Policies on irregular migrants

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Introduction

Economic globalisation and ease of travel mean that Europe's societies are becoming increasingly diverse. The presence of migrants is an important factor in our countries' economic development. Some sectors of our economies depend on them and would not survive without foreign labour. However, the migrant population is not uniform and the situation of migrants may vary from one country to another. When migrants have regular or lawful status, their residence and employment situation is secure, even though the differences in status may be significant.

Irregular migrants are in a very different position. The unlawfulness of their residence means that they live in constant insecurity and are exposed to all kinds of risks, including that of being deported to their country of origin from one day to the next. However, it is not unusual for them to be well integrated into society in their places of residence.

Several definitions are used to describe this category of migrants: undocumented migrants, clandestine migrants and illegal migrants. These definitions focus on certain aspects of their situation. However, the migrants have one thing in common: they do not have permission from the authorities to live in the country and/or engage in paid employment or professional activity there.

It does not take much imagination to realise what kinds of lives irregular migrants lead from day to day. Threats, fear and abuses of various kinds are omnipresent, and the migrants' most fundamental rights may be violated as well. That concerns human rights, including social rights.

Aware of the challenges posed by the presence of large numbers of irregular migrants, the Conference of European Ministers responsible for Migration Affairs, held in Helsinki in September 2002, called on the Council of Europe to look into issues affecting human dignity and the effective enjoyment of minimum rights for persons in need.

The European Committee on Migration (CDMG) therefore decided to assess the specific policies on the situation of irregular migrants in Council of Europe member states. The aim of the exercise was not only to pool national experiences and evaluate them, but also to draw up possible proposals on dealing with irregular migrants and ways of improving co-operation between countries of origin and host countries in this regard.

Five countries volunteered (Armenia, Germany, Greece, Italy and the Russian Federation) and submitted some aspects of their national policies on the situation of irregular migrants for evaluation. This publication (in two volumes) contains the national reports which the European Committee on Migration (CDMG) approved at its 53rd meeting (14-16 May 2007). The national reports are accompanied by a summary report highlighting the various proposals drawn up on the basis of the reports.

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Part I – Synthesis of policies on irregular migrants

1. Objectives of the research programme

This project was conceived as a follow-up to the Action Plan of the 7th Conference of European Ministers responsible for Migration Affairs (Helsinki 2002). The objective of this activity is to help member states to evaluate selected aspects of their national policies relating to irregular migrants. The result of this evaluation may also enable the European Committee on Migration (CDMG) to prepare some general guidelines on improving co-operation (between countries of origin and destination) on the treatment of irregular migrants and to present some examples that might help member states determine or refine their approaches to irregular migrants.

A further objective of this project is to promote that aspect of the CDMG Programme of Activities that is concerned with Compliance with Human Rights and Rule of Law Standards. The legal status of migrants is relevant both to the general issues of migration management and more especially to those of integration and community relations.

In order to achieve these objectives, CDMG identified five member states that had shown a strong interest in participating in this research activity: Armenia, Germany, Greece, Italy and the Russian Federation. Five specific national policies have been chosen for evaluation.

It was decided that evaluation of specific policies would be done on the basis of national reports drafted by national consultants proposed by the respective member states. Each report was to identify the main elements of their national policies, their objectives and achievements, and any obstacles they met during implementation. Particular attention would be paid to critical analysis of these policies and the presentation of general conclusions or recommendations that could be useful for other member states.

In order to prepare the evaluation reports, an ad hoc meeting of CDMG members and national consultants was organised on 2-3 March 2006. This allowed the participants to discuss specific issues related to each report and to draft a common framework for evaluation reports.

The research and preparation of the evaluation reports was undertaken from March to August 2006. All reports were received by the Secretariat by the end of October 2006 and their contents have been accepted by respective CDMG members.

2. Summary of the methodologies from each of the reports

The issue of irregular migration is a huge challenge for every researcher. Firstly, the available data in each country are, for obvious reasons, scarce; often, only crude estimates can be made of the numbers involved. Some countries are also sensitive about revealing any estimates or information about irregular migrants within their borders because of the possible adverse impact this may have on the way migrants and migration policies are perceived. This makes it very challenging to obtain a general picture of the real situation of the irregular migrant population in some countries. In this sense, the researchers involved in our project have applied different methodologies to their analysis and have therefore used comparative sources that they considered more appropriate or more reliable according to their national situation.

Thus, the Armenian report followed the methodology of conducting research through a series of interviews with experts working directly with migration-related issues and interviews with nationals who had gone through a migration process themselves and had been returned to their own country.

The reports on Italy, Greece and Germany were based on comparative paper research, statistics and personal expertise, along with previous studies conducted by the researchers themselves.

The report on the Russian Federation was developed through research and various interviews with key stakeholders involved in the issue.

3. Short description of patterns of irregular migration

The migration situation and the historical factors affecting it differ substantially in the five countries studied. Germany and the Russian Federation have a long history of immigration flows. The regulation tendencies, and the political and public concepts that inspired such tendencies, have notably changed over the years. The evolution of their regulation approaches provides good examples of changing trends and tested methodologies on the issue. The German report reminds us how East–West smuggling and irregular entry during the Cold War was seen as a positive factor and even encouraged by the Federal Republic of Germany. Following the aftermath of 11 September 2001, internal security issues and terrorism have found an easy breach to foster the stiffening of migration regulations in Germany and have thus seriously hindered the irregular migrants' access to minimum rights. An opposite path is being followed by the Russian Federation, where the strategy towards migration is seemingly turning to a more liberal approach for migrants from CIS states.

In the case of the Russian Federation, the disintegration of the former Soviet Union resulted, among other things, in numerous migration flows from ex-USSR states towards Russia. Visa-free entry regimes in the majority of post-

Soviet territories and poor border controls facilitated unregistered migration. Tough migration regulations in the Russian Federation left little space for regular migration and pushed migrants outside the legal field. A large shadow sector offered illegal employment opportunities for migrants. The outcome was a high level of irregular migration for illegal employment as the dominant pattern of international migration in the post-Soviet territory, with an estimated ratio of regular to irregular migration of 1:10.

Armenia gives an example from the other side of the fence. After the collapse of the Soviet Union, the Republic of Armenia generated intensive, unprecedented emigration. The current phase of migratory movements can be seen as the third one and it dates from 2002. Economic and labour emigrants are prevalent amongst the total foreign migration flows from Armenia, with seasonal migrants representing a massive proportion of the total. It is estimated that only a very limited number of Armenians reside in other countries legally. This is essentially conditioned by stricter regulations recently applied by receiving countries towards migration and labour issues. Consequently, in countries where Armenian residents might legally enter with no requirement for a visa, most of them have now found themselves with the status of irregular migrants. The Russian Federation is seen as being the first destination for Armenians. Between 1990 and 2005, it is estimated that between 700 000 and 1 300 000 people left Armenia – a significant proportion of the total population.

In recent years Germany has become a major transit country for illegal migration. About 500 000 to 1 000 000 irregular migrants are estimated to live in Germany. German law does not provide a legal definition of illegal residence; it only regulates entry and residence procedures. Various matters of fact of illegal residence can be differentiated. As the complex issue of "illegality" comprises several, partly overlapping phenomena (illegal entry, illegal residence, illegal employment), and as various entry points into illegal residence exist, discussions about the issue encounter a variety of definition problems. The complexity of definitions for irregular migrants means that it is difficult to come up with a precise figure. This is a common factor from the reports of participating member states and indeed elsewhere.

Italy and Greece provide an example of traditional source countries of emigration that have become receiving countries, with little experience of managing the high number of incoming flows. In the case of Italy the predominance of migration flows from North African and Asian countries has steadily given way, in terms of percentage of flow volumes, to migration waves originating in particular from the Balkans and, later on, from former Soviet-bloc countries and Latin America.

As the Greek report states, the country has only recently become a country of destination for significant numbers of migrants. From the mid-1970s, migrants began to arrive from Africa and Asia. After 1989, migration to Greece

took on massive proportions, with waves of migrants arriving from the collapsed socialist regimes of central and eastern Europe, particularly Albania.

It is apparent from the reports that, in the past two decades in particular, there have been significant changes to historical patterns of migration. This makes it all the more important that organisations such as the Council of Europe continue to monitor patterns of migration and indeed to try to anticipate them, so that appropriate arrangements can be made in receiving countries to ensure continuing social cohesion and, in countries of origin, to take whatever steps are appropriate to minimise the effects of "brain drain". This in turn suggests a strong need for greater levels of co-operation and collaboration between countries of origin and receiving countries.

4. Summary of how each country addresses the issue of irregular migration

The five reports conducted by our researchers allude to the fact that migration is an intrinsic characteristic of modern societies and that the objective of regulations must not be the hindering of migration, but rather to assure legal, controlled management of migration flows. Irregular migration puts those who find themselves in such circumstances into a very vulnerable situation and it also has very negative effect on society as a whole. The indigenous population is more likely to welcome migrants if they can appreciate that their status is a legal one, and it is less likely to support those people they perceive as being in their country without the relevant permission.

Whereas all the countries approach the subject by recognising that irregular migration undermines social cohesion while recognising the potential benefits of migration for the receiving country, the way to approach the actual subject of this activity varies considerably.

An important key factor for the four destination countries studied is the labour market, though the methodology to tackle the issue is completely different. The Italian approach seeks to integrate those migrants with an already existing labour relationship whereas the German system seeks to penalise the shadow economy in general through check controls at the workplace. The German approach is based on the idea that irregular migration is a criminal offence and that any migrant residing irregularly in the country should be expelled. Although the German approach has not proved effective in all sectors of employment – household labour is especially difficult to track down – the system, accompanied by other restrictive measures, has allowed Germany to be one of the European countries with a smaller shadow ('grey' or 'black') economy and a decreasing or stable number of irregular migrants. In Italy, irregular labour concerns mainly domestic work (home-help and caregiver jobs), small enterprises (particularly in the building sector and in low qualified tertiary jobs) and agriculture (in the southern regions). Because of this it is

difficult to reduce the problem through regular checks at the workplace. In Greece, however difficult it may be to track down illegal labour, the scarce resources allocated to tackle this issue are also a decisive factor that determines the widespread importance of the shadow economy.

It must be stated that sometimes even regular migrants feel compelled to accept irregular jobs, because employers are not willing to employ them on a legal basis. This is shown in the Russian report, which points out that employers' profits are higher when they undertake irregular hiring of employees. Thus, measures to fight concealed labour must be accompanied by anti-corruption measures – since bribes are daily used to settle affairs between authorities and employers – and adequate resources. There is an impact on society as a whole because people in irregular jobs are less likely to pay taxes. Although not a party to this research, the UK has noted that there may be a depressive affect on wage rates as a result of the shadow economy.

Greece, Italy and other south European countries have implemented similar methodologies to tackle the accumulation of unauthorised migrant populations on their territories: regularisation programmes. This refers to the rational choice made by governments to prioritise the human rights approach to the subject while combining it with tougher regulations against illegal entry. In the case of Greece, policies concerning admission have remained strict and have been scarcely modified, whilst the conditions for stay and residence have been constantly evolving.

Armenia represents the only source country covered by the research. There are no effective state structures or actions for implementing migration policy and especially for combating irregular migration. Instead there are isolated programmes and projects, carried out separately by uncoordinated authorities or by international organisations, and this does not provide an effective, integrated approach to migration issues.

Thus, the Armenian report is based on analysis of the Concept on State Regulation of Republic of Armenia Population Migration and it focuses on three main working areas and tries to analyse how different authorities deal with these areas. In this sense, the lack of an integrated national and inter-structural approach to the subject makes it difficult to evaluate any new development. These three areas of intervention are:

- awareness raising;
- re-admission arrangements;
- reintegration arrangements;

Germany's big change in legislation occurred in 1990 when regulations were strengthened in order to avoid irregular migration. In 2005 the new Immigration Act came into force with a Germany with a view to implementing the EC

Council Directive[1] and actually took a bigger step in terms of tightening criminal penalties. The regulations try to ensure that no incentives for illegal migration flows to Germany are created, as would be the case if simple legalisation possibilities were offered. Appeals to hardship commissions or petitions for subsidiary protection do not constitute legalisation options. Along the same lines, the network linking those authorities concerned with irregular migration has been extended and currently every time a migrant gets in touch with the administration his or her residence status is verified. This can deter irregular migrants from claiming social rights such as health care and some levels of education, depending on the federal state. In terms of employment, tighter controls and increased penalties are reducing illegal employment and they are accompanied by wider temporary legal employment measures. The 2005 Migration Act, however, is more concerned with establishing other instruments for legal entry that fit with the interests of the national labour market.

The report on Greece analyses the 2005-06 Regularisation Programme. This is the third regularisation programme, whose requirements are more restrictive than the 1998 and 2001 programmes, resulting in a significant decrease in applications.[2] In October 2006, several months after completion of the programme, the government announced that the regularisation effort would be extended to include those who could provide types of documents proving length of residence in Greece that were not allowed in the initial programme, apparently regretting the stringency of the initial requirements it had introduced for regularisation.

Italy has a long tradition of programmes of regularisation. Most of them were similar to amnesties in which migrants' regularisation depended on their residence in Italy. However, the last 2002 regularisation is considered by the Italian authorities as a legalisation tool based on existing job relations. The original restrictive conditions of regularisation were revised during the implementation period to make them more flexible. The main objective of this programme was to recover social security contributions and fiscal contributions that were being lost with concealed labour. The aim that was revealed only afterwards was the "granting of a residence permit to all irregularly present migrants and preventing regularised migrants from falling again into an illegal status".[3]

1. Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence: OJ L 328, 5 December 2002.
2. Cavounidis, Jennifer, *New elements of Greek policies concerning irregular migrants: the policy of regularisation of unauthorised migrants*, CDMG (2006), 56.
3. Zanfrini, Laura, *Italian policy on irregular migrants in the labour market and the shadow economy*, CDMG (2006), 66.

The Russian Federation's new approach on migration policy was outlined in the ad-hoc meeting of the National Security Council on 17 March 2005. By this time it was absolutely clear that the existing model of combating irregular migration mainly by restrictive police methods of detention and deportation of migrants was not effective. The new approach is more liberal: it combines regularisation of migrants with the widening of legal migration channels, keeping in mind Russia's need for additional labour resources. It makes the procedure of getting temporary residence permission and labour permit clearer, simpler and more transparent, and it opens the way for more orderly labour migration by introducing annual labour import quotas. The new policy is promising to be an effective alternative to irregular migration in the Eurasian region.[4]

The following documents are the core of the new approach:

- the 2006-12 State Programme on providing support for voluntary resettlement of compatriots to the Russian Federation;
- the 2005 Concept of regularisation of irregular labour migrants from those CIS states that have visa-free entry regime with the Russian Federation;
- the Federal Law on Registering foreign citizens and persons without citizenship in the Russian Federation;
- the Federal Law on Amendments to the Federal Law on legal status of foreign citizens in the Russian Federation;
- the new Concept of state migration.

The report on Russia focuses mainly on labour-market policies and regulations as it is considered that migrants coming from CIS states (the target group of the research) usually enter irregularity through undocumented employment, not by illegal border crossing. The author underlines the fact that over-regulation and over-bureaucratic procedures push employers and migrant workers towards the shadow economy and then into undocumented stay and absence of human rights protection. In the case of Russia, the new strategy seeks to reduce the number of irregular migrants and to encourage regular flows of migrants for permanent stay and for temporary work, according to the needs of the economy and society. The strategy seeks to reduce corruption and the shadow sector, and to fight human trafficking, and it stresses the importance of interstate co-operation in counteracting irregular migration. The Russian report points out the value of remittances and the loss and lack of control when these are sent through non-formal channels, which is mainly done by irregular migrants.

4. Ivakhnyuk, Irina, *New answers to irregular migration challenges in Russia (Russian Federation)*, CDMG (2006), *67.*

5. Analysis of common approaches to regularisation that have emerged from the reports

All countries have gone through periods of tighter regulation measures and more liberal ones. As Professor Kluth states, three different approaches could be outlined:

- In the state-control approach, irregular entry and residence are seen as a threat to public order and security. The negative effects of irregular migration on society are stressed. This approach can also lead to negative effects, because it hinders irregular migrants' effective access to their right to services such as the health system, which may pose a threat to public health due to uncontrolled diseases, and education, which leads to social exclusion and serious educational gaps.
- The human-rights approach prioritises the protection of migrants and their minimum rights, while giving a more global approach to the phenomenon caused not only by the migrant's individual aspirations, but also by a certain economic system. This integrated approach can only be taken if all the scopes are co-ordinated: labour-market regulations and the fight against concealed labour in general, co-ordination with countries of origin, housing policies, social security, etc.
- The dual perspective "calls for complementing state-control policies with approaches that take the rights of illegally resident migrants, their voluntary return and regularisation programmes into consideration".[5]

It is suggested that one of the main causes of irregular migration might be over-restrictive procedures for regular migration and their inconsistency or mismatch with the actual needs of the economy. In other words, irregular migration might be seen, to some extent, as a reaction by employers and migrants to what they see as restrictive immigration controls. However, all policy-makers are restrained by the fear that a liberal regulation might encourage further migrations towards the country or what is known as the 'pull-effect'. And it should be noted that this is by no means the only driver for irregular migration; the reports have identified a number of other potential causes.

The main motivation for an individual to migrate is to secure a better life, and the key to this is secure employment. Thus most countries tackle the issue from a labour-market approach, be it by allowing migrants to legalise their status by proving that they are beneficial to society (Greece, Italy or Russia) or by allocating resources and means to fighting the general shadow economy (Germany).

5. Kluth, Winfried, *Legal situation of irregular migrants in Germany, i.e. granting and limiting of access to social rights*, CDMG (2006), 68.

6. Analysis of the perceived effectiveness of regularisation policies in the participating countries

Regularisation programmes are said to be tackling the issue of the shadow economy. They can also be publicly justified from a human rights point of view, because they give an opportunity to legalise their situation to people who can bring a positive benefit to society. In this sense, regularisation programmes like the one carried out in Italy might help the target group, but they have no positive effect on the management of migration if they are not followed by other, related policies. The stated objective of this programme in Italy was:

– to promote the emergence of non-EU workers' irregular labour (and therefore recovery of social security contributions due from employers and fiscal contributions to be deducted from the workers' salaries).

But there was a progressive extension of the aims, mainly due to lobbying by civil society and the gradual adaptation of the outlined measures to reality:

– to grant a residence permit to almost all present irregular migrants and to prevent regularised migrants from falling again into illegal status.

These two main objectives were achieved, even though some regulations had to be adapted and re-adapted in the process, and some regions had more successful experiences than others.

The regularisation programme carried out in Greece had the following goals:

– acquisition by migrants of legal status and legal rights, which would greatly reduce the vulnerability of migrants to exploitation and to violation of human rights;

– transferring labour relationships from the informal to the formal sector: the presence of illegal migrants willing to take on substandard jobs results in unfair competition and undermines the labour market position of natives and legal migrants;

– facilitating the social integration of migrants.

The very restrictive conditions and procedures of the Greek regularisation programme of 2005-06 proved to be insufficient for its goals and expectations, because the strict conditions of access to the programme excluded an important segment of the irregular population. After the programme had ended, the government introduced legislation revising the conditions of participation and providing for a new round of applications, in order to increase access to regularisation.

In the case of Germany, no regularisation programmes have been carried out. The security approach and the numerous checks have made the country a

less-sought destination. That entails serious restrictions on access to minimum rights for irregular migrants. It must be said that the German legislation on rights to social services does guarantee access to basic social services such as medical care and education for irregular residents. Furthermore, wage entitlements gained through illegal employment can be claimed in the courts. However, public authorities have a duty to pass information about illegal residence to the competent authorities. This duty of notification can interfere with access to medical care and education.

The far-reaching checks of the labour market, designed to combat illegal employment, reduce the incentive for employers to employ illegal residents and hence the incentive for entry to, and illegal residence, in Germany. This also applies to the prosecution of any kind of human smuggling and trafficking. In recent years the authorities have put enormous efforts into this, and success has been achieved. Such results require a well-run public administration and sufficient funds.

The Russian Federation deals with a very different situation in terms of irregular migration, since most of the migrants with an irregular status have entered legally from visa-free states. Recognising visa-free population movements between former Soviet republics as a 'natural' and humane migration regime in a space where new interstate borders have separated families, relatives, countrymen and compatriots, the Russian Federation focuses on proper migration management as the core of its new migration strategy, which has the following goals:

- to reduce numbers of irregular migrants by their regularisation;
- to encourage inflow of regular migrants for permanent stay and temporary work;
- to lessen corruption in the migration field;
- to cut down the shadow sector;
- to combat human traffickers;
- to inspire more active interstate co-operation in counteracting irregular migration in the CIS region.

Since this is a new strategy, to be carried out in the near future, it seems too early to evaluate its impact, though pilot projects in certain regions have proved successful and a number of lessons have been learned.

In the case of Armenia, the main goals of the new Concept on State Regulation of Republic of Armenia Population Migration are:

- Structure and evolution of population, both in terms of size and demographic situation, in accordance with national security requirements and sustainable human development norms;

– Broader application of the provisions of international documents on the protection of the rights and interests of individuals involved in migration flows.

Professor Gevorgyan's analysis shows that the Concept has not moved up the political agenda of the government. More resources and efforts are needed in order to carry out a co-ordinated and integrated policy and to fulfil the stated objectives.

7. Short analysis of the impact of regularisation policies on irregular migration flows

South European countries tackle the issue of migration through regularisation programmes that have to be repeated after some years, as has been the case in Italy. Regularisation programmes have the effect of 'emptying the basin' of irregular migrants, but actually have no positive impact in the long term; they can actually motivate immigration, because they send out the idea that they are periodical measures. This is why restrictive criteria were chosen in Greece's third regularisation programme, specifically to avoid adverse implications for future illegal migration; but, at the end of the programme, the government found that many migrants were thereby excluded and so it took steps to redress the situation by relaxing the criteria for participation.

To reach the goal of facilitating social inclusion, acquisition of authorised status is obviously a minimal though not sufficient condition for inclusion. It should be noted that, with the third Greek regularisation programme, prospects for social inclusion were greatly improved, given that the regularisation policy came as part of a broader framework that increased access to more permanent status. In the previous programmes, regularisation did not lead to relatively secure status, but only to what has been described as "legalisation under suspension", a phase lasting ten years in which migrants were repeatedly required to renew temporary residence permits of short duration until they became entitled to apply for status as long-term residents. With the new provisions, and in accordance with EU guidelines, this period has been cut to five years. The fact that the policy of regularisation has been applied in tandem with a broader framework leading to social inclusion is perhaps one of the most positive aspects of the present policy.

In the case of Germany, tighter conditions and measures aimed at irregular migrants may restrict irregular immigration if they are accompanied by specific international agreements and a widening of the regulated opportunities for migration. However, the economic and employment situation must not be underestimated as a key factor in reducing irregular migration flows.

In the case of Armenia and the Russian Federation, the reduction of irregular migration is one of the goals, although it is too early to evaluate the real impact of their respective policies.

