fundamentales*. Madrid: Centro de Estudios Políticos y Constitucionales, 2004, pp. 379–407.

⁴⁰ The *padrón municipal* is the Spanish Municipal Registry, it was established in 1996. As Arango & Finoltelli describe, “it is coordinated by the Spanish Statistical Institute (Instituto Nacional de Estadística-INE) and includes all residents that are registered in a Spanish municipality. The Padrón represents a unique statistical source because the Orly registration requirement is a valid identity document. Each registered person (empadronado) automatically gets access to public schooling for children and to the National Health System. That is why inscription in this register is especially attractive for irregular migrants: most of them get a degree of social assistance they would never get in their countries of origin. For this reason, the Padrón is the most widely used database to measure the real volume of the foreign population in Spain (including the irregular one). However, the Padrón suffers from biases that lead to overestimating the number of irregular residents and others that underestimate them”, ARANGO, Joaquín & FINOTELLI, Claudia, “Past and future challenges of a Southern European migration regime: the Spanish case”..., p. 5.

which is required for the regularization of his situation by providing proof of permanent and settled residence⁴¹.

The municipal register was the focus of widespread criticism following the reform in Act 14/2003 that allowed the police access to data on foreigners in the exercise of their powers that included the instigation of expulsion proceedings. The controversy surrounding municipal registration reached a peak in Act 2/2009 which introduced new suppositions of serious infringement. These included article 53.1 c) which defined as a serious infraction the engaging in fraudulent concealment or serious misrepresentation in meeting the obligation to inform the competent authorities of changes affecting nationality, marital status or address, and guilty of misrepresentation in the statement of the obligation to apply for inscription at the municipal registry for the purposes specified in this Law, provided that such an act constitutes an offence.

In addition, with the implementation of Act 2/2009, article 53.2 d) makes it a serious infringement for a homeowner to register an irregular migrant in the municipal register if the owner is renting accommodation to the migrant that would not constitute a real home from abroad. This would incur a penalty for each person improperly registered.

Other rights such as family reunification have been restricted by Act 2/2009. In article 17.1 d) referring to ascendants, the law states that the ascendants of the applicant, and their spouse in the case that they are dependent, be over 65 and that there are reasons to justify the need to authorize their residence in Spain. Regulations shall define the conditions for reunification of the parents of long-term residents in another Member State of the European Union, of EU blue card holders and beneficiaries of the special status for researchers. Exceptionally, on humanitarian grounds, ascendants may be under 65 years of age if they meet the other requirements of the Act.

The 2009 reform also introduced some positive qualifications on family reunification. For example, the person with whom the foreign resident has an emotional relationship similar to marriage shall be deemed for all purposes as qualifying for family reunification, provided that this relationship is duly accredited and meets the requirements needed to cause effect in Spain. In any case, marriage and a similar analogous affective relationship are deemed to be incompatible. No more than one person in an analogous affective relationship can qualify for family reunification although the personal law on immigration acknowledges these links. The reform also incorporates one of the long-standing demands on family reunification: that the residence permit for family reunification covers the

⁴¹ Vid. SOLANES, Ángeles & CARDONA, María Belén, *Protección de datos personales y derechos de los extranjeros inmigrantes*. Valencia: Tirant lo Blanch, 2005, pp. 80–125.

spouse and their children when they reach working age, so they work without legal restriction⁴².

In reference to the freedoms of assembly, demonstration, association and strike, Constitutional Court jurisprudence relating to the Act 8/2000, in particular sentences 236/2007 of 7 November 2007 and 259/2007 of 19 December of the same year, recognizes that the restrictions that the law imposed on foreigners residing legally in Spain on the exercising of such rights could not be justified and were, therefore, unconstitutional, since these rights apply to all persons for the fact of constituting a right. This modification was duly incorporated in Act 2/2009.

Foreign residents in Spain may have the right to vote in municipal elections under the Constitution, Spanish law and international treaties, where applicable. Although Spain has initiated some bilateral accords aimed at allowing immigrants to vote at local elections, as is recognized in other EU Member States, the fact that legislators have chosen not to modify the Constitution's principle of reciprocity will make immigrants' ability to vote dependent on their nationality⁴³.

These accords to foment immigrant participation in municipal elections signed by a democratic state such as Spain with certain not-so-democratic regimes of the countries of origin are clearly hard to justify, so in principle not all third-country nationals will be able to benefit from this hypothetical measure⁴⁴.

One of the most reprehensible aspects of the Spanish Immigration Act is the immigration detention centres. The controversy surrounding these installations has never ceased since their inception under the now-repealed 1985 Immigration Act. In principle, the legal measures stipulate that the immigration detention centres must not be penitentiary in nature since foreigners sent there have not infringed the penal code. These centres are intended to hold foreigners who have committed an administrative infringement under the current Immigration Act. Foreigners are sent there who, for example, are awaiting confirmation of an expulsion order which is under administrative procedure. Official denials that these centres resemble prisons should mean in practice that those interned in these centres and deprived of their freedom are not viewed as criminals.

⁴² Vid. LA SPINA, Encarnación, "Implicaciones jurídicas en la lógica restrictiva de la inmigración familiar", SOLANES, Ángeles (Ed.), *Derechos Humanos, migraciones y diversidad*. Valencia: Tirant lo Blanch, 2010, pp. 257–293.