8. What lessons can be learned from the five national policies?

The reports produced by our consultants lead to the conclusion that the main cause of irregular migration may be over-restrictive procedures for regulated migration and a flexible, "tolerated" concealed labour economy. There is a mismatch between the needs and demands of our economies and the existing migration management policies. Regularisation procedures have to be linked with combating the shadow economy for all society's benefit, because the main motive for irregular migration is employment. The shadow economy has traditionally existed in European countries independently of the presence of irregular migrants and it has to be addressed from a broader point of view.

The lesson learned from analysis of the Greek situation is that a regulation policy must be accompanied by other policies if it is to be effective and if it is meant to prevent the lapse of migrants into illegality. As the Russian report also states, housing policy is an essential adjunct to labour policies in any successful regularisation programme.

Among the lessons Greece has learned from its experience with illegal migration and three regularisation programmes is that implementation of regularisation programmes does not solve the problem of illegal migration. As has been widely noted, a policy of regularisation is an admission of the failure of migration policy to effectively manage migration flows and it must therefore be accompanied by revision of the policies that have failed. Policy directions that have frequently been cited as offering promise in the attempt to combat illegal migration are the opening of legal channels of migration and the forging of bilateral agreements between sending and receiving countries.

Greece's experience with the policy of regularisation has also shown that one of the biggest policy challenges is not only to bring unauthorised migrants into legality, but to keep them in legality.

Migration has to be tackled by a multi-dimensional approach, based on respect for human rights. Strict and security-orientated measures entail very restricted access to minimum rights, and so parallel structures (such as informal networks and NGOs) develop as a less than perfect replacement for the lack of governmental responsibility. When these structures are not sufficiently well developed, the lack of access to basic services can result in serious problems of social exclusion and marginalisation that exacerbate the problems caused by the migrants' illegal or clandestine status.

The great contrast between theory and practice is also a problem, one that shows up policy-makers' misunderstanding of the whole picture. Sometimes the expected results of policies are not being achieved because of a poor policy framework and insufficient knowledge of the real effects of the legislation on the migrants and on society generally. Policies on regularisation and permit renewal by migrants should encourage employment in the formal (as opposed to the informal) sector, but at the same time they must not be greatly at odds with the realities and needs of the receiving country's labour market or society. Thus, any regulation that does not accurately take into account the real needs of the labour market is doomed to fail, be it a tougher or a more liberal regulation.

Lastly, the Russian Federation and Armenia tackle the important issue of co-ordination among countries of origin and destination. Closer co-operation in establishing more flexible and rapid channels in countries of origin for contingents of migrants seeking regular and regulated employment is of paramount importance when tackling migration flows. As Professor Zanfrini hints, the beneficial use of privileged quotas established through agreements with source countries should be one of the key elements of an integrated migration policy.

As pointed out by Professor Ivakhnyuk in her report, revision of the tax code and reduction of taxes related to hiring foreign workers could be effective additional incentives for bringing concealed labour to light.

9. Recommendations for future actions

The role of the Council of Europe and of the CDMG in this issue is mainly to provide the member states with a human rights approach on the subject and a global and comparative orientation when dealing with policies for irregular migration. Therefore, the drafting of some guidelines on the issue could be of great help to the member states and could support them in their process towards a most integrated global and human rights oriented approach.

The report from Armenia suggests:

> Preferably, in view of its high reputation, the Council of Europe might in a formal way sensitise the Republic of Armenia Government towards the issues raised within the scope of the reports urging it to establish a collective structure to be responsible for discussing those issues, with obligatory involvement of governmental institutions eligible in addressing irregular migration issues as well as representatives of NGOs, academies and other institutions concerned.[6]

6. Gevorgyan Vardan, *Policy for combating irregular migration in the Republic of Armenia*, CDMG (2006), *69*.

A proposal put forward by the last meeting of the CDMG in November 2006 fits perfectly with the conclusions of these reports. That is to put forward a model of agreement between country of destination and origin as a means to find a model of best practice on co-ordinating the management of migration flows at intergovernmental level.

The assignment of privileged quotas for labour migration with the source countries should be fostered.

More flexible and efficient channels for people seeking employment should be promoted, in order to make them more suitable for the quickly changing demands of economies of destination and more accessible and attractive to employers.

The term "illegal residence" still lacks sharp definition. German law, for example, does not define illegal residence; it simply regulates entry and residence procedures. There are several aspects to illegal residence. Because "illegality" is a complex of several, partly overlapping phenomena (illegal entry, illegal residence, illegal employment), and because there are various entry points to illegal residence, discussions about the issue tend to revolve around problems of definition. In the German study, therefore, the group of illegally resident third-country nationals was defined as:

> foreign nationals who have neither been granted a residence title nor a toleration certificate and who have neither been registered by the authorities nor in the Central Register of Foreign Nationals (AZR).[7]

In contrast to European Community directives and guidelines, German primary law on foreign nationals does not use the term "illegal". Nevertheless, the term is widely used, both in academic debate and in everyday usage. As some people regard the term as degrading when used with reference to migrants ("illegal migrants") – arguing that "no human being is illegal" – several alternative terms are also used in this context: "illegally resident third-country nationals", a legal term focusing on illegal residence (the term that is used in this study), "irregular", "undocumented", "uncontrolled" or "clandestine" migrants, "status-less" migrants or "*sans papiers*". Member states should consider, when defining "illegal migrants" for their own purposes, using terminology that in their own language is not seen as derogatory, but is nevertheless precise.

In many member states, basic human rights are guaranteed in legislation or under the national constitution. In many areas these constitutional rights form directly applicable law and can therefore, unlike international law, be enforced by individuals through legal action. By contrast, it is often the case that only universal human rights can be invoked by illegal foreign residents. In dealing with the phenomenon of foreign residents who may have entered, or reside in, a country clandestinely, member states should ensure that their domestic

7. Winfried, op. cit., p. 2.

legislation includes at least a minimum level of access to remedies in case of breaches of human rights. This should include the protection of fundamental rights (human dignity and personal integrity), equal treatment, especially of men and women, freedom of religion and conscience, freedom of expression and the special protection of marriage and family, as well as the so-called negative and positive freedom of association.

The issue of domestic work is one that cannot easily be tackled by the same measures used in other sectors to combat concealed work. Because domestic work is carried out in the private sphere and is commonly accepted, the efforts of national authorities to manage this migration are limited and often remain outside the scope of control policies.

Other measures should include:

- promoting the signature and ratification of the European Convention on the Legal Status of Migrant Workers (ETS No. 93);[8]
- promoting the signature and ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;[9]
- promoting the signature and ratification of the Council of Europe Convention on Action against Trafficking in Human Beings,[10] ensuring the allocation of the resources and political will needed to fight trafficking and human smuggling, with a special emphasis on the protection of victims and respect for their integrity;
- encouraging constructive co-operation with civil society institutions;
- considering ways to reconcile differences through the so-called "dual perspective".

In accordance with EU demands to complement state-control policies with approaches that take into account the rights of illegally resident migrants, alongside programmes for their voluntary return or regularisation, several charitable organisations, churches and trade unions have presented similar proposals. Their main aim is to achieve what has been called a "situational de-illegalisation" which works towards a "pragmatic solution of humanitarian and health problems or risks faced by foreign nationals that already live illegally in our country".

8. The Convention was opened for signature on 24 November 1977 and came into force on 1 May 1983.

9. For status of signature and ratification, see: www.ohchr.org/english/countries/ratification/13.htm.

10. The Convention's entry into force requires 10 ratifications, including those of 8 member states. Status of signature and ratification at time of writing: 3 ratifications, 28 signatures, 1 non-member state. To check the status of signature and ratification, see: www.coe.int/t/DG2/TRAFFICKING/campaign/Flags-sos_en.asp.

Part II – Italian policy on irregular migrants in the labour market and the shadow economy

Laura Zanfrini

Executive summary

This report examines the emersion process of "undocumented" migrants' irregular labour provided for by Law No. 189 of 30 July 2002, Law Decree No. 195 of 9 September 2002, which with some amendments became Law No. 195 of 9 October 2002 on "Urgent provisions concerning non-EU migrants' irregular labour legalisation".

The so-called great regularisation of 2002 led to the emergence of about 650 000 individual positions, slightly fewer than the total number of positions that had been held by migrants and regularised through the different amnesty laws in Italy between 1986 and 1998. Thanks to effective organisation, the creation of poly-functional counters for all operations allowed co-ordination among the relevant authorities and, particularly in some areas, harmonious co-operation between public institutions and organisations of civil society, it was possible to process more than 700 000 regularisation applications within little more than one year, as well as cope with several doubtful cases and expand the number of beneficiaries beyond the case typologies the legislator had originally defined. Over the two years after the submission of all applications, only 1.7% of the regularised migrants lost their regular status because they could not obtain an extension of their residence permit, just 8% were jobless and "only" 11.8% were irregularly employed. The positive results of this regularisation in terms of emergence from illegality and the recovery of tax and contributions are therefore undeniable.

Where this particular regularisation, like previous programmes and similar schemes in other countries, missed the target was in its ability to make a meaningful difference to the flow of incoming migrants. As of 1 July 2005, according to our estimates, the number of irregular migrants was already over half a million and it continues to show an irreversible, growing trend, waiting for a new mass-regularisation provision, which many people consider now unavoidable. On the other hand, though irregularity has a negative effect on migrants' employment capacity and on their ability to put their human capital to good use, it does not prevent them from finding a job. Among illegal and irregular migrants, even those with relatively short average migration seniority, three quarters of them have managed to find a job, which in most cases is a steady occupation. But the result has been to strengthen in people's minds the idea of Italy as a country where it is possible to enter, live and work in defiance of any law. The fight against the shadow economy must therefore become an absolute priority, and should make us aware of the consequences that foreigners' irregular employment has, particularly in the weakest regions

most exposed to unemployment, on the functioning of local labour markets, since it represents a threat not only to interethnic co-existence, but also to the very solidity of social cohesion.

1. Short analysis of irregular migration

1.1. Basic information on irregular migrants

Before giving an overall picture of irregular migration, it is advisable to say in advance that the great majority – as many as two thirds according to estimates – of the regular immigrant population currently settled in Italy passed from an irregular status to a regular one, thanks to one of the five mass-regularisation laws that came into force in the period from 1986 (the year of the first[1] amnesty provision) to 2002, the year of the so-called great regularisation, which brought to light about 700 000 employment positions,[2] corresponding to a little less than half of the previously migrated and regularly resident population.

On the basis of statisticians' and demographers' observations and remarks, we can reasonably believe that those regularisation provisions may have had the effect of emptying the basin of irregularity,[3] which however was inevitably destined to grow again in the following years. The numbers and characteristics of the irregular foreign population can therefore be described *ex post* on the basis of the number of applications submitted on the occasion of the different regularisation laws (which obviously do not include all irregular migrants, but certainly a significant part of them). In turn, these regularisations measures reflect the development of the phenomenon of migration to Italy, through the succession of heterogeneous flows in terms of migrants' national origins and characteristics.

1. As a matter of fact, the first regularisation action was ordered, at an administrative level, through the memoranda issued on 2 March and 9 September 1982 by the Ministry of Labour; it was directed at those who had come to Italy prior to and not later than the end of 1980, and had worked continuously since then. The strict conditions, as well as the lack of promotion, limited the extent of those regularisation measures to about 12 000 cases.

2. However, the number of accepted applications, and hence the number of employment positions that actually emerged, totalled about 650 000.

3. In this regard, it should be noted that the only available official estimates concerning irregular migrants' presence are those reported, with reference to 15 April 1998, by a ministerial commission especially established for this purpose (see G.C. Blangiardo (1998), *Relazione di sintesi sugli aspetti quantitativi della presenza straniera irregolare*, Ministero dell'Interno, Rome, pp. 62-72). Apart from that, estimates are usually made by extrapolating on a national scale the results of surveys carried out in particular territories, which among other things allow us to infer that most irregular migrants have come to Italy after the expiry date of the previous amnesty provision. Cf. in this regard the chapter on statistical data included in the annual Report on Migrations edited by Fondazione ISMU (www.ismu.org).

As shown in Table 1,[4] though this does not include the data from the 1986 regularisation, whose impact was however extremely modest, irregular migration to Italy has followed closely the pattern of the flows common to the whole European migration system, and particularly the south European one. The predominance of migration flows from North African and Asian countries has progressively given way, in terms of percentage of flow volumes, to migration waves first originating in particular from the Balkan area, and later from former Soviet bloc countries and also from Latin America.

Table 1: Regularisation applications, 1990-2002, the top ten nationalities (absolute values, percentage of the total and per 100 'regular' foreigners)

	Country of origin	Absolute value (thousands)	%	per 100 RF			Country of origin	Absolute value (thousands)	%	per 100 RF
1990						**1995-96**				
1	Morocco	48.7	22.1	206		1	Morocco	34.8	13.6	43
2	Tunisia	26.3	11.9	211		2	Albania	32.4	12.7	107
3	Senegal	16.0	7.2	221		3	Philippines	19.5	7.6	54
4	Philippines	13.7	6.2	96		4	China	15.8	6.2	98
5	Yugoslavia	8.9	4.0	59		5	Peru	13.5	5.3	169
6	China	8.6	3.9	114		6	Romania	11.9	4.6	84
7	Egypt	7.6	3.5	85		7	Tunisia	11.4	4.5	37
8	Ghana	6.5	3.0	148		8	Senegal	10.8	4.2	52
9	Poland	5.4	2.4	60		9	Nigeria	9.3	3.6	193
10	Sri Lanka	5.3	2.4	117		10	Egypt	9.0	3.5	58
Total top ten		146.9	66.6	137		Total top ten		168.5	65.8	65
Total		220.5	100.0	51		Total		256.0	100.0	35

4. This table and other statistical data have been drawn from A. Cangiano and S. Strozza (2006), "Le procedure straordinarie di regolarizzazione: regole e risultati delle diverse tornate" in S. Strozza and E. Zucchetti (eds), *Il Mezzogiorno dopo la grande regolarizzazione. Vecchi e nuovi volti della presenza migratoria*, Angeli, Milan, pp. 13-40.

	Country of origin	Absolute value (thousands)	%	per 100 RF			Country of origin	Absolute value (thousands)	%	per 100 RF
1998						**2002**				
1	Albania	35.7	16.3	49		1	Romania	143.1	20.4	173
2	Morocco	23.9	10.9	20		2	Ukraine	106.7	15.2	846
3	Romania	22.8	10.4	79		3	Albania	54.1	7.7	34
4	China	15.4	7.0	44		4	Morocco	53.8	7.7	32
5	Senegal	11.2	5.1	35		5	Ecuador	36.6	5.2	297
6	Nigeria	7.3	3.3	56		6	China	35.7	5.1	58
7	Bangladesh	7.2	3.3	60		7	Poland	34.3	4.9	104
8	Pakistan	7.1	3.2	66		8	Moldavia	31.1	4.4	545
9	Philippines	6.9	3.1	12		9	Peru	17.4	2.5	55
10	Egypt	6.5	3.0	28		10	Egypt	16.0	2.3	50
Total top ten		144.1	65.7	35		Total top ten		528.8	75.3	89
Total		219.3	100.0	21		Total		701.9	100.0	48

Source: Author's data process, based on Istat and Ministry of the Interior data

In the 1990 regularisation, launched by the so-called Martelli Law, Moroccans are by far the most numerous foreign community coming to Italy (22%), followed by the Tunisian community (12%), the Senegalese (7%) and Philippine (6%). In the 1995-96 amnesty (the so-called Dini Decree), the Albanian community (13%) almost equals the Moroccan one (14%), while the Chinese (6%) and Peruvian (5%) almost approach the size of the Philippine community (8%), historically one of the largest communities as regards immigration in Italy.

The 1998 regularisation measures (enforced by the passing of the so-called Turco-Napolitano Law) show instead the Albanians as the leading immigrant group (16%) while the Romanians (10%) almost equal the Moroccans, whose numbers are less than half what they were in 1990. The Philippines are significantly fewer (3%), but irregular migrants now include a growing number of Chinese (6%).

The most recent regularisation programme (after the passing of the so-called Bossi-Fini Law), in 2002, attracted roughly three times the number of applications in any previous scheme. Five among the first ten nationalities by numbers of regularised persons originate from Balkan countries or elsewhere in central and eastern Europe. Romanians are the clear leaders in the classification by number of applications (143 000, or 20% of the total). This circumstance changes the overall picture of regular migration, since it assigns to Romanians an equal role to that of Moroccans and Albanians (who, with over 50 000 applications, confirm themselves as major communities of origin for migration to Italy). Among other groups prominent in the regularisation provisions, we find at the fifth place Ecuadorians, with a number of applications (37 000) destined to increase by four times the regularly settled migrants from this country, and Moldavians

have become notably numerous. However, the real novelty of 2002 regularisation is the Ukrainians, who submit eight times as many applications (106 000) as the number of residence permits they had before the amnesty, and become the fourth national community by number of subjects present.

The mean age of irregular migrants and regularisation candidates has tended to grow over time. If we consider the applications submitted in 2002, as shown in Table 2, the migrants' mean age is over 32 years, but it is 38 years for persons coming from eastern Europe, who are mostly women. Mean age is lower in the communities with a male majority, particularly if we consider the communities originating from Bangladesh, Egypt, Tunisia, India and Pakistan. In general, and speaking quite carefully in this case, we can say we are faced with an irregular migrant population formed by "young men and by no longer very young women",[5] which clearly reflects two different starting situations and migration models. Considering the two ends of the regularised migrants' mean age segment, we can see that between the older woman-workers from eastern Europe employed as caregivers and the young Albanians widely employed in the building industry, there is almost a twenty-year gap.[6]

Table 2: Regularisation applications, 2002, the top ten nationalities (by type of contract, gender and mean age)

Subordinate jobs				**Home-help jobs**				**Caregiver jobs**			
Men		**Women**		**Men**		**Women**		**Men**		**Women**	
Nationality	**age**	**Nationality**	**age**	**Nationality**	**age**	**Nationality**	**age**	**Nationality**	**age**	**Nationality**	**age**
Romania	29.2	Romania	26.9	Romania	29.9	Ukraine	40.9	Romania	30.1	Ukraine	43.4
Morocco	27.4	China	29.5	Morocco	27.6	Romania	30.1	Ukraine	35.1	Romania	32.1
Albania	25.5	Ukraine	34.8	Philippines	31.4	Poland	33.1	Ecuador	30.9	Poland	41.9
China	29.6	Poland	27.0	Sri Lanka	29.3	Ecuador	31.0	Peru	31.4	Moldavia	39.0
Egypt	27.5	Albania	27.7	Ukraine	32.8	Moldavia	36.0	Albania	27.2	Ecuador	32.6
India	28.0	Ecuador	28.7	Senegal	29.7	Peru	30.8	Morocco	27.6	Peru	32.0
Ukraine	31.0	Morocco	28.1	Bangladesh	25.1	Albania	30.0	Sri Lanka	30.1	Albania	31.8
Pakistan	28.3	Moldavia	30.8	Albania	25.8	Philippines	31.6	Moldavia	33.0	Russia	43.7
Senegal	29.8	Russia	28.4	Ecuador	30.1	Morocco	29.4	Bangladesh	24.9	Bulgaria	42.1
Ecuador	29.7	Bulgaria	30.8	Peru	29.9	China	31.9	Philippines	32.2	Morocco	30.6
Total	28.3	Total	28.9	Total	29.2	Total	33.4	Total	30.1	Total	38.3

Source: Ministry of the Interior data process[7]

5. C. Conti and S. Strozza (2006), "Lavoratori e lavori sommersi: il quadro attraverso l'ultima regolarizzazione degli stranieri" in S. Strozza and E. Zucchetti (eds), *Il Mezzogiorno dopo la grande regolarizzazione. Vecchi e nuovi volti della presenza migratoria*, Angeli, Milan, pp. 41-89.

6. E. Zucchetti (ed.) (2004), *La regolarizzazione degli stranieri. Nuovi attori nel mercato del lavoro italiano*, Angeli, Milan.

7. Table taken from Zucchetti (2004), op. cit., pp. 28-9.

If we focus now on gender, as shown in Table 3, the 2002 regularisation reports a women's presence much larger than in previous amnesties, as it now involves 46% of all emersion applications and has achieved considerable weight within some emerging communities, such as the Ukrainian, Moldavian and Ecuadorian ones. If we now consider that the basic requirement for access to this procedure was the existence of a job, this datum further confirms the relevance of the female component among those coming to Italy to work, in parallel with the spread on Italian territory of their employment in family-related support positions.[8] This datum is consistent with the family-based structure of the Italian welfare system and with the "racialisation" of care work reported on a global scale,[9] which has helped to change the gender balance among the overall immigrant population.

The cultural rootedness of concealed labour in this particular job sector, along with the continual arrivals of women originating from heavy-migration-pressure countries (particularly from Africa and Asia in the past, and quite abundantly nowadays from eastern Europe and Latin America) available to be recruited by Italian families, makes this method one of the major irregular migration models in Italy, which moreover tends to further spread all over the national territory. Among immigrant women for whom a regularisation application was submitted, 83.6% declared work as home helps (45.8%) or home caregivers (37.8%). On the other hand, we can estimate[10] that there were about 250 regularisation applications among home helps for every 100 foreign home helps already regularly present. A second model, more consistent with the traditional migrants' features, is the one represented by young men of various origins, destined to be employed in low-profile jobs in the tertiary, building and manufacturing industries, or in agriculture.

Obviously, using administrative data to reconstruct a phenomenon like irregular immigration, seen only through the information we can draw from regularisation applications, has quite a few limitations, particularly when the possibility of regularising status is granted only to a few particular categories of foreigners (in this case, subordinate workers), in effect obliging excluded foreigners to declare a different condition from their actual one. Anyway, an analysis of all submitted applications gives a fair outline of the balance between workers recruited by companies, to which 52% of applications refer, and immigrants

8. Zucchetti (2004), op. cit.
9. L. Zanfrini (2005), "Braccia, menti e cuori migranti. La nuova divisione internazionale del lavoro riproduttivo" in L. Zanfrini (ed.), *La rivoluzione incompiuta. Il lavoro delle donne tra retorica della femminilità e nuove disuguaglianze*, Edizioni Lavoro, Rome, pp. 239-83.
10. B. Anastasia and P. Sestito (2005), "Il lavoro degli immigrati e l'economia sommersa" in M. Livi Bacci (ed.), *L'incidenza economica dell'immigrazione*, Giappichelli Editore, Turin, pp. 321-56.

recruited by families as home helps[11] (27.6%) or carers for old and ill persons (20.4%).

It goes without saying that the distribution by individual nationalities reflects their gender composition, with the result that the communities with a prevalence of women mostly concentrate in the area of service with families, whereas those with a prevalence of men usually include subordinate workers employed in companies (with the highest rates reported among migrants from Egypt, Pakistan, Tunisia, Algeria, China,[12] Burkina Faso and Morocco). After the sector of service with families, the building industry absorbs the highest share of regularisation applications (16.6%), as well as the highest number out of already regularised employed migrants, followed by tertiary industry (16%), particularly trade and catering activities, manufacturing industry (10.3%) and finally agriculture (5.3%), a category whose weight, however, triples in the southern regions of Italy. Ultimately, within subordinate jobs for companies, the primacy of Romania goes along with the solidity of the "classic" areas of origin, particularly North African and Asian countries, while in service with families (and in woman-workers' regularisations) the contribution of east European migrants is even more visible.

Table 3: Regularisation applications, 2002, the top 30 nationalities (by gender, in absolute values and percentages)

Men			Women			Total		
Nationality	**A.V.**	**%**	**Nationality**	**A.V.**	**%**	**Nationality**	**A.V.**	**%**
Romania	78 638	20.7	Ukraine	90 921	28.3	Romania	142 963	20.4
Morocco	46 853	12.4	Romania	64 635	20.0	Ukraine	106 633	15.2
Albania	44 050	11.6	Poland	26 856	8.4	Albania	54 075	7.7
China	22 198	5.9	Ecuador	23 696	7.4	Morocco	53 746	7.7
Egypt	15 781	4.2	Moldavia	22 273	6.9	Ecuador	36 591	5.2
Ukraine	15 712	4.1	China	13 449	4.2	China	35 647	5.1
India	13 817	3.6	Peru	11 309	3.5	Poland	34 270	4.9
Ecuador	12 895	3.4	Albania	10 025	3.1	Moldavia	31 102	4.4
Senegal	12 845	3.4	Morocco	6 893	2.1	Peru	17 390	2.5
Bangladesh	11 451	3.0	Philippines	6 858	2.1	Egypt	15 946	2.3
Pakistan	10 820	2.9	Russia	6 021	1.9	India	14 235	2.0
Tunisia	9 139	2.4	Bulgaria	4 813	1.5	Senegal	14 061	2.0
Moldavia	8 829	2.3	Nigeria	3 856	1.2	Philippines	11 759	1.7
Poland	7 414	2.0	Brazil	3 177	1.0	Bangladesh	11 520	1.6

11. The data concerning home helps and caregivers might be actually overestimated since, more than other areas, this lends itself to concealment and fictitious job relations, and provides for modest social security contributions.
12. The Chinese community however shows a less asymmetrical distribution as to gender, with a significant share of women employed in different jobs from those of home helps and caregivers.

Men			Women			Total		
Nationality	**A.V.**	**%**	**Nationality**	**A.V.**	**%**	**Nationality**	**A.V.**	**%**
Sri Lanka	6 083	1.6	Colombia	2 689	0.8	Pakistan	10 894	1.6
Peru	6 081	1.6	Croatia	1 875	0.6	Tunisia	9 585	1.4
Algeria	5 950	1.6	Bolivia	1 533	0.5	Bulgaria	9 122	1.3
Yugoslavia	5 718	1.5	Sri Lanka	1 476	0.5	Sri Lanka	7 559	1.1
Macedonia	5 502	1.5	Senegal	1 216	0.4	Nigeria	6 810	1.0
Philippines	4 901	1.3	Yugoslavia	1 032	0.3	Yugoslavia	6 750	1.0
Bulgaria	4 309	1.1	Belarus	1 018	0.3	Russia	6 706	1.0
Ghana	3 183	0.8	Dominican Rep.	958	0.3	Algeria	6 145	0.9
Nigeria	2 954	0.8	El Salvador	957	0.3	Macedonia	5 830	0.8
Bosnia-Herzegovina	2 441	0.6	Ivory Coast	780	0.2	Brazil	5 348	0.8
Croatia	2 333	0.6	Slovakia	771	0.2	Croatia	4 208	0.6
Brazil	2 171	0.6	Hungary	736	0.2	Colombia	4 140	0.6
Turkey	1 918	0.5	Ghana	689	0.2	Ghana	3 872	0.6
Burkina Faso	1 653	0.4	Ethiopia	644	0.2	Bosnia-Herzegovina	2 704	0.4
Colombia	1 451	0.4	Czech Republic	569	0.2	Ivory Coast	2 183	0.3
Ivory Coast	1 403	0.4	Argentina	558	0.2	Bolivia	2 174	0.3
30 major countries	368 493	97.2	30 major countries	311 973	97.2	30 major countries	673 968	96.3
Total	379 207	100.0	Total	320 826	100.0	Total	700 033	100.0

Source: Ministry of the Interior data process[13]

1.2. Rationale for adoption of the specific policy

The laws on regularisation enforced in 2002 should be seen as part of what can be considered an Italian tradition in this kind of provision. This tradition dates back to the 1980s (when the first law on immigration came into force) and most probably has not yet come to an end because, while we are writing this report, there are many people – particularly in immigrant communities – who believe that the launch of yet another amnesty is not far off, since the estimated number of irregular migrants in Italy is now (2006) very close to the number of applications submitted in 2002.[14]

However, the categories of beneficiaries identified from time to time by the legislator are quite different. Law No. 943 of 30 December 1986 provided for

13. Table taken from Zucchetti (2004), op. cit., pp. 28-9.
14. It should be however noted that through the entry planning of 2006, in particular following a supplementary decree passed on 25 October 2006 (published 7 December 2006), the number of admitted entries, equal to 520 000, should considerably reduce the irregulars' stock, though several experts agree in believing that the number of new entries outside the official planning programmes will continue to be very high.

the 120 000 beneficiaries to obtain either an authorisation to work (for those, about 45 %, who had an employer who wanted to recruit them) or entry in the employment lists (for those officially unemployed). The second regularisation, launched at the end of 1989 at the same time as the so-called Martelli Law (a decree turned into Law No. 39/1990), consisted in fact in a general amnesty, which set the ability to prove entry to Italy prior to 31 December 1989 as the only required condition. It led to the regularisation of about 220 000 migrants, who were granted a two-year residence permit: 21 000 subordinate workers, 13 000 self-employed workers and 180 000 persons in search of a job (among whom we can reasonably assume there was a certain number of family members, as this law did not provide for regularisation for family reasons). Aimed at reducing the area of irregularity – disregarding immigrants' occupational position – and avoiding its regeneration in the future, this law for the first time shed light on the attraction potential associated with mass-regularisation provisions.

The evidence of this attraction is that, five years later, a new regularisation provision (the so-called Dini Decree) led to the emersion of about 246 000 positions, mostly among subordinate workers. Considering the requirements of the decree, however, many irregular migrants (estimates range from 100 000 to 150 000 persons) were excluded from this provision.[15] Finally, the 1998 regularisation promulgated through Law Decree No. 113 of 13 April 1999 allowed the emergence (under the same conditions provided for in 1995) of the positions of those who could prove they had come to Italy before the enforcement of the Turco-Napolitano Law. Thanks to the 220 000 migrants who succeeded in being regularised in virtue of this provision, on the eve of the 2002 regularisation measures, the beneficiaries of the various regularisation laws amounted to about 50 % of the number of regularly settled migrants, or even 60 % of them, if we include in the total the family members who joined them at a later stage. Furthermore, in contrast to the proportion of overstayers, which gradually decreased over time (involving fewer than 10 % of regularised migrants in 1999), it was by then evident that such provisions were actually mostly used to legalise the position of those whose arrival had completely escaped the network of checks and official migration planning programmes, despite the quota increase.

The 2002 regularisation measures were included in a wider-ranging political action aimed at bringing to light concealed labour among Italian workers and regularly resident foreign workers – through the possibility to benefit from specific amnesties – and particularly "undocumented" foreigners. Unlike the previous regularisation actions (especially the one that resulted from the Martelli Law, in which the grant of a regularisation title depended entirely on

15. E. Reyneri (2001), "Migrants in irregular employment in the Mediterranean countries of the European Union", in *International Migration Papers*, No. 41, International Labour Office, Geneva.

the emigrant living in Italy, but was at a different level from previous similar schemes), the 2002 procedure did not aim to present itself as an amnesty, but rather as a legalisation tool based on existing job relations. This is why government circles refused to use the word "amnesty" (*sanatoria*), a term already in common use, in order to reaffirm that it was only meant to bring to light irregular labour (keeping to the letter of the text of this law). However, as we shall see in detail in the next paragraphs, the migrant typologies that could benefit from this provision were progressively enlarged, following pressure on the government in this regard. The final result, just as had happened with previous regularisations and laws, was that the idea that any new juridical framework had to be necessarily preceded by an action that "exceptionally" allowed as many immigrant workers as possible to come out of illegality gained ground.

1.3. Immigration regulations in force and how these are applied in practice

The law that regulates foreign citizens' entry, permanence, expulsion and treatment is the "Consolidated Act concerning the regulations on immigration and norms on the foreigner status" adopted through Law Decree No. 286 of 25 July 1998, subsequently amended by Law No. 189 of 2002, which in turn was completed by enforcement regulations approved through Presidential Decree No. 334 of 18 October 2004.

Traditionally a country of origin for emigrants to America, Australia and northern Europe, Italy experienced a turning point between the late 1970s and the early 1980s, during a peculiar stage of the history of international migration, a stage characterised by the rise of restrictive policies, and particularly by the closing of the traditional central and north European destinations. The role of historical and political factors in structuring migration to Italy has been far less important than in other European countries with an earlier migration tradition. Migration to Italy was in fact spontaneous, and migrants began to flow independently of any active recruiting policy, usually with no links with the colonial past, attracted – setting aside the barriers to traditional destinations – by the relative facility with which they could enter the country and stay, despite their irregular status, able to mask the real motive for their stay by seeming to choose Italy as a tourist destination. These circumstances also offered many opportunities for migrants to join the shadow economy, and this further increased the already widespread irregularity, in terms of persons present and labour, and was destined for a long time to burden integration processes to such an extent as to be identified as the distinctive feature of (what was later called by some authors) the "Mediterranean immigration model".[16]

16. R. King (2000), "Introduction", in R. King, G. Lazaridis and C. Tsardanidis (eds), *Eldorado or Fortress? Migration in Southern Europe*, Macmillan Press and St. Martin's Press, Houndmills and New York, pp. 1-26.

As with other south European countries, it took several years to make Italy aware of its new role in the international migration system and an even longer time before it recognised its need for imported labour, in view of the sudden turnaround in its demographic trends. In a situation of overall normative and institutional deficit, which characterised Italy's migration transition, lay and religious associations and other bodies acted as real substitutes for inadequate public action (to such an extent that several scholars talk about a situation of "functional overload" in charitable organisations, which felt obliged to take responsibility for extra tasks that did not concern them). Private social action has been enriched quantitatively and qualitatively by a gradual strengthening over time of relations with the public sector, particularly in the local societies characterised by the best institutional performances.

Juridical vagueness has become a basic element in the structure of relationships between immigrants and Italian society. In fact, the first law on immigration dates back to 1986,[17] that is, more than ten years after the turning point of 1974 (the first year in which the number of incoming foreigners exceeded that of Italians who emigrated). Law 943/1986, besides establishing an entry and access mechanism to the labour market (which, however, remained substantially unenforced), granted equal treatment to Italian and foreign workers, and acknowledged that the latter had a few social rights, including the right to family reunification. More extensive were the provisions of the Martelli Law (Law 39/1990), which, besides introducing a yearly flow planning system,[18] also laid down some regulations on foreigners' legal protection, expulsion, asylum and self-employment. The first organic set of rules came only in 1998 through the passing of the Turco-Napolitano Law (Law Decree 286/98), which was also the fruit of the reflections and the pressure power of third-sector institutions and civil society. Counter to the tendency of the juridical frame elsewhere in Europe in those years, this law also acknowledged (along with push factors) elements that made immigration attractive, elements strictly connected with Italy's economic requirement for imported workers,[19] by providing for a special mechanism to determine every year the required immigration for labour purposes (in addition to the flows for family or humanitarian reasons, which are unpredictable and cannot be planned).

17. Previously the law ignored foreigners except as potential public nuisances, in the Police Code from 1931.

18. Again, the planning mechanism turned out to be largely ineffective. For development of the law in this area and migrants' inclusion in the Italian labour market, see L. Zanfrini (2005), "Il lavoro", in Fondazione ISMU, *Decimo Rapporto sulle migrazioni 2004. Dieci anni di immigrazione in Italia*, Franco Angeli, Milan, pp. 117-44 (available on demand also in an English version: "Labour", in Fondazione ISMU, *The Tenth Italian Report on Migration 2004. Ten Years of Immigration in Italy*, pp. 91-118; www.polimetrica.com).

19. See L. Zanfrini (2000), "*Programmare" per competere. I fabbisogni delle imprese italiane e la politica di programmazione dei flussi migratori*, Angeli, Milan.

Apart from those reasons, these measures are based on four fundamental principles that define the "Italian integration model", in the words of the former president of the Integration Commission established at the President's Office of the Council of Ministers:[20]

- *Interaction based on security:* the law provides for a set of tools aimed at fighting illegal immigration, carrying out expulsions, fighting criminality and human trafficking;
- *Safeguard of personal rights extended to irregular migrants:* the law provides for compulsory education granted to all foreign children, regardless of their residence title; in addition, it guarantees healthcare to irregular migrants and introduces a residence permit issued for social protection purposes in order to safeguard the victims of human trafficking;[21]
- *Regular migrants' integration:* the law ratifies the same civil and social rights as those granted to Italian citizens, acknowledges the right to family reunifications and introduces the institution of a residence paper (*carta di soggiorno*, a permanent right to stay in the country, which can be obtained by those who have lived in Italy for five years at least);
- *Pluralism and communication:* the law respects cultural differences also through the safeguard of the language and the culture of the country of origin; at the same time, it acknowledges the right to literacy; finally, it provides for the involvement of civil society's organisations and migrants' associations in carrying out integration policies.

We can consider the integration model outlined by the legislator as a "reasonable" one,[22] one that shows considerable openness to social rights, but a substantial closure in terms of political rights. In addition, an anachronistic law on citizenship, passed in 1992 and based on the descent principle, emphasises the familistic and ascriptive characteristics of the Italian model, which are also evidenced by a clearly lower rate of naturalisations, out of the overall number of foreigners present, than the one reported in other European countries; therefore, marriage with an Italian citizen is still the most widespread way for foreigners to gain Italian nationality. A further serious gap in the juridical system is the lack of an organic law regulating the status of political refugee, a circumstance that helps to explain the small number of asylum petitions accepted by Italy. However, the most important limitations are not in the text of the law, but rather in its enforcement. The debate that preceded and followed the passing of the Consolidated Act was monopolised by the theme

20. G. Zincone (ed.) (2000), *Primo rapporto sull'integrazione degli immigrati in Italia*, Il Mulino, Bologna.
21. The law now deals with this kind of irregularity, thanks to Article 18, Law 286/1998, by which victims of human trafficking can be granted a temporary residence permit and included in special protection programmes.
22. Zincone (2000), op. cit.

of security, meaning both border controls and the fight against criminality attributed to foreigners, as well as by very strong media exposure of the whole migration question. Those circumstances diverted public attention from some aspects of this law, such as the introduction of a long-term residence permit, implemented, however, with great delay, and criteria in the fight against discrimination, which in certain areas go beyond the directives of the European Union (in that they extend the principle of equal treatment also to citizens from third countries).

Along with the well-known prevarication and ineffectiveness of the Italian bureaucracy – which the impact of migrants makes even more evident – several researchers have noticed an excessive administrative discretion in applying criteria, and often considerable variation from place to place in the way the public administration treats immigrants, exacerbated by officials' and managers' lack of information and sensibilisation actions. The number of convictions for crimes of racial discrimination is negligible at present, partly because foreigners, particularly irregular migrants, who are victims tend for different reasons not to report such episodes, quite often committed by other foreigners.[23] This in turn means there is a lack of case-law to which reference can be made. Furthermore, the establishment of a contact centre against racial discrimination at the President's Office of the Council of Ministers does not seem so far to have had an impact as significant as that of similar services in other countries either, even if we can expect it to develop in the future.

Finally, in analysing migrants' inclusion in society, we cannot neglect the Italian welfare system and its peculiarities, since its strong emphasis on the role of family[24] penalises those subjects who cannot rely on the support of family and neighbours. Thus the right to equal treatment granted to foreign and Italian subjects in gaining access to any resource or social opportunity clashes with a situation of widespread discrimination (especially in some sectors of society, such as the real-estate market) and a socially shared expectation that the local population will have privileged access to resources and opportunities. Consequently, even if Italian citizens have become increasingly aware of the usefulness of immigrant labour, they are still convinced that Italians are entitled to benefit first from certain rights and services.

In some ways the Bossi-Fini Law – passed in 2002, in surely less favourable economic conditions than in the second half of the 1990s – has recognised these lower expectations of integration by:

– *limiting entry* (by abolition of entry to allow migrants to go in search of a job, reintroducing the principle of local workforce unavailability before

23. G. Zincone (ed.) (2001), *Secondo rapporto sull'integrazione degli immigrati in Italia*, Il Mulino, Bologna.
24. G. Esping-Andersen (1999), *Social Foundations of Postindustrial Economies*, Oxford University Press, Oxford.

certain jobs can be filled and a foreigner's entry authorised, restricting the criteria for family reunifications);

- *introducing some restrictions on immigrants' permanent residence*, which in any case is more strictly bound to possession of a job contract (this law also reduced residence permit duration – particularly in the case of unemployment – raising at the same time from five to six years the temporary residence to be proved before a long-term residence permit is granted);
- *increasing penalties and measures aimed at fighting irregular immigration*, through the introduction of a new kind of crime in the case of a migrant's further irregular entry onto Italian territory after expulsion, the provision for forced expulsion in cases of irregular permanence and the extension of "administrative detention" (which may reach 60 days).

In relation to the subject of this report, the most vulnerable point in the juridical regulations in force on immigration consists in the distance between the norms that regulate entry for labour purposes and the actual procedures that migrants undergo to gain economic inclusion. Despite the troubled preparation process of the entry management system in force, and the growing number of granted authorisations over time, which has made Italy one of the major countries officially importing labour, there remains a worrisome gap between granted authorisations and the actual number of immigrants who every year enter the Italian labour market without holding a residence permit that allows them to work there regularly.

According to several researchers and key informants, this gap is the outcome of three factors:

- a quota restriction policy, which systematically produces undersized quotas in relation to the migration pressure from abroad, and also to the declared needs of the economy;
- legal procedures[25] that scarcely reconcile themselves with the urgency characteristic of the demand for workforce, and the procedures through

25. A residence permit for work purposes is issued after the need for a residence contract for work purposes has been submitted at the office for all immigration matters in that province. This procedure envisages: a) an employer's application for issue of a named authorisation for work purposes or (if the employer does not directly know the worker) an authorisation relating to one or more persons registered in the employment lists of Italian consulates abroad; b) a copy of the request addressed to the competent employment centre, which also by fax or e-mail forwards the offer to other employment centres; c) the issue by the immigration office, after the Head of Police's approval, of the authorisation within 40 days of the application's submission, in compliance with the terms of the collective work agreements in force and within the limits set by the decrees on migration flow planning; d) paper forwarding to the consulate for the issue of a visa; e) on arrival in Italy, the foreign worker must go to the immigration office to sign the residence contract and apply for the issue of a residence permit.

which labour demand and supply meet within a post-Fordist economic system, where labour demand is pulverised and a relevant share of imported labour is absorbed by families and micro-production units;

– the spread and rooted nature of the shadow economy (which is an enormous absorption reservoir for immigrants' concealed labour, disregarding the effect of further increasing it) related to migration dynamics themselves – since, according to Italian law, no one can be regularly employed who does not possess a valid, effective residence permit.[26]

The irregular status of many migrants is the outcome of legislative malfunction, but above all, as we previously remarked, of a deeply rooted shadow economy, which over time has strongly conditioned migrants' relations with the institutions of the Italian society, their inclusion in welfare structures (up to extending their benefits to non-entitled migrants, where fundamental needs are concerned) and migrants' image in the mass media. The formal system of rights and controls, which regulates immigration for economic and humanitarian reasons, in fact runs alongside an informal system of employment, social support, "tolerance" of irregular residence and labour,[27] and a periodical resort to mass regularisations, which have become the "normal" way of managing migration. Furthermore, any legislative action to renew the legal framework on immigration has unavoidably been followed by an amnesty, which is always announced by the authorities as the last one, with the wish that new regulations will prevent the need to reconstruct another area of irregularity over time – a wish that clearly has not come true, since the recurrence of regularisation measures may instead have helped to de-legitimise the normative structure, and strengthened the belief that Italian borders and Italian society are extremely porous towards irregular immigration.

1.4. Possible root causes of irregular migration and why people choose it

According to many experts and operators in this area, the major cause of irregular immigration is an over-restrictive admission system. This opinion is shared in particular by several pro-immigrant organisations, notably the Italian section of Caritas, which is universally considered one of the major actors in matters of integration. Its annual report never omits to denounce the

26. In this regard, it should be noted that Italy has never implemented a regularisation mechanism on an individual basis similar to those in force in other countries – such as, for example, France and Spain – allowing regularisation of the position of those who, having achieved a given length of residence and being able to prove they have taken root in the local society, have an employer who is prepared to employ them. The only exception – but it is actually a mere exception – is the possibility to obtain a temporary residence permit for protection purposes, which can be granted to the victims of human trafficking.

27. L. Morris (2003), "Managing contradictions: civic stratification and migrants' rights" in *International Migration Review*, XXXVII, No. 1, pp. 74-100.

prohibitionist nature of migration policies. This position is also supported by entrepreneurial associations and organisations, which have repeatedly criticised not only the permitted entry volumes, but also the complicated admission procedures. They do not hide their interest in having available a workforce whose structural value is nowadays acknowledged. The point is that the number of regularisation applications, averaged over the period between the 1998 and 2002 regularisations, shows that about 175 000 non-seasonal workers are requested every year, a definitely higher number than the yearly planned quotas.[28] Consequently, the possibilities of legally migrating to Italy seem undersized not only in relation to the unstoppable migration pressure from abroad, but also in relation to the potential demand.

Besides those various opinions about the quotas of migrants admitted compared to the needs of the Italian economy, the problem is that the migration planning system set out by the legislature does not seem to be in a position, in spite of all the efforts made in recent years on inter-governmental co-operation, to carry out any actual deterrent function against irregular immigration. Furthermore, it does not really restrain the activities of the illegal migration industry.[29] Irregular migration to Italy represents only a tessera of a larger mosaic – such as the phenomenon of persons' mobility – which, as everybody knows, is assuming a planetary character and extent, with compositions and directions that become increasingly unrelated to migration policies. Italy's configuration and geographical position make it a nerve centre for illegal migration from the Mediterranean and Balkan areas, even though merely in transit to other European countries.

In the particular case of migration from east European countries – from which lately the largest flows have originated – there are many incentive factors, but migration pressure is driven by the deep changes in local societies along with the passage to market economy. These factors also depend on economic integration with EU member countries, which has been recently started, though it has already become tangible in several ways: in a process of production unit relocation carried out by several Italian enterprises; in geographical closeness and the ability to relatively easily obtain entry visas;[30] in the attractive power

28. In our opinion a great deal of caution is, however, necessary, as we have argued in other reports, in treating regularisation applications as a meter of unanswered labour demand; see L. Zanfrini (2005), "Domanda di lavoro e immigrazione", in Unioncamere, *Rapporto Excelsior 2005. Alcune tendenze evolutive del mercato del lavoro in Italia*, pp. 151-77.