⁴³ Vid. SANTOLAYA, Pablo & REVENGA, Miguel, *Nacionalidad, Extranjería y Derecho de sufragio*, Madrid: Centro de Estudios Políticos y Constitucionales, 2007; Vid. DE LUCAS, J. (dir.), *Los derechos de participación como elemento de integración de los inmigrantes*. Madrid: Fundación BBVA, 2008; & MOYA, David & VIÑAS, Alba (eds), *Sufragio y participación política de los extranjeros extracomunitarios en Europa*, Barcelona: Fundació Pi i Sunyer, 2010.

⁴⁴ SOLANES, Ángeles, "La participación política de las personas inmigrantes: cuestiones para el debate", *Derechos y libertades: Revista del Instituto Bartolomé de las Casas*, Year 12, n°. 18, 2008, pp. 67–96.

Article 60.2, referring to the refusal of entry, as appears in the 2009 Immigration Act, indicates that “the places where foreigners are held are not to be penal in character, and shall be equipped with social, legal, cultural and health services. Foreigners held at these centres will only be deprived of their freedom of movement.” Indeed the fact that the admission to and stay in one of these centres is carried out under the judicial authority and supervision should mean that the guarantees for foreigners interned in these centres are sufficiently solid. In this sense, the third section of the article states that “all foreigners, during their internment, will be at the disposition of the judicial authority that authorized their internment, and the governing body at the centre must inform the judicial authority of any change in circumstances in relation to the situation of foreign internees”.

However in practice, the frequently published reports on the living conditions at these centres by NGOs working in the field of human rights have fanned the debate on their constitutionality⁴⁵. The immigrant detention centres have come under the scrutiny of the Spanish Ombudsman who has insisted the law stipulates that these are not penitentiary centres, even though internees are deprived of their freedom of movement, and yet the law does not regulate what form this deprivation is to take or what its limits should be.

The main problems generally found at immigration detention centres are, according to the Ombudsman, the following⁴⁶:

1. There is a tendency to give more importance to security measures and police controls than to the internee’s living conditions and the maintenance of those rights to which they are entitled despite the deprivation of the freedom of movement.

2. The detention centre model is inadequate as it basically means that the National Police Force takes into custody persons of very different backgrounds for a prolonged period of time. It would make more sense for the police to hold people in custody outside the centres, with specialist social workers taking on the role of coordinators to ensure better coexistence at these centres.

3. The lack of any control mechanism for police actions at the centres due mainly to the fact that the public sector employees who work at the centres are not identified. There is also a lack of, or limited, video surveillance at the centres and no facilities to store recordings for later consultation.

⁴⁵ Vid. Asociación de Derechos Humanos de Andalucía (APDH), *Centros de Retención e Internamiento en España*, Octubre 2008; & Comisión Española de Ayuda al Refugiado (CEAR), *Situación de los centros de internamiento para extranjeros en España*, Diciembre 2009.

⁴⁶ Spain’s Ombudsman (Defensor del Pueblo), report nº 10010, published 07/07/2010-10044814. Vid. Spain’s Ombudsman (Defensor del Pueblo), *Informe a las Cortes Generales 2009*, Madrid, pp. 441–452, & *Informe a las Cortes Generales 2010*, Madrid, pp. 392–400.

4. The general absence of social care facilities at the centres, which makes the work of the police officers at these centres more difficult as they are obliged to take on duties which go beyond their remit.

5. Overcrowding exacerbates the existing structural deficiencies at some of these centres.

6. The lack of any common criteria to request admission to the centres, in which former inmates released from prison and pending an expulsion order rub shoulders with other foreigners who have been detained for irregular stay, that is for an administrative infringement rather than a criminal offence.

7. The lack of an appropriate system to provide for families to be together, because even where these facilities exist, they are inadequate for proper use by the internees.

In reality, the nature of the Spanish Immigration Act obliges us to make constant demands for the rights of foreigners to be guaranteed in terms of access and configuration of the legal statute of the immigrant. As we pointed out at the start of this paper, this scenario prevents the legal-political measures articulated around immigration and human mobility from reaching beyond national frontiers, and this affects the development and guarantee of human rights.

We cannot cease in our efforts, and at the same time we must positively value what has already been achieved, without losing sight of the fact that human rights linked to migrations and the development of freedom demand, to paraphrase Ihering⁴⁷, a constant legal and social struggle.

HUMAN RIGHTS, IMMIGRATION AND DEVELOPMENT: A VIEW FROM SPAIN

Summary

W przedstawionym artykule przedmiotem rozważań czyni autorka problem migracji we współczesnym świecie. Nie jest to jednak socjologiczna analiza tego zjawiska. Zasadniczym celem wysiłków autorki jest ukazanie migracji z perspektywy problematyki praw człowieka. Migracja, zarówno ta wewnętrzna, jak i międzypaństwowa, przedstawia się tu jako fundamentalne prawo jednostki do zmiany miejsca zamieszkania. Autorka konsekwentnie broni poglądu, w myśl którego dzisiejsze państwa, kształtując politykę migracyjną, nie powinny zamykać oczu na ścisły związek zjawiska migracji z prawami człowieka. W tym też kontekście pojawia się krytyczna analiza rozwiązań prawnych dotyczących polityki migracyjnej obowiązujących w jej ojczystej Hiszpanii.

⁴⁷ JHERING, Rudolf Von, *The Struggle for Law*, translated for the 5th German Edition by John J. Lalor, The Lawbook Exchange, LTD. Union, New Jersey, 1997.