29. It should, however, be noted that irregular migration pressure is limited in countries where agreements aiming to undercut illegal immigration by assigning privileged quotas has produced particularly significant results.

30. In the particular case of the new members that joined the European Union in May 2004, the postponement of workers' free movement may be considered a textbook case of institutional production of irregularity by the countries, Italy included, that have applied it; M. Ambrosini (2004), "Da braccia a persone. Ambiguità e precarietà di un processo di affrancamento" in M. Barbagli, A. Colombo and G. Sciortino (eds), *I sommersi e i sanati. Le regolarizzazioni degli immigrati in Italia*, Il Mulino, Bologna, pp. 139-65. It must be however noted that the Council of Ministers, in the session of 24 July 2006, cancelled the regulations on limited access to labour markets by the citizens of the eight new EU member countries, for whom it was still in force.

exerted by ethnic networks, which are not yet in the position to organise their compatriates' legal immigration on a large scale, but at the same time are still tempted to make a profit from the great amount of emigration candidates; and in the perception – especially among the female component – of a relative abundance of informal job opportunities in supporting Italian families.

On the other hand, ethnic networks play a role that goes far beyond the migration flows from eastern countries. An analysis of the results of the different regularisation provisions seems to confirm "that in most cases, illegal flows are generated by the same reasons that drive regular migrations and not because some national groups are particularly inclined to avoid ordinary entry procedures".[31] Contiguity with the industry of illegal immigration and human trafficking for exploitation, calling systems on a family and community basis, and mechanisms of emulating emigrated compatriates are some of the factors that contribute to make ethnic networks a strategic element in providing migration flows with a self-propulsive dynamics. The 2002 regularisation made this role particularly visible: we need only think that 11% of regularisation applications were submitted by foreign employers, quite often belonging to the same community as the worker to be regularised; the Chinese community alone submitted about 23 000 regularisation applications, 21 400 of which concerned subordinate jobs.

In addition to the gap between migration pressure and regular entry possibilities, the other major attractive factor for illegal immigration is undoubtedly the shadow economy spreading and taking root, a phenomenon characterising the whole country, but which has some peculiar regional and sectoral features. In absolute values, the northern regions, thanks to their abundance of job opportunities, take the great majority of undocumented migrants. Nonetheless, it is in the southern regions that irregularity becomes a sort of "normal" element in an institutional development and operational model that we might define as a "widespread illegality model". In those regions, infringements of labour regulations have structural features showing various levels of seriousness and can even lead to the establishment of "phantom" enterprises that find in illegal immigration a particularly profitable recruitment area.

In the particular case of agriculture, immigrants' concealed labour is included in a system of mutual benefits involving employers, new immigrants and, for some aspects, local workers who enjoy public unemployment benefits. This system is encouraged by the high territorial mobility of the immigrant workforce, which during the year moves from one region to another (the "seasonal workers' circuit") following the calendar of fruit and vegetable production. Furthermore, since the assignment of quotas established by the planning decrees reflects the unemployment rates of the region, the southern

31. M. Carfagna (2002), "I sommersi e i sanati. Le regolarizzazioni degli immigrati in Italia," in A. Colombo and G. Sciortino (eds), *Stranieri in Italia. Assimilati ed esclusi*, Il Mulino, Bologna, pp. 53-87; quotation p. 65.

districts usually find themselves with a migrant workers' contingent far below the amount demanded by the producers' organisations, thus making the resort to irregular labour almost unavoidable. Immigrants' propensity to abandon this sector and move to regions that offer better-paid job opportunities constantly regenerates the demand for labour, which finds in irregular and illegal immigration a "natural" answer. Therefore, apart from the constraints set by migration policies, "not only do irregularity and clandestinity not represent an obstacle, but, paradoxically, they become essential".[32] To confirm the attraction of southern Italy for irregular immigrants, we can mention the regions Calabria and Campania, where the number of regularisation applications in 2002 respectively equalled and exceeded the total number of regularly resident foreigners.

In the economically more dynamic regions, immigrants' irregular employment is instead contiguous to a general tendency to multiply "bad jobs" and make job relations precarious, and mixed up with an impudent use of only apparently legal contractual solutions. The case of the building industry, a sector which collects a significant part of irregular immigration and employment, is particularly impressive, as this is a sector in which outsourcing logics more evidently go along with labour precariousness. In low-qualification services, and in the whole area of "bad jobs", concealed labour may be described as the last stage of a dismantling action carried out on the typical institutions and rights of the *société salariale*,[33] where immigrants' labour discrimination and underpayment easily give rise to social dumping phenomena.

Because of the rigid link in law between job condition and residence rights, the informalisation of job relations ends by being strictly connected with migration dynamics. On the one hand, because it attracts new irregular flows driven by the belief that they will easily find a place in the shadow economy. On the other hand, by exposing regular immigrants to the risk of not obtaining, on expiry, a residence permit extension, the law contributes to the social construction of irregularity, on which researchers have focused for a long time.[34] It is this strict connection sanctioned by law between job condition and residence right, sealed by the provision for a "residence contract" (*contratto di soggiorno*) that leads to an outcome that is just the opposite of what was expected.[35]

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32. E. de Filippo and A. Spanò, *La presenza straniera a Napoli e il processo di regolarizzazione dei lavoratori immigrati*, in E. Zucchetti (ed.) (2004), op. cit., pp. 347-410; quotation p. 376.

33. R. Castel (1995), *Les métamorphoses de la question sociale*, Fayard, Paris.

34. S. Palidda (1996), *L'integration des immigrés dans les villes: le cas italien,* Report drawn up for OCDE International Migration and Labour Market Policy Division.

35. This risk is particularly emphasised by both researchers and pro-immigrant organisations, but it does not always seem exactly confirmed by available empirical evidence which indicates, as we shall see, for example, a high extension rate of residence permits obtained through the 2002 regularisation.

Finally, we must add that a chronic lack of inspection activities and a substantial non-application of sanctions (some of a penal nature), which the law instead provides for those who employ irregular migrants, together make the law quite ineffective as a potential discouragement. This is even more valid for home help and carer jobs in families, where the decisive factors leading to irregularity mostly depend on a family need to limit the cost of those services, the urgency with which these needs reveal themselves, the ease of concealing a worker's presence, the rarity of checks or inspections, a lack of institutionalisation, a lack of deterrent public policies, and the fact that this market represents nowadays a "normal" outlet for newcomers who come to Italy illegally or with a tourist visa: these are the major reasons that almost physiologically expose this sector to the risk of informality. On the other hand, expulsion provisions are normally used for the safeguard of public order and not as a strategic tool to fight irregular immigration and employment. This circumstance heavily affects its deterrent value, even during the stages that seem politically less "friendly" to migrants.

The question of the possible attraction role played by welfare interventions remains open. It refers both to institutional actions (bearing in mind that Italian law guarantees healthcare to immigrants without a residence permit and forbids reporting them to the police, and in addition grants their children the right and duty of school attendance) and to the interventions provided by the dense network of charity organisations and third sector associations, which in the name of ideological or religious principles usually adopt a universalistic approach that quite rarely discriminates against those who cannot show a residence permit. It is awareness of this potential attraction, which helps to discredit the principle of legality and encourages dumping phenomena in access to jobs, that has driven some pro-immigrant organisations[36] to stop their intermediary activities between labour supply and demand in the case of irregular employment (an activity which however remains widely practised, particularly in the less structured areas of voluntary work).

Finally, we cannot undervalue the attractive effect of repeated regularisation programmes since, in the Italian experience – unlike that in other countries – these measures do not ask migrants to prove a period of residence exceeding a few weeks or at most a few months. This effect further spreads out when these provisions are actually announced in advance, thus allowing irregular migrants already in Italy to organise the arrival of their relatives and friends. In the 2002 regularisation, the effect of the announcement was confirmed by an "explosive" increase in irregular migrants to Italy – which produced a

36. See for example, the results collected by an inquiry into home carers in Lombardy: M. Ambrosini and C. Cominelli (eds) (2005), *Un'assistenza senza confini. Welfare "leggero", famiglie in affanno, aiutanti domiciliari immigrate*, Osservatorio Regionale per l'integrazione e la multietnicità, Rapporto 2004, Regione Lombardia, Fondazione ISMU, Milan.

number of applications that went far beyond all expectations – and by the high number of arrivals reported just before the regularisation, or even after its official enactment. In fact, a possible passage to a more rigorous and severe government structure may have led migrants to perceive this provision as the last chance they had to come to Italy and regularise themselves, with a consequent activation of transnational connections and calling of newcomers from the countries of origin and from other territories of the migrants' diaspora. According to unofficial sources, this was aided by a good deal of tolerance in neighbouring countries towards the "regularisation tourists".[37]

2. Main characteristics of the specific policy

2.1. Main objectives and components

The basic scope of the rules that regulated the 2002 regularisation measures (Law No. 189 of 30 July and Law Decree No. 195 of 9 September, turned with some amendments into Law No. 195 of 9 October 2002, "Urgent provisions concerning non-EU workers' irregular labour") was to allow the emergence of non-EU workers' irregular labour with reference to workers employed on 10 June 2002, even if not in possession of the major requisite that the law in force considers essential in order to be regularly employed by a company or a family: a residence permit for work purposes,[38] and particularly a valid one [cf. § 2.2].[39] This provision was in particular addressed to employers, who were offered an opportunity to amend any previous financial, penal, administrative, fiscal, social security and welfare tort committed by employing a foreign worker not in possession of a residence permit. In principle, workers with an employer who did not want to employ them on a fully legal basis (as well as irregular self-employed workers) were thus excluded. This objective was consistent with amendments brought to the legislative system by Law 189/2002, which stated that the right to reside in Italy (with some obvious exceptions, such as accompanying family members) was strictly connected to an existing regulated job, that entry aimed at allowing migrants to go in search of a job ("entry

37. F. Pastore (2004), "Che fare di chi non dovrebbe essere qui? La gestione della presenza straniera irregolare in Europa tra strategie nazionali e misure comuni", in M. Barbagli, A. Colombo and G. Sciortino (eds), *I sommersi e i sanati. Le regolarizzazioni degli immigrati in Italia*, Il Mulino, Bologna, pp. 19-45.

38. According to the Italian laws in force, those residence permits refer to: subordinate workers, self-employed workers, seasonal workers (only with seasonal contracts), family, study (within a time limit of 1 042 hours/year), protection (for the victims of human trafficking for exploitation); they do not refer to tourism or healthcare. Those who hold juridical status as a refugee can benefit from a residence permit, which allows them to work; however, this is not the case for asylum seekers during the petition preliminary investigation stage, and consequently they end by increasing the supply of concealed labour.

39. See note 16.

through a sponsor") was no longer permitted, and that unemployment could not last longer than six months, after which repatriation was provided for.

Obviously, a non-negligible outcome of such a vast emergence operation was the recovery of social security payments due from employers[40] (and in prospect, the fiscal contributions to be deducted from workers' salaries). This outcome proved even more relevant, in a difficult period for the Italian economy in general and for the government in particular, in squaring state accounts. Indeed, according to some critical interpretations, it was this goal that actually led the government to decide first to pass this regularisation provision and then, as we shall see, to gradually extend its range. On the other hand, this opportunity to fill the coffers of the state became an effective tool for political legitimisation of a regularisation action of an "embarrassing" extent, especially for some elements of the governing coalition. Furthermore, granting a residence permit to all irregularly present migrants and preventing regularised migrants from falling again into an illegal status may have been, in some experts' opinion,[41] the major objectives of the legislator's intentions.

It is useful to recall that these objectives represent the outcome of a progressive extension of the aims of a programme that, at the beginning, had been defined in a much more restrictive way. The idea of regularisation itself was completely absent from the original government bill, in line with the government's intention to confirm its rigorous image in immigration management, in contrast to the "laxist" approach of the past. In the bill initially approved by the Senate, the hypothesis of an emersion provision restricted to foreign workers employed in families and present at the end of 2001 was put forward. This being a need felt right across Italian society, a restriction to this particular category of workers was considered politically more consistent with the government's guidelines than a general amnesty. However, the end-of-2001 deadline had already waned in the letter of Law 189, published in the Official Gazette of 3 August 2002, which extended the possibility of being regularised to any worker employed as a home help and already present prior to the date of enforcement of the law. The pressures coming from the "pro-immigrant organisations" and from the world of enterprise, the protagonists of an unusual alliance with what has

40. The estimated revenue for Inps (the Italian Social Security Institute) in 2003 through regularisation of foreign workers totalled €1.7 billion; see M. Peruzzi (2003), "Fino al 2008 un saldo attivo di circa 3 milardi di €" in *Il Sole 24ore*, 3 March 2003, p. 5. Considering that these contributions, at least partly, were shouldered by immigrants, some commentators critically remark that in this way funds were drained from immigrants to the coffers of the state.

41. E. Codini (2006), "Obiettivi e risultati della regolarizzazione italiana del 2002" in V. Cesareo and E. Codini, *Il Mezzogiorno dopo la grande regolarizzazione. L'esperienza italiana nel contesto internazionale*, Angeli, Milan, pp. 81-94.

been defined as an advocacy coalition[42] in favour of irregular immigrants, led to a further considerable extension of regularisation.

Through Law Decree No. 195 of 9 September 2002 (turned with some amendments into Law No. 222/2002), the possibility for migrants to emerge from irregular labour and obtain a residence permit was extended to all subordinate workers already settled in Italy on 10 June 2002. Furthermore, during the implementation stage of these regulations, a set of "adjustment" provisions formalised through ministerial memoranda or informally adopted on the initiative of some local authorities, as we shall see, further enlarged the area of potential beneficiaries. Finally, the possibility to become regularised ended by including all those who were able to find a real or fictitious employer[43] willing to declare having established a job relation as from 10 June 2002. There was practically no possibility to check the truthfulness and the continuity of such job relations during that time interval, and the consequence was that even those who had come to Italy after the enactment of the law could be included.[44] Consequently,

> despite the provision for an exclusive connection with an actual job situation, a part … of the last regularised migrants, in agreement with their employers, did not avail themselves of the opportunity offered by the regularisation provisions to "regularise a job relation" (such as the law provides for), but rather to "regularise their presence", and in some cases, simply to come to or remain in Italy without the purpose to find a job, or in some other cases, to start searching for a regular job.[45]

As we have mentioned, organised expressions of civil society have become one of the major actors in the immigrants' integration in the Italian context. A common characteristic of most of these organisations is a "liberal" approach to newcomers (significantly shared also by trade unions, unlike the corporative attitudes of closure seen in some other countries) and a sort of familiarity with the world of irregular and illegal immigration, developed through support, guidance and advice actions, which are usually accessible also to "undocumented" migrants. This approach also confirms the peculiar role those organisations played in the preparation and implementation of the laws on regularisation.

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42. This is how Zincone defined the lobby group consisting of Catholic associations, unions, progressive associations and a group of judges and immigration experts particularly committed to safeguarding the weakest and most marginal immigrants; G. Zincone (2005), "Cittadinanza e migrazioni: un'applicazione al caso italiano", in M. Livi Bacci (ed.), *L'incidenza economica dell'immigrazione*, Giappichelli Editore, Turin, pp. 383-425.

43. As a matter of fact, the law provided for 2 to 9 months in prison for those who submitted a false emersion declaration in order to elude the regulations on immigration.

44. This was possible if a passport had not been stamped, but also by simulating a return to one's country of origin in order to justify a stamp with a date subsequent to the admitted one, or by certifying one's identity with a document different from a passport.

45. B. Anastasia and P. Sestito (2005), op. cit., p. 334.

Their role goes far beyond their actions of information circulation and advice to regularisation candidates (which to a good extent has fallen on them), and significantly affected the "adjustments" to this law in its development stages. In any case, the dense network of such organisations spread over the national territory ensured that all information on regularisation procedures trickled down to the immigrants' communities, and gave employers the benefit of advice on preparing the required papers. Surely, without their action, these regularisation measures would not have gathered such a high number of applications, and we would even dare say that the whole regularisation system was devised on the implicit assumption that those civil society organisations would accept an indispensable role, which was not formally provided for by the procedural course.

2.2. Implementation of the policy

The 2002 law on regularisation provided for the co-operation of three different ministries, namely Interior, Labour and Social Policies (Welfare), and Post and Telecommunications.

According to the emersion procedure, by 11 November 2002 the employer had to go to any Italian post office, collect a free kit containing a set of forms and then return the papers (either personally or through a person with an appropriate proxy) to the same post office. Forms and papers were subsequently forwarded to the competent prefecture (Ufficio Territoriale del Governo, UTG). In addition to the expense of outstanding social security contributions, access to the emersion procedure included the payment of a lump-sum contribution – to be charged to the employer (€700 in the case of subordinate jobs, €290 for home helps) – as well as submission expenses (€100 for subordinate jobs, €40 for home helps).

In the case of subordinate jobs, the law did not establish any limitation to the number of migrants to be regularised by each employer, whether one-man businesses or companies,[46] but fixed instead the compulsory signature of an open-ended contract, or in any case, a contract of a minimum duration of one year. Each family was allowed to regularise only one home help (but several employers were allowed to submit a regularisation application in the case of a single hourly-paid home help working in different families at least 20 worked hours per week) or instead one or more carers per person, by submitting the medical certificate of the aided person. In any case, each regularisation application had to refer to a single worker, who was asked to sign it with his/her employer.

46. The types of employers prepared to regularise their workers' position gave rise to a few misinterpretations, since some prefectures restricted applicability to entrepreneurs, excluding for example NGOs and professionals.

As soon as the application was brought to the post office, it was then forwarded to the competent UTG, which was assigned to examine its admissibility, while the Police Head Office was assigned to check the existence of possible impediments to the grant of a residence permit. In case of a positive result, employer and worker were both invited to present themselves at the counter for all operations established in each UTG in order to sign the residence contract. A key role was therefore assigned to prefectures, which found themselves obliged to cope with such an "event" with a seriously undersized staff in comparison with requirements (though several temporary workers were included), and often with inappropriate logistic and IT structures.[47]

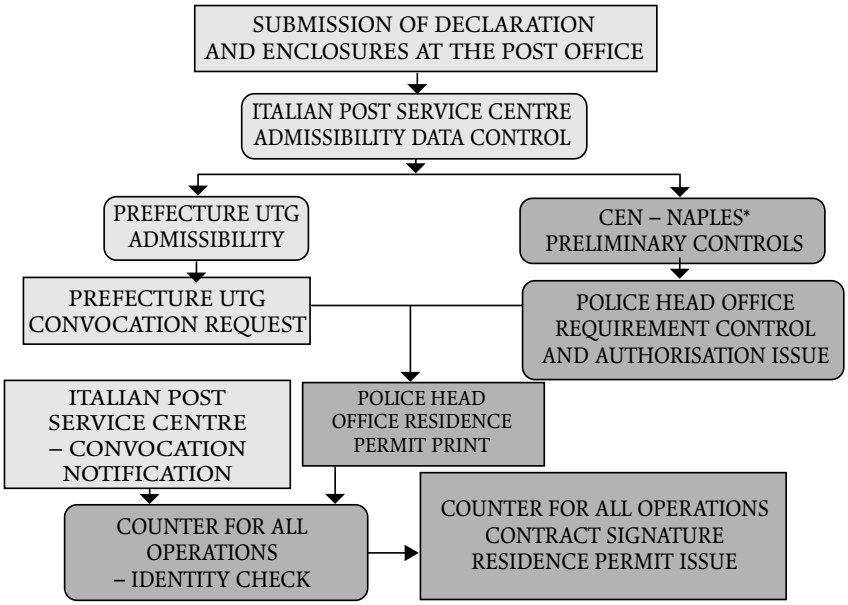
From an organisational point of view, once it was stated that rapidity in completing the necessary procedures was one of the key requirements of this action (compared to past programmes), two options proved particularly strategic, and allowed papers to be dealt with in a much shorter time than expected:

- post offices (considering that post offices are extremely widespread over Italy – with over 14 000 counters – and familiar to any citizen) were identified as the most appropriate places in which regularisation application forms could be collected and then submitted;[48]
- establishment of counters for all operations in each UTG, with representatives of all relevant administrations, in order to avoid any problem caused by lack of co-ordination, such as had happened in the previous regularisations, and also to avoid any delay in paper forwarding from one office to another. Besides prefecture representatives, the counter for all operations had representatives of the Police Head Office, the Labour Office, the Italian Post Service, the Tax Office and Inps (the Social Security Institute), in order to allow all those concerned to carry out in a single office all the required procedures: fiscal code attribution, social security contribution settlement, job contract signature and issue of the residence permit for the foreign worker.

47. M. Molteni (2004), "Le conseguenze della mancanza di disposizioni emanate in sede nazionale", in M. Ambrosini and M. Salati (eds), *Uscendo dall'ombra. Il processo di regolarizzazione degli immigrati e i suoi limiti*, Angeli, Milan, pp. 30-42. This essay mentions the case of the Prefecture of Milan, which was obliged to avail itself of the hardware and server made available by the Chamber of Commerce of Milan.

48. Through this procedure, a new practice was started, which has been used also for the submission of employment applications in compliance with the planning decrees concerning immigrant workers' entries. This practice, however, roused a great deal of criticism among those who deem that municipalities should manage the procedures (such as residence permit extension) concerning foreign residents living in their territory.

Figure 1: Regularisation procedure, 2002



Taken from: www.utgroma.it

* All the kits delivered to the Post Offices were forwarded to the Italian Post Service Centre in Naples, where all the papers were scanned and then divided by competent province.

These innovations gave rise to a "winning organisational model",[49] which was further rewarded, in some local situations, by effective co-operation between the public authorities and third-sector organisations. The latter carried out a great deal of front-office work (information provision and advice on preparing the required paperwork), setting up dedicated counters, since the decision to forward all applications through post offices meant there was no institutional filter between applicants and administration. Though the law gave employers the task of submitting regularisation applications, in many cases the immigrants personally made the first move in order to "persuade" their employers or even find a fictitious employer. All these circumstances helped to make the role of those third-sector organisations even more decisive, starting with the task of translating and "decoding" the instructions in the kit. Furthermore, this front-

49. B. Anastasia and S. Bragato (2004), "L'immigrazione in provincia di Vicenza: l'impatto della 'grande regolarizzazione' " in E. Zucchetti (ed.) (2004), op. cit., pp. 185-260.

office function proved particularly strategic in bringing to light anomalous cases, that is, those not initially provided for by the law – despite the high number of such cases – and in finding possible or alternative solutions that nonetheless allowed migrants to obtain regularisation.

In practice, the mobilisation ability shown by the institutions and civil society organisations, particularly in some areas of the centre-north, allowed them to cope with all the cases that could hardly be covered by the letter of the law (which in any case was not devoid of some uncertainty, resolved to a great extent by the memoranda issued during implementation) by searching for a solution, legitimating the job position in question by negotiating agreement among the different actors. In a particularly hot political climate, the winning strategy was to reduce the occasional problems to their merely technical aspects, thus neutralising their political nature.

Besides the political significance of this co-operation – which represents one of the most precious legacies of this regularisation action[50] – the result was to extend the benefits of regularisation to more groups than had been envisaged at the beginning, even if it meant forcing aside the meshes of the net. In several cases, reasons of humanity and solidarity got the better of the regulation, which had been announced as simply a campaign to identify irregular job relations and bring them to the surface. In fact, even though the more militant and reactive elements in pro-immigrant associations tried to undermine the system on which the regularisation was based (for example, by urging people who manifestly lacked the required qualifications to submit a regularisation application), much more frequent was the tendency to exploit the grey areas of the regulations, quite often backed – explicitly or implicitly – by Police Head Offices and prefectures. A sort of connivance developed locally, thanks to existing interpersonal ties and a shared sensitivity to migrants' problems, and considerable expertise was achieved by civil organisations over time, resulting in the imposition on the government of definitely more generous interpretations in the clarifying memoranda than had originally been envisaged for these regulations. This contributed to the "success" – as measured by the huge number of applications – of an operation that otherwise would have risked being too limited in its application because of recurring concealed and discontinuous labour situations, particularly in the most degraded contexts with widespread illegality. However, the way its scope was progressively enlarged meant that the law was interpreted differently in various parts of Italy, an outcome that could be only partly amended by interpretative memoranda and judicial intervention.

50. However, even though some places were notable for the most successful and institutionalised co-operation, in other places there was a lack of co-ordination, and private-social associations had the feeling of being obliged to shoulder also the faults of the public institutions.

On the other hand, the insistence on presenting this regularisation as the last one, a necessary watershed before starting a new age marked by greater strictness in managing this phenomenon,[51] amplified an effect already seen in previous mass regularisation: the attraction of new irregular flows and the resort to any possible stratagem to obtain, at least on paper, the qualifications required for regularisation. Apart from the fact that such behaviour was fraudulent – and sometimes even had criminal consequences – numerically the result was a progressive universalisation of its scope, which led the great majority of migrants irregularly present in Italy, disregarding their real employment conditions (this at least is the opinion substantially shared by key informants) to benefit (or try to benefit) from this procedure.

As we previously mentioned, the many different typologies and cases not provided for by the ideal course described by the law, led during the implementation stage to several adjustments, usually originating from the bottom up – that is, on the initiative of local co-ordination teams and working groups – which later on, sometimes after excessive delay, were acknowledged by the central administration through the issue of several memoranda.

The first adjustment – one that gave rise to a great deal of discussion, before being acknowledged by the Ministry of the Interior memorandum of 31 October 2002 – concerned the possibility of regularisation for workers who decided to resort to "self-denunciation" because their employers had refused to follow the procedure. For those workers, the memorandum provided for the issue of a six-month residence permit aimed at allowing them to go in search of a job. This opportunity, in open contrast with the spirit of the law on regularisation, asserted itself as the fruit of a large campaign by unions and pro-immigrant organisations, supported by a set of jurisprudential decisions which had outlined a sort of "right to regularisation". However, we can reasonably assume that some immigrants were excluded, considering that the option of a labour dispute was decided by the government only a few days before the closing date for applications.

A second adjustment, provided for by Ministry of the Interior note No. 48145/30.1.a of 4 December 2002, concerned the recurring problem of losing an employer – a likely event in the case of immigrants working as carers for old or terminally-ill persons – in the period preceding the convocation. This problem was solved by providing in this case, too, for the issue of a residence permit aimed at including the foreign worker in the employment lists.

51. It should be noted that the new law has provided for a clear worsening of the penalty for those who engage irregular migrants, from 2 million lire (about €1 000) to the current €5 000 per worker.

Another adjustment concerns transfer, that is, the possibility of signing an employment contract with a different employer, where a job relation ended during the period between the application submission and parties' convocation. This possibility was for the first time envisaged by an agreement protocol among several parties, signed in Milan on 19 February 2003, and destined to be widely debated by the mass media and "legitimised" by the fact that in many cases the people concerned were employed as old people's home carers, who had lost their job after the death of the person being cared for, but had been co-opted by another family; such a situation awoke widespread sympathy in public opinion. This was resolved by two memoranda – adopted by the Ministry of the Interior on 3 April 2003 and, on 8 April, by the Ministry of Welfare – which acknowledged a solution widely shared and locally applied, thus overcoming the reservations that the government had initially about this procedure (however, with the specification that a job relation could be actually established only on signature of a residence contract, that is, as soon as the parties were called).

A further adjustment concerned cases where, on convocation, the employer who had submitted the application was no longer able – for any reason – to employ the worker, and the worker was not able to find another employer. In this case, too, in contradiction of the initially declared aim (the emersion of irregular job relations), the administration decided to grant a six-month residence permit aimed at allowing the migrant to go in search of another job. This solution also allowed the inclusion of a certain number of migrants who had resorted to paying a certain sum of money to a fictitious employer, who afterwards had disappeared.

Furthermore, in principle, if the two contracting parties failed to present themselves at the convocation (except for justified reasons), this would have led to application nonsuit and file closure. However, several prefectures decided to call later on the parties again, shouldering the economic and organisational costs involved, in order to avert the risk that a migrant might lose the opportunity to regularise themself. In fact, except for the most obvious reason – the employer's unavailability (especially if it was a fictitious employer)[52] – there could be other valid reasons, such as health conditions or a death in the family, preventing the concerned persons from presenting themselves.

52. The procedure was to send notice of the convocation to the employer, but not to the migrant: hence, the problems caused by a new employer or by a worker's self-denunciation, if the employer was unable to offer regularised employment.

3. The impact of specific new policies on irregular migration and migrants

3.1. Assessment of results against objectives: positive and negative aspects[53]

Thanks to the previously mentioned "adjustments" during the implementation stage, this regularisation procedure resulted not only in the submission of a huge number of applications, but also in the acceptance of most of them. The ratio between holders of a residence permit on the eve of the regularisation measures and regularised persons (52 to 100)[54] gives an idea of the extent of the disruptive impact of this regularisation which, as we have seen [§ 1.1], had also the effect of reshaping the world of the immigrant population officially settled in Italy.

In general, we can say that the 2002 regularisation had the effect of re-establishing consistency between the actual status of most immigrants present in Italy and the conditions set by the law for legal residence in Italy and, in particular, for inclusion in the labour market. Particularly in those cases where, on convocation, it was not possible to ascertain the presence of an employer (either the original one or a new one), the procedure usually ended with the issue of a residence permit for unemployment reasons for a limited period, according to the terms established by the Bossi-Fini law. In all other cases, the procedure usually ended with the issue of a one-year residence permit for subordinate labour, to be extended only if, on expiry, the job relation still existed. However, two critical elements should be pointed out.

The first critical element is the number and extent of cases and typologies that did not quite fit the letter of the law. The statistically most significant case is

53. This section is based on the results of an inquiry promoted by the Ministry of Labour and Social Policies, and co-ordinated by Fondazione ISMU, Milan. This inquiry included an analysis of regularisation applications, a direct survey of a sample of 1 400 employers who had regularised their foreign workers, a qualitative inquiry carried out on institutional and civil society actors, and a direct inquiry – the main source cited here – into a representative sample of 30 000 migrants selected without regard to their juridical status and in a way ensuring their statistical representativeness. Interviews were made during the first months of 2005, the period to which the data and information reported in this chapter refer. A summary of the results from the whole inquiry is included in V. Cesareo (2006), "La ricerca: obiettivi e risultati" in V. Cesareo and E. Codini, *Il Mezzogiorno dopo la grande regolarizzazione. L'esperienza italiana nel contesto internazionale*, Angeli, Milan, pp. 15-78. For an in-depth study of the direct inquiry into 30 000 migrants, see G.C. Blangiardo and P. Farina (eds) (2006), *Il Mezzogiorno dopo la grande regolarizzazione. Immagini e problematiche dell'immigrazione*, Angeli, Milan.

54. G.C. Blangiardo, "I processi di immigrazione: dall'illegalità alla regolarizzazione", in M. Livi Bacci (ed.), *L'incidenza economica dell'immigrazione*, Giappichelli, Turin, 2005, pp. 41-56.

probably that where an employer, though adhering to the regularisation offer, charges a foreign worker with part or all the expenses meant to be borne by the employer, either past expenses (for the work period before regularisation) or possible future expenses (the social security contributions meant to be borne by the employer). Available data tell us that more than half the regularised migrants suffered some forms of this abuse, frequently being obliged to pay the sum for starting the procedure and pay the social security contributions formally due by the employer. In about 10% of cases, immigrants suffered a wage cut to balance the social security contributions borne by their employers. On the other hand, such behaviour was not definitely stigmatised by public opinion. On the contrary, it was sometimes considered as an appropriate compensation for the "favour" granted by the employer and, where a migrant worked for a middle- or low-income family, as almost unavoidable if the cost of the service was to be sustainable.

A second case, which is even more distant from the ideal process outlined by the law, is the simulation (whether total or partial) of an existing job relation in order to allow regularisation of an irregularly resident migrant not in possession of the qualifications required by the law. This might take place for various reasons: reciprocity obligations with compatriates or relatives, sentimental reasons or solidarity-humanitarian reasons (those which have led some pro-immigrant organisations to incite their members to sign "solidarity contracts"). Some ethnographic studies have even documented the birth of real markets where it was possible to buy regularisation papers and job contracts.[55] In fact, in the most serious cases, regularisation was "bought" for a certain sum of money without any guarantee for the immigrant that the procedure would come to a successful conclusion, giving it the features of an actual crime. Clearly, it is difficult to get reliable estimates of the extent of this phenomenon, but in several places police investigations led to the arrest of would-be employers and intermediaries who were making a lot of money.[56] In evaluating the positive and negative aspects of these regulations, we have to consider that appointing the employer as the person to submit a regularisation application – a "qualifying" aspect of this provision – actually produced several negative consequences, and increased the asymmetry between the parties. In addition, the fact that this amnesty opportunity was offered to employers inclined to "confess" an existing irregular job relation made this regularisation

55. G. Semi (2004), "L'ordinaria frenesia. Il processo di regolarizzazione visto dal 'basso'" in M. Barbagli, A. Colombo and G. Sciortino (eds), *I sommersi e i sanati. Le regolarizzazioni degli immigrati in Italia*, Il Mulino, Bologna, pp. 167-85.

56. In Caserta, for example, the cases of extortion of money from migrants in exchange for false employment contracts became so widespread that the authorities were obliged to adopt drastic measures, such as setting up a blacklist of suspect employers, whose applications were consequently blocked.

particularly attractive for newcomers from abroad, since migrants were not asked to prove their permanent residence in Italy.[57]

The second critical element is not so much about the intrinsic characteristics of this procedure or its proportions, which are perfectly consistent with the aims of the Bossi-Fini law, but rather its imbalance in relation to the labour market, characterised by the spread of non-standard job relations, which give rise to unstable and discontinuous job careers, in addition to a strong demand for concealed labour. The aim of avoiding a relapse into irregularity – a danger the legislator averted by insisting that regularisation could be achieved only by establishing a regular job relation – would therefore be jeopardised, according to a widespread opinion among researchers and key informants, by the instability of many careers (an almost inherent instability in the case of home carers, bearing in mind that usually their job ends when the assisted person dies or moves to a retirement institution).

However, analyses showed that, two years after applications were submitted (cf. Figure 2):

- only 1% of those who had been granted a one-year residence permit for job reasons did not obtain an extension on the first expiry date, whereas 90% of those who gained a six-month residence permit to go in search of a job were able to find regularised work;
- overall, only 1.7% of regularised workers had lost their regular migrant status after two years; all the others obtained an extension of their permit gained through regularisation. In detail, just under half of them obtained a permit extension thanks to the survival of their original job; 40% of them thanks to signing a contract with a new employer (a possibility formally excluded for workers employed in families, but in fact widely admitted on residence permit extension); a small percentage (1.6%) was granted a further permit to go in search of a job, while 2.8% of migrants acknowledged having resorted to a fictitious employer. The two last values rise respectively to 3.7% and 16.5% if we consider only those immigrants who were irregularly employed at the time of the interview (of whom 7.3% had not had their permit extended);
- unemployment involved 8% regularised persons; within this group, 11.8% were irregularly employed, while 11% had a temporary job or were employed as contract workers (*lavoratori parasubordinati*).

A minority (but not a negligible number) of migrants persists, who are regularised in terms of their residence permit, but in fact unemployed or else in occasional or unregulated work. This allows them to stake a claim to

57. F. Ciafaloni (2004), "I meccanismi dell'emersione", in M. Barbagli, A. Colombo and G. Sciortino (eds), *I sommersi e i sanati. Le regolarizzazioni degli immigrati in Italia*, Il Mulino, Bologna, pp. 187-200.

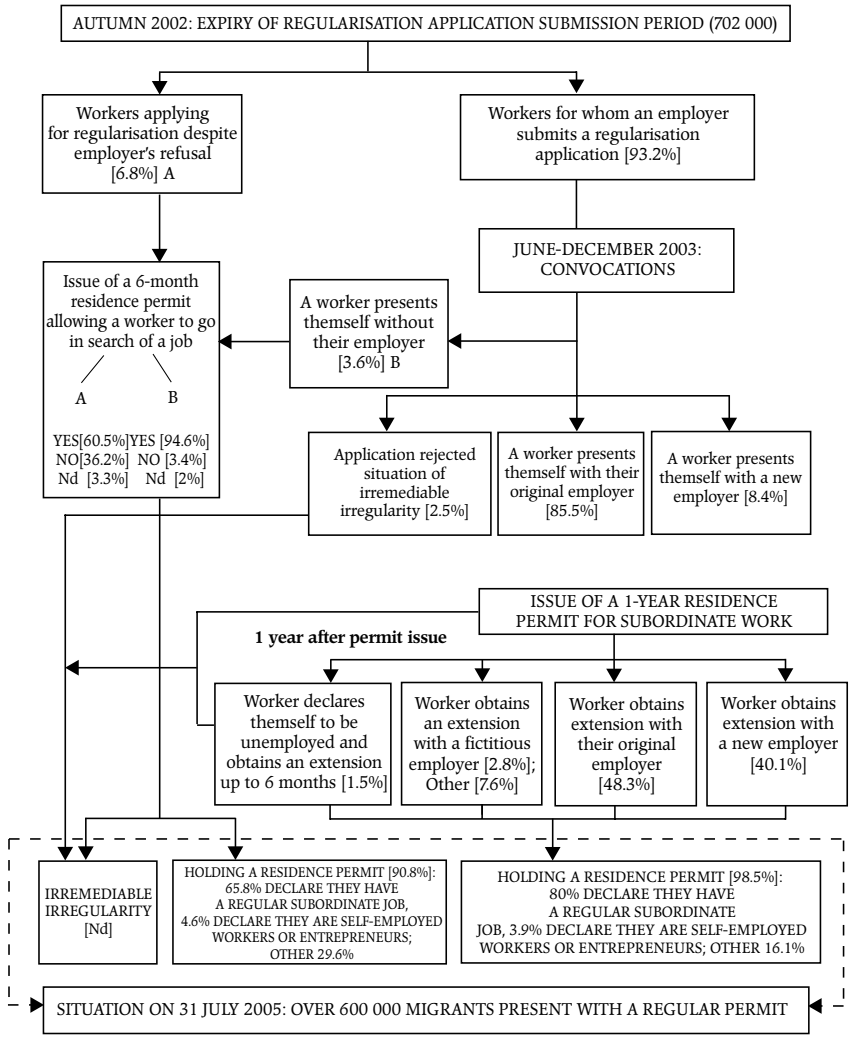
regularised migrant status, and it underlines the limitations of laws that strictly connect the right of residence with an existing job, a principle widely shared by Italian public opinion. We must, however, remember that there is some imbalance between the medium-term outcomes synthetically expressed by the reported data and the perceptions of key informants, who tend instead to emphasise the risk of relapsing into illegality and thus workers' vulnerability, since they must at all costs obtain a work contract[58] within a very short time if they do not want to risk losing their residence permit.

On the other hand, the connection between residence and access to the official labour market cannot but lead us to point out that regularisation measures undoubtedly help migrants' economic integration. Regularised migrant status reduces unemployment risks – besides, obviously, concealed labour risks – and encourages a wage integration process with local workers, in compliance with what economists' analyses have for a long time underlined and all inquiries have confirmed. A comparison between the 2002 regularised migrants' professional position and the condition of the regularised migrants who did not benefit from this opportunity (but to a good extent were already regularly present before its enactment) reveals a rather similar profile – since, for example unemployment rates are the same in both groups. The same is true of factors that affect their ability to produce income, which also relate to the different length of residence in Italy of the two groups, to which these differences can be reasonably ascribed.

An analysis of regularised migrants' professional careers – and, to some extent, their mobility processes – cannot but end in general with a positive opinion about these regularisation measures and the progressive enlargement of the pool of beneficiaries, measures which have led to the issue of a great number of residence permits aimed at allowing migrants to find a job. The result seems all the more positive if we consider that the inclusion of such a high number of regularised workers in the labour market took place in a not particularly favourable period for the Italian economy.

58. This datum is evidenced by many inquiries carried out in recent years, and emerges in particular from the survey of employers, institutions and associations, who were interviewed for the inquiry mentioned in note 63. See in particular: R. Bichi, L. Zanfrini and E. Zucchetti (2006), *Il Sud dopo la grande regolarizzazione. La domanda di lavoro immigrato e il ruolo degli attori locali,* Angeli, Milan.

Figure 2: Results of the regularisation process, 2002 (numbers at each stage)



Note: Nd = Not determined.

Taken from V. Cesareo (2006), "La ricerca: obiettivi e risultati" in V. Cesareo and E. Codini, *Il Mezzogiorno dopo la grande regolarizzazione. L'esperienza italiana nel contesto internazionale*, Angeli, Milan, pp. 15-78; diagram p. 67.

Where this regularisation, like previous ones and similar measures in other countries, missed its target was in its ability to significantly reduce incoming flows. The number of regularly resident migrants, assumed as a basis for this evaluation, has risen over time at a very fast rate – it was only one million people in 1997, but already in 2003 had exceeded the second million, and is soon going

to total three million individuals,[59] with a growth rate that, should it continue, would almost double this sector of the population every three years – and so the percentage incidence of undocumented migrants is today lower than in the past. However, in absolute terms, the estimated number of irregular migrants in Italy on 1 July 2005 was already half a million individuals,[60] and shows an irreversible tendency to further increase, waiting for a new mass regularisation law that many experts consider now inevitable. Many immigrants, too, share this opinion: on the basis of experience, they can reasonably believe that four years represent a reasonable time between one amnesty and the next.

However, though irregularity – as we have underlined – seems to jeopardise migrants' chances of employment and putting their human capital to good use, it does not prevent them from finding a job. Among illegal and irregular migrants,[61] even among those with a modest period of residence in Italy, three quarters have a job, usually a stable job. This confirms that the Italian economy can absorb immigrants far beyond the limits set by the quota system, but it also further strengthens the idea in people's minds of Italy as a country where people can enter, live and work whatever the law says.

Currently, irregular flows come above all from Romania (more than 17% of irregular migrants present), Albania, Morocco and Ukraine, and the sectors in which concealed labour is concentrated are the usual ones: services to families, building industry, trade, and agriculture in the South. In southern Italy, where a minority of migrants settle (they tend to go to the more dynamic regions of the North), irregularity rates are extremely high (27% of migrants do not hold a regular residence permit, against a national average of 16%, and only 15% in the Centre-North),[62] which is evidence of the role of those regions as first landing place, but also of their ability to offer to the most vulnerable migrants several job and income opportunities within the depths of shadow economy.

The decision made by the new Italian centre-left government elected in April 2006, to pass – at the time we were drawing up this report – a new flow-planning decree that would accept all applications that had not been granted by previous decrees on this matter – should be seen in the light of this overall picture.[63] This decree was promptly labelled by the centre-right opposition as

59. Istat, *La popolazione straniera residente in Italia al 1° gennaio 2005*, Istat, Statistiche in breve, Rome, 2005.
60. G.C. Blangiardo and M.L. Tanturri (2006), "La presenza straniera in Italia" in Blangiardo and Farina (eds), op. cit., pp. 23-51.
61. These data, too, refer to 2005.
62. Blangiardo and Tanturri (2006), op. cit.
63. In its 24 July 2006 session, the Council of Ministers approved a decree bill (to be submitted to parliamentary committees and the State-Regions Conference) that would grant 350 000 non-EU workers access to the labour market. These quotas, added to the 170 000 already authorised, should cover all the about 520 000 applications already submitted and probably help to drastically reduce the number of irregularly present, employed migrants.

a "disguised amnesty". On the other hand, the perception of planning decrees as functional equivalents of regularisation actions was there long before the enactment of this decree and appears now implicitly in the language used by the mass media, but also by the relevant institutions, as they talk about the possibility of getting migrants into regularised employment, migrants who in most cases are already living in Italy.

3.2. Lessons learned and proposals for the future

In the light of this overview, showing positive and negative aspects, we can learn lessons on three different levels about the policy examined in this report. The first level is procedural development, the second is the law on immigration, and the third level is how consistent are the laws on immigration with the operational logic of the labour market and society in Italy.

On the first level, cases that emerged during implementation show that the opportunity to regularise job relations does not guarantee that it will be used. In a context where concealed labour is extremely widespread and culturally accepted, it has great advantages from an economic point of view and makes immigrants more adaptable, or at least less free to move into the market and search for a more profitable job. Therefore, having one's regularisation dependent on signing a regular job contract – a solution that in principle might be shared for many reasons – has had the effect of exposing some immigrants to the necessity of accepting, whether willingly or not, the conditions imposed by employers, or even to suffer real vexations, frauds and cheats.

On the one hand, the derogations from the legal provisions enforced at the start soon seemed a self-evident way of extending the range of this action (so hitting the target of bringing into the sphere of legality as many jobs as possible) and avoiding discrimination against workers who had dishonest or unavailable employers; yet, on the other hand, they helped to strengthen the idea that *escamotages* (actual pretences) were not only effective (allowing immigrants to achieve legal status), but in some way were accepted practice, shared by civil organisations and (more notably) the administration, which was concerned about the almost irreparable damage an exclusion from regularisation would involve. This policy has confirmed the image of a country where the gap between the law and its enforcement is seen as "normal".

At the second level, an analysis of the 2002 regularisation measures confirms a critical aspect pointed out by several inquiries in recent years on the strict connection between the right of regular residence and occupational conditions. Regularisation – besides adding to the entitled beneficiaries, which to some extent asserted itself during the procedure – appear to exceed even the original scheme that had inspired the reforms in the Bossi-Fini Law.[64] In fact, beneficiaries are now granted a residence permit for only one year (a shorter period than

64. Codini (2006), op. cit.

the one granted in the permits in force prior to decree enactment), which, keeping to the letter of the regularisation decree, cannot be changed into a permit for self-employment – indeed, as regards home helps, it is actually impossible for them to change their jobs.[65]

Therefore, these regulations cannot escape coming to a dead end, in which requests for migrants' social integration (which, in the legislator's aims, can be achieved only through a regularised job) give way to a definitely functionalistic logic, where the right to reside ceases as soon as the host society no longer finds it profitable to use the migrant workforce. In fact, the risk of non-EU workers' discrimination does not put an end to the negative consequences of a weakening of their juridical status, which, according to several experts, has further worsened through the adoption of the current juridical system. Other consequences include the gradual devaluation of immigrants' human capital (which reduces the overall efficiency and competitiveness of the system) and the risk of social dumping carried out through the forming of a sort of a "backup post-industrial army".[66]

Coming to the third level, analysis of regularisation measures and their outcomes confirms the need to set the debate on migration policy in a broader framework, but focusing on two policy areas: the first one is the overall labour market management; the second one includes family policies and the institutionalisation of what we can call a "parallel welfare".

As regards domestic work, regularisation applications have confirmed that jobs as home helps or carers are the starting occupations for most women originating from heavy-migration-pressure countries, particularly among irregular migrant women, who unceasingly come to Italy called by the migration chain mechanisms and by the blooming industry of illegal immigration. Italy's extraordinary capacity to absorb these foreign workers also confirms the extent of the need for them, as a result of the demographic, economic and cultural changes in Italian society. Neither public policies nor the activities of charity organisations have proved effective in intercepting and meeting these needs, which have consequently found an appropriate answer in a parallel welfare system,[67] mostly fed by immigrant women's labour, with no substantial institutional action. The high costs involved in legally employing a worker and the "profitability" (in the broad sense) of resorting to irregular labour [§ 2.4] makes this one of the sectors most at risk of increasing irregular jobs, a

65. A definitely questionable expectation, which does not seem to have been actually applied when residence permit extensions were granted by the regularisation measures, since a large proportion of migrants employed as home helps presented themselves for their permit extension with a different employer from the original one.
66. L. Zanfrini (2006), "Il consolidamento di un 'mercato del lavoro parallelo'. Una ricerca sugli immigrati disoccupati in Lombardia" in *Sociologia del Lavoro*, No. 101, pp. 141-72.
67. Zanfrini (2005), op. cit.

risk that also leads to increased social inequality, since the most economically and culturally disadvantaged family groups are those that more frequently resort to less expensive recruitment networks, but are not in a position to guarantee high service levels.

Coming to the theme of labour market management, there is an increasing need to accompany the deep changes taking place in the job market – and their implications, particularly in terms of increasing job precariousness – with appropriate guidance for those with unstable or discontinuous work careers. This may involve – for immigrants, but not just for them – action aimed at maintaining employment capacity and supporting professional mobility. However, the volume of applications in this regularisation seems to prove that it is "difficult to trace out a clear boundary between immigrants' function of 'lubricating' the labour market – that is, the fact that they cover jobs left uncovered by Italian workers, their greater availability to geographical and professional mobility, etc. – and their presence in the shadow economy".[68]

The foreign component has become, over time, a very relevant part of the overall irregular labour market (even though it is periodically "deflated" by the effect of regularisations), and irregular labour is widespread even among those who hold a regular residence permit,[69] which indicates that neither a new campaign against illegal immigration nor a rise in the quota of migrants admitted will prove enough to end – or drastically downsize – foreigners' concealed labour. Fighting the shadow economy must therefore become an absolute priority, and we must be aware of the effect that, particularly in the regions more exposed to unemployment risks, migrants' irregular employment has on the very functioning of local labour markets. By redefining downwards work conditions, social acceptability levels and the profitability – meant globally – of some jobs, but also by starting to dismantle the system of rights and safeguards that defined in the past the *société salariale*,[70] unregulated immigrant labour becomes a threat not only to peaceful interethnic coexistence, but also to social cohesion.

4. Summary and conclusions

The "great regularisation" provided for by Law No. 189 of 2002 ended with the submission of over 700 000 legalisation applications, 90% of which were accepted, allowing those migrants to obtain a residence permit for work

68. Anastasia and Sestito, op. cit., p. 322.

69. Although with significant changes over the years, which to a large extent may actually be attributed to amnesty provisions, one third to one half of all immigrants' irregular jobs are carried out by those who hold a regular residence permit; E. Reyneri (2004), "Immigrants in a segmented and often undeclared labour market", in *Journal of Modern Italian Studies*, Vol. 9, No. 1, pp. 71-92.

70. Castel (1995), op. cit.

purposes. Its impact can be even more appreciated if we consider the restrictions established by the law, which in principle excluded self-employed and unemployed workers, as well as migrants who came to Italy for some other reason than a job (for example, as part of an immigrant family). It also reshaped regular immigration, in view of the increasing weight of the migration flows from eastern Europe (and within them, the female component), the significance of domestic jobs and the widening area of migrant settlement in Italy. In addition, this regularisation played a major and decisive role in encouraging a significant proportion of migrants to settle in Italy, which handed over a considerable number of workers to the official labour market and thus to the tax and social security system. Belying a still widespread commonplace among researchers – the fruit of an information deficit on this matter – the great majority of regularised migrants have succeeded in keeping their regularised status and obtained an extension of their residence permit, either through their original employer or through a new one. This has happened despite a difficult period for the Italian economy and despite the fact that in many cases the regularisation process ended with the issue of a residence permit for unemployment reasons. Though the debate remains open on the real need for foreign workers and the most desirable structure for migration policy, it is unquestionable that illegal migrants' irregular employment continually results in unfavourable consequences, such as market distortion, discrimination against immigrants, competition with the weakest segments of local labour, misappropriation of resources meant for the whole community and a weakened sense of legality. Thus, any action aiming to bring irregular labour to the surface practically takes its legitimacy for granted.

From another point of view, the "successful outcome" of this regularisation, judged by the amazing number of submitted and accepted applications, has also become a way of measuring irregular migration pressure on Italy, which has not been certainly inhibited by the enactment, in 2002, of a new set of laws on migration or by the "promise" of greater strictness that accompanied their enforcement. The strengthening of "external controls", which went along with the normative development, did not produce the expected effects. On thecontrary, there is an ever-growing awareness, explicitly admitted even by government authorities, that actions aimed at fighting irregular migration absorb an abnormal quantity of resources, infinitely higher than those supporting social integration projects, yet definitely disproportionate to achieved results. Controls are, on the contrary, insufficiently developed and almost totally non-dissuasive in jobs and situations where the atavistic scourge of concealed labour takes place and develops. As a result, controls have no effect on the extraordinary attraction represented by a large, widespread shadow economy, which finds in illegal migration its best source of recruitment.

Entering an Italian regularisation tradition, the 2002 provisions undoubtedly had an attraction effect and strengthened the idea that in Italy regularisations are considered as a normal immigration control tool. Even among those who in principle are more favourable to this solution – which is considered as the

lesser of two evils in relation to an almost physiological inability by migration policies to make a crumbled demand coincide with an increasingly globalised offer – there is a stronger awareness that regularisations actually increase the pathological phenomenon – irregular migrants' presence – that they are intended to fight, or they even reward illegality. Therefore, the price that Italian society is going to pay represents a further discredit of the principle of legality, which is further worsened by the mass nature of regularisations, where the provision for selection filters – as in the case of the 2002 amnesty – had more the effect of urging people to go in search of possible *escamotages* in order to avoid them ("unjustly" excluding those who found no way to gain the necessary qualifications), rather than rewarding those who had shown an actual will to integrate themselves (as tends to happen in the individual regularisations provided for by other law systems). Furthermore, amnesties have been repeatedly interpreted as functional substitutes for ineffective or undersized admission policies. Consequently, their reiteration has ended by producing the paradoxical effect that planning policies are perceived nowadays as regularisation measures, though undersized compared to the number of potential "regularisation candidates", and based on distribution criteria by countries and professional categories that obviously do not reflect the typology of the job relations that already existed when these provisions were enacted.

The migration "normalisation" process, validated now by its indissoluble ties with everyday life in Italian society and by the fact that it is perceived in this way by public opinion,[71] has ultimately kept up with a repeated resort to "exceptional" regularisation actions (in their political definition), but of such an extent as to significantly weigh not only upon the resident foreign population volume, but also upon the whole population itself (whose strength is now actually entrusted to migrations from abroad). As we have seen, an overwhelming majority of regular migrants who live and work in Italy have come through an irregular approach to this country and by permanently illegal conditions over a longer or shorter period. Quite often, even those who have always been regularised migrants only succeeded in migrating thanks to the presence in Italy of a relative who had passed to legality through an amnesty. This datum alone provides tangible evidence – in the words of a researcher – of the failure of sovereignty, or better, of its central manifestation, which in the contemporary international juridical paradigm is represented by control on migration flow movements.[72]

71. G.G. Valtolina (2003), "Atteggiamenti e orientamenti della società italiana", in Fondazione ISMU, *Ottavo Rapporto sulle Migrazioni 2002*, Angeli, Milan, pp. 193-214 (also available in English: "Attitudes and orientations in Italian society", in Fondazione ISMU, *The Eighth Italian Report on Migrations, 2002*, Milan, 2003, pp. 141-61; see www.polimetrica.com).

72. F. Pastore (2004), "Che fare di chi non dovrebbe essere qui? La gestione della presenza straniera irregolare in Europa tra strategie nazionali e misure comuni", in M. Barbagli, A. Colombo and G. Sciortino (eds), *I sommersi e i sanati. Le regolarizzazioni degli immigrati in Italia*, Il Mulino, Bologna, pp. 19-45.

Part III – The legal situation of irregular migrants in Germany and their access to social rights

Winfried Kluth

Executive summary

German law does not provide a legal definition of illegal residence; it only regulates entry and residence procedures. Certain matters of fact of illegal residence can be differentiated. As the complex issue of "illegality" comprises several, partly overlapping phenomena (illegal entry, illegal residence, illegal employment), and as various entry points into illegal residency exist, discussions about the issue encounter a variety of definition problems. In this report, the group of illegally resident third-country nationals will be defined as foreign nationals who have neither been granted a residence title nor a toleration certificate and who have been registered neither by the authorities nor in the Central Register of Foreign Nationals (*Ausländerzentralregister – AZR*).

In Germany, awareness of the issue of illegal migration only began in the 1990s. Within the public debate in Germany, one can distinguish certain key positions: first, a "state-control" approach, which regards illegal immigration first and foremost as a violation of applicable law; second, a "human rights" approach, which emphasises the rights of illegally resident migrants and demands that minimum standards of social protection be established. Whereas the state-control approach has been adopted by the Federal Ministry of the Interior and the state interior ministries, the human-rights approach is supported by many civil-society actors (churches, charitable organisations, refugee support groups). A third, intermediate position has been represented by the so-called "dual perspective", which calls for state-control policies to be complemented by approaches that take the rights of illegally resident migrants, their voluntary return and regularisation programmes into consideration. This position has been adopted by several charitable organisations, churches and trade unions.

An analysis of legal developments shows that Germany has consistently tightened the rules on foreign-resident and criminal law in order to tackle illegal immigration and human smuggling or trafficking in human beings, and it has, if required by EU legislation, brought German law into line with EU directives. In some cases, German criminal law even exceeds EU demands.

Apart from legalisation campaigns, there are some other ways of obtaining a legal residence title (asylum petitions, marriage, parenthood). The legal regulations try to ensure that no incentives for illegal migration to Germany are created, as would be the case in a simple legalisation campaign. Appeals to hardship commissions or petitions for subsidiary protection do not constitute legalisation options.

1. The phenomenon of irregular migration

1.1. Basic information on irregular migrants

1.1.1. Data sources

It is difficult to obtain reliable data on the size and the composition of the illegally resident population. One of the main reasons is that the size of the illegally resident population depends on several factors: not only migration itself, but also birth rates, mortality and overstaying (illegal residence after a residence title has expired). Furthermore, in recent years Germany has increasingly become a major transit country for illegal migration.

Persons without a legal residence title or toleration certificate try to leave no traces in the official residence statistics. Therefore, statistics about illegal migrants are compiled as a result of state control and police work. Some information can be gained from Police Crime Statistics (*Polizeiliche Kriminalstatistik – PKS*) and the statistics on "border control measures pursuant to foreign-resident law", which are compiled by the Federal Police (*Bundespolizei – BP*). More information results from the activities of non-governmental charities and support groups who – in the course of their work – regularly come into contact with residents who do not possess a legal residence title.

Employment is one of the main motives for illegal residence, though it is impossible to discern a clear-cut pattern of illegal migration or of the circumstances in which illegally resident migrants live in Germany. The illegally resident population is a very heterogeneous group. It consists of contract workers overstaying their permitted term of residence, asylum seekers who have gone underground, illegally resident domestic helps and family members joining their families that already live in Germany.

The most important data sources are:

- data of the Federal (Border) Police, including registered illegal entry, entry with forged travel documents and information about human smuggling;
- asylum statistics of the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge – BAMF*);
- statistics by the Federal Labour Agency (*Bundesagentur für Arbeit*) on illegal employment of non-German labour;
- surveys by charitable organisations.

1.1.2. Size of illegally resident population

On the basis of existing statistical data, it is not possible to find out the exact number of illegally resident migrants in Germany. The so-called principle of

multiplication has been suggested in order to arrive at an estimate of the number of illegally resident migrants. Such an estimate would require that the unknown quantity (total number of people living in Germany without a legal residence status) is directly proportionate to the measured quantity.

This method is problematic, because it is very difficult to determine the correct multiplier. In using this method, a starting point for estimating the size of the illegally resident population in Germany could be data available from administrative checks.

However, this can only be applied under certain conditions: if an estimate is to be based on the data available from the Police Crime Statistics (*PKS*), one has to be sure that illegally and legally resident migrants are equally likely to commit a criminal offence. Moreover, the probability of being charged by the police as a suspect in crime would also have to be equally high for both groups. According to Stobbe,[1] however, this correlation cannot be taken for granted, as illegally resident migrants try to be as inconspicuous and law-abiding as possible in order to avoid police checks and not draw attention to themselves. In the view of Vogel,[2] there are also cogent arguments against applying the principle of multiplication to statistical data available from administrative checks at the workplace, because the data derive from case statistics where the number of the illegally resident people involved cannot be ascertained. Such an estimate would also fail to include people who live in Germany without a legal residence status, but are not gainfully employed (e.g. university students or accompanying family members).

However, the data gained from workplace checks offer a basis for estimating the number of illegally employed migrants in certain sectors of industry. Some workplace checks are carried out in response to reports that assume that, among other things, the language or foreign appearance of workers could be an indication of illegal employment. Consequently, these workplace checks do not constitute a representative sample of workplaces in a certain sector of industry. To optimise the sample, it was suggested that workplace checks by customs officers should be carried out randomly in a certain sector of industry. The resulting ratio between the number of employees without a legal residence status and all employees that have been checked could be used as a basis for a projection of the total number of illegally resident migrants employed in this sector of industry. Others suggest that estimates of the size of different subgroups of the illegally resident population could be a promising alternative to a general estimate, due to the complexity and diversity of the social phenomena.

In spite of the difficulties involved in estimating the illegally resident population in Germany, there have been repeated attempts in the public debate to give

1. Stobbe (2004), p. 94.
2. Vogel (2002), p. 74 ff.

rough estimates. In recent publications, the number of "illegals" in Germany was estimated at about one million people. This was based on a projection of local estimates. It was called a "realistic minimum level". Other authors estimate that about 500 000 to one million illegal migrants live in Germany, allowing for the fact that the residence status of citizens from the new EU member states has been legalised since their countries joined the European Union on 1 May 2004. Lederer, on the other hand, has estimated – on the basis of the number of illegally resident non-German suspects registered in police crime statistics – that the minimum number of illegally resident migrants has levelled out at about 100 000 people since the mid-1990s. In order to arrive at this estimate, the number of illegal entries registered by the Federal Police (*BP*) has been subtracted from the total number of detained suspects without a legal residence status. This subtraction is necessary because illegal border crossings are registered twice in the official statistics, in the Police Crime Statistics (*PKS*) as well as in the statistics on illegal entry (which are compiled by the Federal Police – *BP*): People detained while attempting to cross national borders illegally are not permitted to enter German territory, but are regularly sent back immediately to the neighbouring country they have used as a transit country.[3] For the year 2003, the total number of illegally resident registered suspects amounted to *96 197* people. If one subtracts the number of *19 138* registered illegal entries, the resulting figure of illegally resident suspects that have been detained inland is *77 059*.

On the whole, there nevertheless seems to be a consensus that the number of illegally resident migrants in Germany probably increased continuously until the mid-1990s. Since then, it can be assumed that the number of illegally resident migrants has – at its high level – remained stable or even decreased.

1.2. Immigration regulations in force

According to the principles of international law, all states take advantage of their sovereign powers in order to regulate entry and residence rights for foreign nationals. The regulations and rights have therefore developed separately for each state, in response to their history, changing traditions, structures and political interests.

The term "illegal residence" still lacks sharp definition. German law does not provide a legal definition of illegal residence; the Residence Act (*Aufenthaltsgesetz – AufenthG*) simply regulates entry and residence procedures (§§ 3-38, Residence Act – *AufenthG*). Under German law, foreign nationals are only entitled to enter or reside on German territory if they are in possession of a valid passport or comparable document, unless an exemption has been granted in accordance with decree-law (§ 3, paragraph 1, Residence Act – *AufenthG*). Furthermore,

3. Sachverständigenrat (2004), p. 59.

foreign nationals require a legal residence title for entering or residing in Germany, the only exception being if other provisions have been introduced by European Union law or decree-law, or if residence rights have been granted in accordance with the 1963 association agreement between the European Economic Community and Turkey. Residence titles can be granted in the form of a visa, a residence permit or a settlement permit (§ 4, paragraph 1, Residence Act – *AufenthG*). If a foreigner enters German territory without the obligatory passport or travel documents and without the obligatory residence documents, his entry is illegal (§ 14, paragraph 1, Residence Act – *AufenthG*). If foreign nationals are not or no longer in possession of the necessary residence documents, or if their residence entitlement granted in accordance with the 1963 association agreement between the European Economic Community and Turkey has expired, they are under a legal obligation to leave the country. If the respective foreign nationals do not leave German territory immediately, or within the period granted by the authorities, their residence becomes illegal (§ 50, paragraphs 1 and 2, Residence Act – *AufenthG*).

For this analysis it is essential to differentiate three groups:

1. Foreign nationals who have been granted a suspension of deportation (a "toleration" certificate): they are under a legal obligation to leave the country, but their expulsion or deportation cannot be enforced for factual or legal reasons. As toleration certificates merely suspend deportation procedures, they do not constitute a legal residence title; the people concerned continue to be legally obliged to leave the country (§ 60a, Residence Act – *AufenthG*).
2. Foreign nationals without a residence title who have been registered in the Central Register of Foreign Nationals (i.e. they are known to the authorities), but who have not been granted a toleration certificate.
3. Foreign nationals who have neither been granted a residence title nor a toleration certificate, and who have not been registered by the authorities or in the Central Register of Foreign Nationals.

In this report, the definition of illegal residence refers only to the people described in 3 above.[4]

Another difficulty in defining the boundaries of the term "illegality" arises from the fact that several phenomena, which are at least partly inter-related, are regularly discussed under the same heading: illegal entry, illegal residence and illegal employment. This is why many authors focus on the legal consequences and punishability of unlawful residence in order to arrive at a definition of illegality. The punishability of unlawful entry or residence is based on § 95 Residence Act (*AufenthG*) and entails prison sentences or fines for, among other things,

4. For more details, see Kluth and Cernota (2006), pp. 6-11.

- residence without the obligatory passport or comparable travel documents,
- residence without the necessary legal residence title, if the foreign national concerned is under a legal obligation to leave the country and has not been granted a suspension,
- unlawful entry,
- entry or residence in spite of a respective ban.

The liability to punishment of illegal employment of foreign nationals is based on § 404 of the German Social Code (*Sozialgesetzbuch III – SGB III*) and on §§ 10, 11 of the Act on Intensifying the Fight against Illegal Employment and Ensuing Tax Evasion 2004 (*Schwarzarbeitsbekämpfungsgesetz – SchwarzArbG*). Consequently, the offence of illegal employment can be committed by foreign nationals with or without a legal residence title. If a person lacks both the obligatory residence title and work permit, his or her legal situation is often referred to as "double illegality".

Another problem in defining the term "illegality" arises from the fact that there are various entry-points into illegal residency. For example, illegal entry occurs not only if a person crosses the national (green or blue) borders without the necessary documents, but also if the entry is only "seemingly legal", a term used to describe entry with the help of forged or altered travel documents or a fraudulently obtained visa. Another possibility would be entry based on the fraudulent abuse of permitted ways to enter the country without a visa or with the help of a fraudulently obtained visa. In the latter case, the illegal residence begins as soon as the allotted period of residence has expired (known as "overstays").

In the case of foreign nationals who are entitled to enter the country without a visa (from the EU Positive List of countries without visa requirements), the privilege of temporary residence (pursuant to § 15, Residence Decree – *Aufenthaltsverordnung* (*AufenthV*)) ceases to apply if a foreign national takes up employment without having been granted a work permit (see § 17, paragraph 1, Residence Decree – *AufenthV*). Consequently, this person lacks the necessary residence permit and is legally obliged to leave the country, having committed an offence against § 95, paragraph 1, No. 2, Residence Act – *AufenthG*.[5] As illegal residence can thus also occur after legally entering the country and

5. Welte (2002), p. 56. It also constitutes a violation of § 284 German Social Code *(SGB III)* and is punishable as a misdemeanour. The prevailing legal opinion has demanded the same legal consequences for "citizens of negative states". However, a ruling by the Federal Court of Justice *(BGH)* in April 2005 came to the conclusion that, in this case of taking up illegal employment, the illegal act is committed by fraudulently obtaining a visa, with the granted visa retaining its formal validity. The Federal Ministry of the Interior has expressed its intention to close this legal gap. BGH, ruling of 27 April 2005, Ref. 2 StR 457/04.

temporarily living there legally, the Expert Panel on Migration and Integration has pointed out the occurrence of a large number of hybrid forms between legal and illegal entry, residence and employment.[6]

In contrast to European Community directives and guidelines,[7] German primary law on foreign nationals does not use the term "illegal". Nevertheless, the term is widely used in academic debate and everyday usage. As some people regard the term as degrading when used with reference to migrants ("illegal migrants") – arguing that "no human being is illegal" – several alternative terms are used in this context: "illegally resident third-country nationals", a legal term focusing on illegal residence (the term that is used in this study), "irregular", "undocumented", "uncontrolled" or "clandestine" migrants, "status-less" migrants or "*sans papiers*".

The basic rights guaranteed in the German constitution of 1949, the Basic Law (*Grundgesetz – GG*), are legally enforceable. According to Article 1, paragraph 3, Basic Law (*GG*), these constitutional rights constitute directly applicable law and can therefore, in contrast to international law, be enforced by individuals through legal action. The basic rights are only restricted by the rights of others and Germany's constitutional order (Article 2, paragraph 1, Basic Law – *GG*). However, only universal human rights can be invoked by illegal foreign residents. For example, an illegal foreign resident can invoke the protection of human dignity (Article 1, paragraph 1, Basic Law – *GG*). Correspondingly, the right to life and physical integrity (Article 2, paragraph 2, sentence 1, Basic Law – *GG*) is a universal right, whereas the right to personal freedom is restricted by the ensuing sentence 2 ("Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law"). These constitutional rights do nevertheless have a "third-party effect", as they establish an "objective value system" which is legally binding for civil and employment law. This entails, for example, that employers have to respect the fundamental values of the Basic Law (*GG*) in their dealings with illegally employed foreign residents. This includes the protection of their fundamental rights (human dignity and personal integrity), equal treatment, especially of men and women, freedom of religion and conscience, freedom of expression, the special protection of marriage and family and the negative and positive freedom of association.

From a historical point of view, it becomes obvious that policy approaches towards illegality have changed in recent decades. The time of the so-called guest-worker migrations came to an end many years ago. Nowadays human smuggling and other aspects of criminal activity are in the focus of politics.

6. Sachverständigenrat (2004), p. 348.

7. For example, EC Guideline 2004/81/EC of 29 April on granting residence titles to third-country nationals who have been victims of human trafficking and are willing to co-operate with the authorities (OJ L 261, 6 August 2004, pp. 19-23). See also Kluth (2006), p. 1 ff.

In contrast to south European countries, which responded to illegal immigration by implementing legalisation programmes, Germany imposed restrictions on asylum law and family migration possibilities for non-German residents, because these two areas were regarded as the main source of illegal residence.[8] It was only in the 1990s that public debate and policy began to change its perspective on illegality. On the one hand, measures were taken to compensate for the abolition of border checks at EU-internal borders under the Schengen Treaty of 1990. On the other hand, the "criminalised horror scenario of mafia-like criminal organisations smuggling countless migrants into Europe"[9] began to take hold of the public imagination. In its 2001 report, the Independent Migration Commission focused, among other things, on the issue of illegality and thus fuelled the public debate.[10] After the terrorist attacks on New York City on 11 September 2001, the perspective shifted further towards security and crime-prevention issues. In the public debate, there was a tendency to link the issues of terrorism risks and illegal migration. As a consequence, measures against terror suspects were complemented by countermeasures against illegal immigrants and human smugglers or traffickers.

Within the public debate on the issue of illegality in Germany, which began to develop only in recent years, one can distinguish two key positions: on the one hand, an administrative or state-control approach, which has been adopted by the Federal Ministry of the Interior and the state interior ministries; on the other hand, a human rights approach, which has been adopted by civil-society actors (churches, charitable organisations, refugee support groups).[11]

In the state-control perspective, illegal immigration is, above all, a violation of applicable law. This position also implies that illegal residence poses a threat to public order and security. Proponents of this position also argue that there is a link to the rising crime rates faced by society as a whole, a trend which is inevitably fuelled by the actions of human smugglers and illegal migrants.[12] Furthermore, this position emphasises further negative effects on society, such as tax evasion and non-payment of social insurance contributions, which put additional pressure on public spending and state budgets.[13] According to the Federal Ministry of the Interior, there is no alternative to preventing illegal entry and residence, because it is one of the main duties of the state to establish a consistent legal order that applies to all residents. Otherwise, illegal residence would deteriorate into a permanent occurrence, undermining public efforts at regulating migration inflows. In this perspective, the main focus has to be

8. Sieveking (1999), p. 93.
9. Bade (2001), p. 66.
10. Unabhängige Kommission Zuwanderung (2001), pp. 196-8.
11. In many cases, the contact between the staff at social organisations and illegally resident migrants triggered an increased awareness of the issue, first in churches and then in the broader public, see Anderson (2003), p. 9.
12. Hanning (2000), p. 11; Sonntag-Wolgast (2000), pp. 23-5.
13. Welte (2002), p. 55.

on how to fight illegality in a way that is as effective and economical as possible.

The human-rights perspective, on the other hand, emphasises that illegally resident migrants cannot be made solely responsible for their situation. On the contrary, it is pointed out that demand and support from German society have contributed to the problem, too. Furthermore, it is argued that a consistent legal order can not realistically be achieved through state legislation alone, since other areas of social reality are also marked by inconsistencies; in addition, there have always been collisions between different legal interests, making it inevitable in legal practice to take some discretionary decisions. In the area of illegal immigration, these conflicting interests regularly occur, because human rights such as health, education and protection against exploitation are involved.[14] In consequence, it is seen as the duty of the state to strike a balance between the demands of establishing a consistent legal order and guaranteeing just and fair treatment in individual cases.[15] In a more direct manner, this approach has also been called the "victim perspective", the main political aim being to help "illegalised" refugees to achieve a long-term perspective for their lives.[16]

An intermediate position, trying to reconcile these seemingly irreconcilable differences, is represented by the "dual perspective". In accordance with EU demands to complement state-control policies by approaches that take into consideration the rights of illegally resident migrants, their voluntary return and regularisation programmes, several charitable organisations, churches and trade unions have presented similar proposals. Their main aim is to achieve a "situational de-illegalisation" which works towards a "pragmatic solution of humanitarian and health problems or risks faced by foreign nationals that already live illegally in our country". Consequently, these groups have called on politicians to, among other things, abolish restrictions on family reunion, grant residence titles to tolerated refugees (pursuant to § 23, paragraph 3, Residence Act – *AufenthG*), implement hardship regulations, initiate voluntary return programmes for migrants who have gone underground, protect victims who act as witnesses in court cases and establish minimum standards of social protection that are not undermined by the obligation to be registered by local authorities (pursuant to § 87, Residence Act – *AufenthG*).

1.3. Rationale for adoption of specific policy

The reform of foreign-resident law in 1990 (Foreigners Act) imposed harsher sentences for illegal entry, residence and human smuggling. The reform of asylum law and its regulations and the amendment of the relevant article in the German constitution (Article 16 and Article 16a, Basic Law – *GG*) were

14. Cyrus (2004), p. 39 ff.
15. Deutsche Bischofskonferenz (2001), p. 41.
16. Forschungsgesellschaft Flucht und Migration (1998).

aimed at stepping up national countermeasures against illegality.[17] Further changes resulted from the Combating Crime Act of 1994 (*Kriminalitätsbekämpfungsgesetz*), which introduced several new offences in order to tackle illegal residence, namely the offences of illegal entry, illegal residence after expulsion or deportation, and fraudulent petitions in order to obtain residence papers (§ 92, paragraph 2, Foreigners Act – *Ausländergesetz* (*AuslG*)).

Offences of human smuggling, previously listed in § 92 Foreigners Act (*AuslG*), were incorporated into the new §§ 92a and b of the Foreigners Act (*AuslG*), thereby increasing the maximum prison sentence from three years to five or ten years respectively for the offence of human smuggling of foreign nationals by profit-orientated or criminal organisations. Simultaneous amendment of § 84, Asylum Procedure Code – *Asylverfahrensgesetz* (*AsylVfG*) (offence of inducing fraudulent asylum petition) imposed harsher penalties; a new § 84a of the Asylum Procedure Code (*AsylVG*) introduced the offence of "fraudulent asylum petition induced by profit-orientated and criminal organisations". The harsher penalties were aimed at deterring offenders and bringing asylum regulations in line with legislation on organised crime. In 1997, further efforts were made to tighten the rules, by reforming foreign-resident and asylum-procedure law, reducing the minimum number of smuggled people for the offence of human smuggling to two.

The anti-terrorist legislation passed after the events of 11 September 2001 tightened several rules in foreign-resident and asylum law.[18] For example, German embassies abroad are now entitled to carry out or initiate identity and background checks on visa applicants. The extent of personal data stored in and transmitted to the Central Register of Foreign Nationals (*AZR*) has also been increased. Furthermore, the visa register has been upgraded to a visa decision register, recording data both on issued and denied visas. These measures were also aimed at stepping up border checks and police identity checks within Germany. There have been extensions of the authorities' powers to exchange personal data. In addition, foreign-national law has been amended in order to ensure that fingerprints (of all ten fingers) are taken from all foreign nationals who are arrested for illegally crossing national borders or illegally staying in Germany. The latter amendments were not adopted in the immediate context of anti-terrorism legislation, but in order to implement the EC Council Regulation "Eurodac" of 2000.[19]

17. Sieveking (1999), p. 105.

18. Schmahl (2004).

19. EC Council Regulation No. 2725/2000 of 11 December 2000 on setting up "Eurodac" – allowing the exchange of fingerprinting data in order to implement the Dublin Convention (OJ 2000 L 316, p. 1). Pursuant to Article 11 of the Regulation, taking fingerprint data is not mandatory in the case of illegal residence. Eurodac was put into operation on 15 January 2003.

On 1 January 2005, the new Immigration Act took effect in Germany, its main focus being on residence law (Residence Act – *AufenthG*); it replaced the former Foreigners Act (*AuslG*). It also adopted the existing list of offences committed by foreign nationals, with only minor alterations (§ *95*, Residence Act – *AufenthG*). It thus also incorporated and complemented the regulations against human smuggling (§§ *96*, *97*, Residence Act – *AufenthG*). For example, § *96*, Residence Act (*AufenthG*) (smuggling of foreign nationals) introduced additional offences in paragraph 2: carrying a firearm or other weapon, inhuman treatment or actions imperilling or degrading smuggled persons or damaging their health. Paragraph 5 also made reference to the Penal Code for these offences, implementing the additional protocol of a UN agreement on fighting organised crime.[20] The offence of human smuggling by profit-orientated and criminal organisations (in § *97*, Residence Act – *AufenthG*) was extended in order to introduce a maximum ten-year prison sentence in cases where the smuggled person had died in the process (in accordance with § *96*, Residence Act – *AufenthG*).

These amendments implemented the EC Council Directive of 28 November 2002 on facilitating unauthorised entry, transit or residence,[21] as well as the accompanying decision on tightening criminal penalties,[22] to a large extent.[23] The German Penal Code now even exceeds EU demands in this respect, by also imposing criminal penalties in cases where repeated human smuggling has occurred without the realisation of profit.[24] The discretionary provision of the directive, by which it is not mandatory to impose sanctions if human smuggling has been carried out "in order to provide humanitarian support to the persons concerned" (Article 1, paragraph 2 of the Directive), has not been implemented verbatim. The exemption from punishment in the case of humanitarian efforts cannot be deduced from § *96* paragraph 1, No. 1 Residence Act (*AufenthG*), as the profit orientation is defined here as part of the offence of facilitating human smuggling. In the view of the Federal Government Commissioner for Migration, these regulations need to be slightly amended

20. Article *6* paragraph 3 of the Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementary to the United Nations Convention against Transnational Organized Crime, which came into force on 28 January 2004.
21. EC Council Regulation 2002/90 of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (OJ L 328 of 5 December 2002, p. 17).
22. Council decision of 28 November 2002 on the adoption of appropriate sanctions against the facilitation of unauthorised entry, transit and residence (OJ L 328 of 5 December 2002, p. 1). The decision demands an eight-year prison sentence as the minimum standard for the maximum penalty.
23. In § 92a, the Foreigners Act (*AuslG*) had already contained the regulations that have become mandatory pursuant to Article 27 paragraph 1 of the Convention implementing the Schengen Agreement. These regulations expired when the Council Directive mentioned above entered into force on 5 December 2004 (Cantzler 2004, p. 49).
24. Sachverständigenrat (2004), p. 362.

in order to bring them in line with §§ 96 and 97 Residence Act (*AufenthG*).[25] Other EU directives, such as the "Victim Protection Directive"[26] are yet to be implemented in the context of a second amendment of residence law.

Apart from formal legalisation campaigns, several possibilities of escaping from illegality have been mentioned in the literature, such as submitting a petition for political asylum, marrying a German partner or marrying a non-German partner with a residence entitlement.

If foreign nationals submit a petition for political asylum in Germany, they in principle have the right to stay in Germany until asylum procedures have been completed (leave of residence pursuant to § 55 paragraph 1, Asylum Procedure Code – *AsylVfG*). If the Federal Office for Migration and Refugees (*BAMF*) has decided that a foreign national is entitled to political asylum or to protection against deportation in accordance with the Geneva Convention (§ 60, paragraph 1, Residence Act – *AufenthG*), he or she is entitled to receive a residence permit (§ 25, paragraph 1, sentence 1 and paragraph 2, sentence 1, Residence Act – *AufenthG*). However, there are several obstacles to obtaining legal status through an asylum petition. To begin with, applicants have to provide proof that they have entered Germany directly by air and that they have not been granted a visa by another EU member state. Furthermore, an asylum petition has to be submitted "immediately" after entering the country (§ 13 paragraph 3, sentence 2, Asylum Procedure Code – *AsylVfG*). The law does not contain a clear-cut deadline for submitting a petition, but if applicants are unable to provide sufficient explanations for an obvious delay, this will have a negative impact on their credibility and the administrative review of their asylum petition.[27]

Marrying a German partner or a non-German partner with a long-term residence entitlement can be another way of obtaining a legal residence status. Some trafficking organisations do therefore offer their assistance in arranging (fictitious) marriages in order to obtain a residence title. The legal basis is the special protection of family and marriage in accordance with Article 6, paragraph 1, Basic Law (*GG*). However, legal regulations make ex-post legalisation of existing illegal residence very difficult. The relevant regulations in the Residence Act (§§ 28 ff., Residence Act – *AufenthG*) are aimed at spouses joining their husbands or wives who already live in Germany. In many cases, non-German or bi-national couples prefer to get married abroad in order to avoid difficulties

25. In § 96 paragraph 1 No. 2, the Residence Act *(AufenthG*) includes repeated offences or acts facilitating the unauthorised entry of several persons in its definition of the criminal offence, preventing an exemption from punishment.
26. Council Directive 2004/81/EC of 29 April 2004 on residence permits issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who co-operate with the competent authorities (OJ L 261 of 6 August 2004, pp. 19-23).
27. Marx (2003), §13 marginal note 38.

in obtaining the necessary marriage documents. In order to get married, prospective couples have to provide these documents: a passport or other identification, a birth certificate and other documents in accordance with the law of their country of origin.[28] Officials at the civil register office have to check if the documents are authentic. If they suspect a fictitious marriage, which would constitute sufficient grounds for annulling a marriage pursuant to § 1314 paragraph 11, No. 5, German Civil Code (*Bürgerliches Gesetzbuch – BGB*) they are entitled to interview the prospective spouses (§ 5, paragaph 2 sentence 1 Civil Status Act – *Personenstandsgesetz*). According to past court decisions, a "fictitious marriage" is defined as a marriage with the sole purpose of obtaining a residence entitlement, with the persons involved having no intention to establish a permanent marital partnership.[29] If registrars come to the conclusions that two applicants intend to enter into a fictitious marriage, they can refuse to conduct the wedding.[30]

The obligatory marriage documents also include a residence certificate issued by the local authorities, which by itself is not the equivalent to being issued a residence entitlement. However, in the process of issuing such a certificate, local authorities do often discover that the residence of the applicant is illegal and so inform the police. The prospects of being granted a toleration certificate by foreign-resident authorities for the purpose of marrying are bleak, especially if the person concerned has already applied for protection against deportation on the grounds that he or she is not in possession of a passport, for example. In principle, issuing such a toleration certificate is possible if the civil register office does not object to the submitted documents.[31] The illegal status of an applicant can also be uncovered if authorities demand proof of his or her ability to enter into marriage (certificate of marriageability), which is common practice. An exemption from this obligation can only be granted if a Higher Regional Court has found that an international certificate of marriageability cannot be obtained (§ 1309, German Civil Code – *BGB*). It is common practice that the Higher Regional Courts will contact the local foreign-resident authorities in order to establish whether a submitted certificate of marriageability is legitimate; the local authorities will, in turn, carry out data-reconciliation measures in order to prevent fictitious marriages.[32] If a Higher Regional Court comes to the conclusion that the parties involved intend to enter into a fictitious marriage,

28. We will not address the problems involved in legalising these documents; for further details, cf. Beauftragte der Bundesregierung (2005), C III.1.2.2.
29. Federal Constitutional Court (*BVerfG*), ruling of 12 May 1987, Ref. E 76, 1; Federal Administrative Court (*BVerwG*), ruling of 9 September 2003, Ref. 1 C 6.03, in *Informationsbrief Ausländerrecht* 2004, pp. 77-80.
30. For more details see Göbel-Zimmermann (2006).
31. Storr et al. (2005), § 60a *AufenthG*, marginal note 6.
32. In practice, Higher Regional Courts can follow different procedures. The procedure described here is the one followed by the Civil Register Office of the City of Nuremberg.

it will refuse to grant an exemption from the obligation to submit a certificate of marriageability.[33] As in all these cases the applicants are unable to provide all the necessary marriage documents, their intention to get married will not assist them in their efforts to obtain legal residence status.

A marriage with a German partner can (§ 28, Residence Act – *AufenthG*), like marriage with a non-German partner, result in a limited residence or a permanent settlement permit (§ 30, Residence Act – *AufenthG*).[34] However, several conditions have to be fulfilled before such a permit can be issued (§ 5, paragraphs 1 and 2, § 29 Residence Act – *AufenthG*), such as sufficient income, living space, absence of a criminal record and proof of legal entry or ex-post legalisation through re-entry.[35] If these conditions are not fulfilled, local foreign-resident authorities can refuse to issue a residence document[36] in order to prevent a fictitious marriage. If suspicions have been raised, local foreign-resident authorities can also carry out investigations into whether a fictitious marriage (a "residence marriage") has been entered into subsequent to a wedding. If authorities find proof that this is the case, the residence title that has been issued will be repealed, as no permanent marital partnership has been established and, consequently, the relationship is not protected by Article 6, paragraph 1, Basic Law (*GG*). It is as such not a criminal offence to enter into a fictitious marriage, but it is illegal to apply for a permanent residence title on the basis of a fictitious marriage (§ 95, paragraph 2, Residence Act – *AufenthG*).

Another way of obtaining legal residence status is to accept – before a notary public – parenthood for a child born out of wedlock. The most common case is that a German man accepts paternity of a child born to a non-German woman without legal residence status. Conversely, a non-German man can also recognise paternity of a child born to a German woman. In addition to accepting parenthood, applicants are obliged to accept personal custody of the child. For a non-German parent who is under a legal obligation to leave the country, the acceptance of parenthood and custody of a child creates the legal basis for being granted legal residence status (§ 28 paragraph 1 No. 3, Residence Act – *AufenthG* in combination with § 4, paragraph 1, Nationality Act – *Staatsangehörigkeitsgesetz*). In contrast to the previous regulations in the Foreigners Act (§ 8 paragraph 1, No. 1, Foreigners Act – *AuslG*), illegal entry without a visa is no longer a legal obstacle in these cases. In this respect, the new Residence Act is therefore less restrictive than the old Foreigners Act. As the

33. See decision by Higher Regional Court (*Kammergericht*) Berlin of 27 March 2001 (Ref. I VA 36/99) in *Neue Juristische Wochenschrift-Rechtsprechungsreport* (NJW-RR) 2001, p. 1373ff.
34. A registered life partnership has the same legal effect in granting a residence title. The regulations of the Residence Act (*AufenthG*) apply accordingly (§ 27 paragraph 2).
35. The ex-post legalisation of illegal entry is not mandatory, however, pursuant to § 5 paragraph 2 Residence Act (*AufenthG*).
36. A toleration certificate might be applicable if other family members were already resident and if the applicant were granted additional time to fulfil the requirements.

main legal issue here is personal custody, it is also legally irrelevant if the father is the biological or social parent. A legal violation would only occur if the alleged parent-child relationship in a family did not exist in reality. Up to now, there are no data available on whether these regulations have been taken advantage of to a large extent in order to obtain legal residence status, which would be a criminal offence pursuant to § 95, paragraph 2, Residence Act (*AufenthG*). Efforts by the German Conference of the Ministers of Interior to shed light on these issues have so far been unsuccessful.[37]

The new Residence Act (*AufenthG*) has created the possibility of granting a limited residence permit for urgent humanitarian or personal reasons or in cases where a considerable public interest exists (§ 25, paragraph 4, Residence Act – *AufenthG*). In principle, these grounds could also be recognised under the previous law (§ 55, paragraph 3, Foreigners Act – *AuslG*), but it only has been a toleration certificate that was granted with reference to these regulations. Furthermore, the group of people potentially profiting from these regulations has been extended. Previously, foreign nationals could submit such a petition only if an unappealable decision on their residency had not yet been reached.

The new Residence Act has also created the possibility for state governments to set up hardship commissions (§ 23a, Residence Act – *AufenthG*). In cases of severe hardship, these commissions can make a recommendation to state authorities to grant a residence permit, provided that all other legal options have already been exhausted.[38] State authorities are not bound by such a recommendation, because granting a residence title is in this case a discretionary decision which legally constitutes a reprieve. The foreign national concerned can therefore not submit such a petition directly to state authorities or appeal against their eventual decision.[39] Under current law, foreign nationals who have committed severe criminal offences are excluded from the hardship regulations, but these offences do not include illegal entry or residence pursuant to § 95, paragraph 1, Residence Act (*AufenthG*). It is up to the federal states to decide on the composition of hardship commissions. Most federal states have set up such commissions[40] and decided on procedure. According to state

37. Report of the meeting of Working Group I of the Conference of State Interior Ministers in Husum on 7/8 October 2004 on the issue of obtaining a residence title or German citizenship through parenthood.

38. These regulations, including ensuing state regulations, will be in force for a limited period of time only, i.e. until 31 December 2009 (§ 15 Abs. 4 Immigration Act – *ZuwG*).

39. The Federal Government Commissioner on Migration, Refugees and Integration has expressed a differing view on this issue (2005, C III.2.3).

40. The states of Lower Saxony, Hamburg and Hesse have commissioned the petition committees in their state parliaments to adopt this responsibility. In the states of Bremen, Bavaria, Saxony and Mecklenburg–Western Pomerania, a final decision has not yet been reached.

regulations,[41] an executable order to leave the country is one of the preconditions for reviewing a case, but many states do also accept the existence of a toleration certificate. Foreign nationals are barred from submitting a petition to hardship commissions if they are to be expelled for one of the reasons listed in §§ 53 to 55, Residence Act (*AufenthG*) or if a deportation order has been issued in accordance with §58a, Residence Act (*AufenthG*). The same applies to cases of illegal residence, which is either stated explicitly in state regulations,[42] or results from the condition that petitioners must not be sought by the police or that a legal trial on the question of whether an expulsion order is executable is pending.[43]

In the literature, the question of whether the legal option of a reprieve is possibly unconstitutional continues to be contentious. The reservations expressed by some legal experts concern the relationship between the hardship commissions and the parliamentary petition committees, a possible violation of the principle of constitutional definiteness, and the exclusion of due legal process.[44]

In spite of differing views, being granted a suspension of deportation (a *Duldung* or toleration certificate) does not legalise the residence of foreign nationals, as it legally only constitutes a temporary suspension of their repatriation or deportation (§ 60a, Residence Act – *AufenthG*). A toleration certificate is issued if there are obstacles to deporting foreign nationals to their country of origin (pregnancy, illness or injury). However, their residence and employment status continue to be insecure, because their residence in Germany continues to be illegal and has been only temporarily exempted from sanctions.[45] In the medium term, a toleration certificate can only be converted into a residence title if a suspension of more than six months has been granted and if state authorities have decided to grant temporary residence title to foreign nationals who are members of a certain group or nationals of a certain country (§ 23 paragraph, 1 Residence Act – *AufenthG*). If in other cases the obstacles to leaving the country still persist after six months, either for legal or factual reasons, it is possible, after deportation procedures have repeatedly been suspended for a total of at least eighteen months, to be granted a limited residence permit for humanitarian reasons (§ 25, paragraph 5, Residence Act – *AufenthG*). However, if foreign nationals themselves are, at least partly, responsible for the deportation obstacles (e.g. because they have destroyed their identification documents),

41. Schwantner (2005).

42. For example, in Schleswig-Holstein: "[…] has resided on the territory of the Federal Republic of Germany illegally not only for a short term (more than 3 months) in the past". See also principles of proceedings of the hardship commission at the Ministry of the Interior, Schleswig-Holstein, on line at: http://landesregierung.schleswig-holstein.de.

43. Storr et al. (2005), § 23a, *AufenthG* – marginal notes 12 and 14.

44. Schönenbroicher (2004); with more reservations, Storr et al. (2005), § 23a, *AufenthG*, marginal notes 18-21.

45. Storr et al. (2005), § 60a, *AufenthG*, marginal note 3.

they are barred from this possibility. According to explanatory statements accompanying the new law, the obstacles to leaving the country, mentioned in the law, are to be congruent as far as possible with the obstacles to deportation. Practical experience has shown that some local foreign-resident authorities, in the first months of 2005, were employing differing interpretations of obstacles to leaving the country and obstacles to deportation. There are differing views on whether these practices of implementing the new Residence Act (*AufenthG*) undermine the intention of legislators in this point.

1.4. Possible root causes of irregular migration and why people choose it

The German system of migration control includes external controls (e.g. the visa system and external border controls) as well as a system of internal controls by means of residence and work permits. This is complemented by control mechanisms that work via data exchange, checks at the workplace, close co-operation between authorities and their obligation to forward information. Germany's central location in Europe means that all borders are affected by illegal entry and smuggling operations. In recent years, most arrests took place on the borders with Poland, the Czech Republic and Austria.

Concerning border controls and checks inland, the control technology has been gradually improved and more personnel have been assigned. Controls that include identity checks and residence status are carried out by the Federal Border Police (since July 2005, the Federal Police – *BP*) and the police of the federal states. Evaluating whether these checks are effective, as measured by their objectives, is not easy. As a consequence of the stepped-up controls, the number of arrests dropped. However, the increased intensity of checks might also result in an expansion of the smuggling business and increased propensity to violence by the smugglers.

Networking of the authorities concerned with illegal migration (Federal Police – *BP*, Federal Office of Criminal Investigation – *Bundeskriminalamt* (*BKA*), Federal Office for Migration and Refugees – *BAMF*, Federal Intelligence Service – *Bundesnachrichtendienst* (*BND*), Department for Financial Control of Illegal Employment at the Federal Customs Administration, police of the federal states etc.) has been extended. In various fora (e.g. Joint Analysis and Strategy Centre Smuggling Criminality; Working Group on Illegal Migration and Smuggling Criminality) the information gained by the authorities is pooled and, based on this general view of the facts, specific needs for action are identified. Various authorities co-operate in their operations, and the pooling of information is complemented by national and European information systems. Germany has concluded bi- and multilateral agreements on the co-operation of police and border control authorities with neighbouring countries. As part of the strategy to displace border controls into the countries of origin or transit, liaison officers

of various authorities and document counsellors are dispatched to countries of origin or transit.

As part of controls inland, the police carry out identity checks without specific cause or grounds for suspicion, which in some circles are a controversial topic in the discourse on migration, criminality and national security, because there is a danger that they might be seen as discriminatory treatment. Apart from these police checks, other internal controls in Germany typically target the labour market and social benefits. Virtually every time a migrant gets in touch with the authorities, his or her residence status is checked. Among internal controls, we can differentiate direct and targeted checks, such as checks at the workplace, and indirect checks; the latter "coincidentally" occur as a result of the obligation to forward information and the process of data verification. Controls on the labour market comprise a combination of both types, whereas other areas (welfare benefits, education and the obligation to register) are primarily screened via indirect controls.

With regard to labour market controls, data exchange with the social insurance agencies and the Central Register of Foreign Nationals (*AZR*) and the external controls at workplaces in co-operation with the authorities play a central role. As a consequence of plausibility checks as part of data exchange, a registered employment with fraud social security card or counterfeited income tax card is not possible. Since 2004/05 the efficiency of checks at the workplace (external controls) has been increased as a result of the pooling of competences at the Federal Customs Administration (Department for Financial Control of Illegal Employment). There is now less organisational fragmentation as a result of the new Residence Act (*AufenthG*), which became effective on 1 January 2005 and introduced the system of "one-stop government" at the foreign-resident authorities. Apart from issuing residence titles, the foreign-resident authorities are now also in charge of issuing work permits. As a consequence of the relatively large number of checks, as well as intensive co-operation and data-technological links, the intensity of checks on the German labour market is high, compared to other industrial states. In different sectors, though, the intensity of controls varies.

Measures to reduce the demand for illegal employment primarily tackle the problem by tightening controls and increasing the penalties for the respective offences. In addition, the requirements for access to the labour market have changed, which have opened up opportunities for temporary legal employment and caused a decline in illegal employment.

The internal controls based on the requirement to forward information (§ 87, Residence Act – *AufenthG*) are mainly effective if social services are claimed (e.g. in health care and education). The authorities have to report to the foreign-resident authorities if they come to know about a person lacking status or if the foreign-resident authorities request a report. In public discourse, these obligations to forward information are criticised by churches, charitable

organisations and aid organisations. For certain social services, a right to claim exists that can also be used by illegally resident third-country nationals, but this involves disclosure of their residence status.

As part of the repatriation support programme REAG (Reintegration and Emigration Programme for Asylum-Seekers in Germany), which was commissioned by the Federal Ministry of the Interior and the respective state ministries and which is carried out by IOM, illegally resident persons and victims of human smuggling have the possibility to claim funds. At the same time the Federal Government ensures that the federal states comply with their obligation to enforce the duty to leave the country. In order to facilitate the implementation of deportations, the Federal Government co-ordinates its repatriation policy with the countries of origin and concludes agreements with them. In addition, various measures are carried out to counteract problems with repatriation procedures.

Unlike south European countries, Germany does not carry out legalisation campaigns. The regulations for old cases and permission to stay (*Altfall-und Bleiberechtsregelungen*) that were carried out in the past differ from those campaigns as they were restricted to certain nationalities and the applicants had to have toleration status – and were therefore known to the authorities.

Regarding the access to social services and health care, the risks for the providers of such services result from the complicated interrelation of the state's right of sovereignty, the human right to health, life and physical integrity, and the question of how to distribute the costs for the administered treatment.[46] Here, the impact of the authorities' obligation to forward information and the potential punishability of assistance can be seen. The obligation to forward information is particularly relevant in cases where the social welfare office covers the costs, because this has to be reported without exception of any kind. Pursuant to the Residence Act (§ *96*, *AufenthG*), rendering assistance can in some cases be considered as an element of an offence, since it supports illegal stay. Regarding access to the education system, the same problems apply, whereas it is controversially discussed as to whether public schools are subject to the obligation to forward information.

In some towns and districts there are indications that the authorities have become sensitised to the social problems of illegality and they now try to exhaust the scope of available options, especially in health care. The authorities' willingness to help is a qualitatively new step.

The impact of controls on the social situation of illegally resident migrants becomes apparent on two levels. On one level, because they fear that police checks or contacts with the authorities will result in disclosure of their status and the consequent enforcement of the foreign-resident law, illegally resident

46. Kluth and Cernota (2006), pp. 12-21.

migrants usually try not to attract attention. To what extent the fear of disclosure influences the life of illegally resident migrants depends on the background of the migrants, the situation in their country of origin and its distance from Germany. On a second level, internal controls have an impact on their access to social resources, which is actually very restricted, despite them having some legitimate claims. For that reason, illegally resident migrants are at more risk of finding themselves in an emergency situation, so that their social networks play an important support role; but they can compensate the lack of access to education, housing and social services only to a limited extent.

Networks of relations contribute to the emergence and persistence of illegal stay, for instance in illegal family reunions. The situation is particularly difficult in cases of illegal stay with children. Irrespective of the legal situation on the compulsory school attendance of illegally resident children, which differs from one federal state to another, there are indications that the problems of schooling and education for illegally resident children get worse as those children get older. Even if attendance at a primary school is possible, the transition to secondary school is almost impossible because school registration requires disclosure of the child's residence status. Their working and living conditions, with insecure residence status, mean that illegally resident migrants may be faced with health risks. Because they lack health insurance, many illegally resident migrants do not undergo preventative medical examinations. For fear of disclosure, illegally resident migrants make little use of public health care. In the long run, alternative options (e.g. self-treatment, commuting to the country of origin or approaching the bureau of a medical refugee aid or other civil-society network) cannot compensate for this. As a result, there is a danger that diseases and injuries are neglected and get worse, or are treated too late, which can constitute a risk for the persons in question, but also for the general public.

As illegally resident migrants usually cannot appear as the main tenant, they have to rely on niches in the housing market. In doing so, they are very much exposed to landlords who act arbitrarily, since they cannot take legal action in cases of disputed tenancy without disclosing their legal status. There are virtually no opportunities for illegally resident migrants for political participation in Germany as this involves the risk that their status will be disclosed. No protest movement, such as the *sans papiers* in France, has developed. Among the few exceptions are migrant organisations that act as a lobby for the rights of illegally resident migrants at local level. Churches and non-governmental organisations highlight the problems that are connected with illegal stay in Germany, and their calls to improve the living situation of illegally resident migrants and avoid hardship are directed to policy-makers. Although the topics of criminality and illegal stay are closely connected in public discourse, indicators based on the investigated suspects registered in the Police Crime Statistics show that illegally resident migrants have lower crime rates than Germans. On actual criminality, though, there are no reliable figures available (such as convictions).

As illegally resident migrants cannot take up legal employment in Germany, many earn their living in the shadow economy. On the scope of illegal employment, the affected branches of the economy, and the distribution and size of the companies that employ illegally resident migrants, no precise information is available. Findings from qualitative-empirical studies show that there is access to the labour market in the commercial and private sectors (e.g. in domestic service or domestic nursing). Typical features of these jobs are precarious employment conditions, including a low level of qualification, physical work combined with little need to know the German language, temporal limitation or seasonal employment, and high turnover of employees. There is a wide range of employment conditions, including relatively stable working relationships, with satisfied employers and employees and mutually beneficial working conditions, but also forms of coercion and forced labour.

Illegal employment of foreigners causes loss of tax and social security revenues, and harms the community because they do not pay the cost of using social services, benefits (e.g. welfare benefits), public infrastructure (particularly in education, health care, housing and traffic) and public services (e.g. security and public order, the legal system); nor does illegal employment generate direct taxes, social security contributions for social pension funds, health insurance, nursing care insurance or unemployment insurance. It is a matter of controversy whether the costs of checks and controls by the authorities should also be included in the calculation of the fiscal impacts of illegal migration. On the other hand, illegally resident migrants pay indirect taxes, such as general excise taxes, VAT and specific excise taxes (e.g. eco-, petroleum, tobacco and alcohol taxes) by consuming goods and services. This helps to reduce fiscal losses for the public budget. Beyond estimates, the exact amount cannot be ascertained, though. There is hardly any empirical evidence in Germany on the more far-reaching impacts of illegal employment of foreigners, especially on jobs, working conditions and wages of the non-migrant labour force, as well as on sectoral structural change and economic growth.

2. German legislation on social rights of irregular migrants

2.1. Main objectives and components

2.1.1. Access to public health care[47]

It has been found that the supposed harmful connections between migration, health and disease are mostly imaginary; but the risk constellations associated with the current living situation of migrants in the receiving country are very real. For illegally resident migrants, there are risks to health in their working

47. Ibid.

and living conditions, and their insecure perspective of residence. The employment situation of illegally resident migrants is characterised by a high degree of adaptability in the type of employment and working hours, and the work may be physically demanding or dangerous, since occupational health and safety regulations usually cannot be enforced. Anderson (2003) report cases of illegally resident migrants who continued to work despite being sick, because they feared losing their job; as a result, diseases were neglected and got worse. In addition, housing conditions are often crowded, resulting in few recreational possibilities and hardly any privacy. Health risks also result from the pressure of not attracting attention in public and the requirement to blend in to avoid being checked. The mental strain connected with this may lead to psychosomatic disorders. Even though illegally resident migrants are mostly younger and therefore healthier persons of working age, their illegal stay is connected with a higher risk of disease, for the reasons mentioned above. To make matters worse, the lack of health insurance cover among illegally resident migrants in many cases entails neglect of preventive medical examinations.

Worried that their lack of residence title may be disclosed, illegally resident migrants prefer certain specific options in case of disease or emergency. For less serious ailments, they try to treat them themselves or apply traditional methods of treatment. In some cases, they manage to organise medical treatment by a doctor who speaks their mother tongue via their personal network. Another option is to "borrow" the health insurance card of a legally resident acquaintance. For migrants who regularly commute between their country of origin and the receiving country, and who are covered by health insurance in their country of origin, the situation in case of illness is less dramatic because they can receive in-patient or out-patient medical treatment in their country of origin. In contrast, illegally resident migrants who come from more distant countries, and have no contacts among medical professionals via their network, have to rely on assistance from aid organisations.[48]

Medical care for more than 90% of the population in Germany is organised via the public health care system. For that reason, there are hardly any alternative structures or institutions that might provide medical treatment to illegally resident migrants and other persons without health insurance. One exception is the bureaus of medical refugee aid that are found in many cities. These were established after the Asylum Seekers Benefits Act (*Asylbewerberle istungsgesetz – AsylbLG*) came into effect in 1993, stipulating limited entitlement to medical treatment for asylum seekers and refugees. Apart from this target group, the services provided by the bureaus also address other persons without health insurance. As part of this service, the bureaus refer migrants to doctors

48. Alscher et al. (2001), p. 36, report that often illegally resident migrants are not informed about offers by non-governmental organisations that are addressed to illegally resident migrants or that in many cases the offered assistance is not taken up for fear of detection or deportation.

and hospitals that are willing to treat them inexpensively or free of charge. One example of such a network run by a church body is the Malteser Migranten Medizin of the Malteser Hilfsdienst e.V. in Berlin and Cologne, which was founded in February 2001.[49] The above-mentioned initiatives have the aim not only to offer "substitute medicine" to illegally resident migrants, but also to provide adequate treatment for the affected persons by involving a network of participating doctors (Müller 2004, p. 70).

According to Gavranidou and Lindert (2003, p. 146), these are ultimately temporary solutions which cannot compensate for the lack of access to the public health care system on a continuing basis. The capacities of non-governmental networks reach their limits if, for example, cost-intensive dental treatments, further treatments by medical experts or in-patient treatments are required – which might be necessary in case of infections, chronic or psychic diseases. As a consequence, there is the danger that diseases and injuries are treated too late, which results in a risk for the victims as well as for the general public, especially if contagious diseases are spread. Churches and charitable organisations therefore consider that ensuring minimum social standards for illegally resident migrants and searching for solutions for their medical treatment are urgent tasks for policy-makers.[50]

2.1.2. School attendance[51]

Because there are different opinions on whether schools have an obligation to forward information, any decision to admit illegally resident children is left to the individual school in many cases. The individual school decides to what extent it considers the obligation to forward information relevant and whether it accepts the risk of being found guilty of abetting. Another problem that arises for schools that are willing to admit such children is the question of insurance cover for illegally resident children, responsibility in cases of accident and the unsettled issue of who covers the costs for teaching material and extracurricular activities.

There are indications that the problem of schooling and education for illegally resident children gets worse when those children get older. Whereas education and childcare at preschool age can usually be organised by finding a place in a (private) kindergarten or within the personal network, parents with children who have reached school age are confronted with the question whether they risk enrolment at a public school or, where sufficient financial resources are available, they enrol the child at a private school. In most cases children stay at home, where some private tuition can be organised. Illegally resident pupils are also faced with the question of documenting their school performance;

49. Malteser Hilfsdienst e.V. (2004).
50. Deutsche Bischofskonferenz (2001), p. 51 ff.
51. Kluth and Cernota (2006), pp.23-31.

for example, even if they are allowed to attend school, no leaving certificate can be issued. This has a negative impact on the child's future school career.

2.1.3 Employment of illegally resident migrants[52]

Even though the derivation of any wage entitlement is a matter of dispute between the academic literature and the courts, it is generally agreed that such a wage entitlement for work actually done exists.

According to the prevailing view, wage entitlement ensues from § 611, German Civil Code (*BGB*).[53] The absence of a residence permit does not affect the validity of the contract of employment. In particular, the contract of employment is not void according to § 134, German Civil Code (*BGB*); and § 4, paragraph 3, sentence 1, Residence Act (*AufenthG*, Gainful Employment and Integration of Foreign Persons in the Territory of the Federal Republic of Germany) does not prohibit the signing of contracts of employment under civil law, but rather prohibits employment under public law.[54] An infringement of § 134, German Civil Code (*BGB*) and, thus, the invalidity of the contract of deployment is assumed, if a prohibited employment is apparently and knowingly the subject matter of the contract of deployment. An employment is considered to be prohibited if an employment permit is not applied for, shall not be applied for or has already expired.[55] If the contract of employment is invalid according to § 134, German Civil Code (*BGB*), the wage entitlement derives from the Labour Law's legal construction of the de facto contract of employment (*Faktischer Arbeitsvertrag*). According to this construction, invalidity of the contract of employment cannot be claimed retrospectively, but has an effect only for the future. Hence, as long as the invalidity of the contract of employment is not claimed, the contract of employment still exists, but it is fraught with a severe defect. Nonetheless, this contract of employment exists de facto and thus is legally acknowledged.[56]

Obstacles to enforcing wage entitlement derive more from practical considerations than from legal ones. In particular, the regulations on the capacity to be a party to legal proceedings and the capacity to conduct proceedings in one's own name (§ 46, paragraph 2, sentence 1, Labour Court Law – *Arbeitsgerichtsgesetz* (*ArbGG*); § 51, paragraph 1, sentence 1, 1st alternative, Code of Civil Procedure – *Zivilprozessordnung* (*ZPO*)) do not take citizenship or status of residence into account. Under § 2, paragraph 1, No. 3a,

52. Ibid., pp. 33-40.
53. See § 19 paragraph 1, *Arbeitsförderungsgesetz* (*AFG*).
54. See Bundesarbeitsgericht (BAG) in Entscheidungen zum Arbeitsrecht (EZAR) 322 Nr. 3; Entscheidungen des Bundesarbeitsgerichts (BAGE) 29, 1; see also AG Hamburg, in *Arbeit im Betrieb* 1992, 455.
55. Renner, Ausländerrecht, § 4 marginal note 135, Entscheidungen des Bundesarbeitsgericht (BAGE) 22, 22.
56. See McHardy, in *Recht der Arbeit* 47 (1994), pp. 93, 98 m.w.N.

Labour Court Law (*ArbGG*) the competent courts in this matter are the Labour Courts.

In general, legal aid can be granted even to illegally resident persons, since the provisions relevant for the granting of legal aid for Labour Court proceedings (§ 11a, paragraph 3, Labour Court Law – *ArbGG*, § 114 Code of Civil Procedure – *ZPO*) do not distinguish the applicant's citizenship or status of residence. Thus, foreign persons are treated like German nationals.

With regard to the substantive law, the German legal system provides for illegally resident persons to gain access to medical and social services in compliance with standards of human rights. Over school attendance it can be stated that the federal government has no legislative power: it is the *Länder* governments that are competent to regulate this field of law.

2.1.4. Internal controls by the obligation to inform[57]

This type of check is another central element in the German control systems for the detection of illegally resident foreigners. Quintessentially, these checks are a side-effect of the normal cross-checks in general administrative proceedings; they have been adjusted for the purpose of internal controls. The system is primarily based on the instruction to forward information, which is anchored in § 87, Residence Act (*AufenthG*, formerly § 76, Foreigners Act – *AuslG*). Pursuant to this paragraph, (only) public authorities are obliged to advise the foreign-resident authorities, on request, of relevant information (in accordance with § 86, paragraph 1, Residence Act – *AufenthG*), such as actual or usual residence (§ 87, paragraph 1, Residence Act – *AufenthG*). However, if the authorities come to know about a foreigner staying in the country who is not in the possession of the required residence title and whose repatriation has been temporarily suspended (toleration certificate), they are obliged to inform the responsible foreign-resident authorities immediately (§ 87, paragraph 2, Residence Act – *AufenthG*). This information can also be reported to the police, who in turn inform the foreign-resident authorities. Pursuant to the general administration guidelines on the Foreigners Act (No. 76.2.1.1), the responsible authorities are – apart from the police – schools, universities, labour offices, and youth and social welfare offices. As a consequence, illegally resident migrants can assume that their illegal stay may be detected as soon as they get in touch with public authorities and that this might result in detention or repatriation. This is particularly relevant when the migrants apply for welfare benefits, access the educational system or enter the housing market.

In this area, the obligation to forward information is a key element for claiming benefits in the public health care system. If they cannot bear the costs of treatment in hospital, illegally resident foreigners are entitled to a refund of

57. Kluth and Cernota (2006), pp. 35-65.

expenses by public health care pursuant to the Asylum Seekers Benefits Act (*AsylbLG*) (§ 4 in connection with § 1, paragraph 1, Nos. 5 and 6 Asylum Seekers Benefits Act – *AsylbLG*). In such cases, an application for refund of expenses is submitted at the social welfare office in advance. In cases that require immediate treatment, the application can be submitted subsequently. According to the legal expertise by Fodor,[58] the administrative departments of (public) hospitals have only a restricted obligation to forward information, as enquiries about the residence status of their patients are not necessary in order to "perform their tasks" (§ 86, paragraph 1, Residence Act – *AufenthG*). Social welfare offices are obliged to identify residence status and forward the result to the foreign-resident authorities.

The underlying objectives of this type of internal control are, on the one hand, the exclusion of illegally resident migrants from welfare benefits, because they have not paid contributions in the system of a mutually supportive society. On the other hand, the aim is to detect the individual and repatriate him or her.[59] As there is a lack of information that could be used as evidence, it remains unclear whether this actual refusal of access to welfare benefits has a deterrent impact on illegally resident migrants.

Some federal states, such as Bavaria, require compulsory school attendance for children without secure residence status, whereas other federal states exclude them in their school laws and leave it to schools whether to admit them. Should these children be registered at a public school, the control mechanism pursuant to § 87, paragraph 2, Residence Act (*AufenthG*) is applied. If, during the registration process, schools or supervisory school authorities come to know about the lack of residence status, they are obliged to report this to the foreign-resident authorities. Some federal states (e.g. Berlin) explicitly state that the obligation to forward information only applies to those who decide upon the school admission. Should, for example, a teacher come to know about the illegal residence status later, he or she is not obliged to report the child. Referring to this, however, one legal opinion argues that heads of schools also exercise an "educational-pedagogical" profession and therefore enquiries about residence status are not necessary to perform their tasks. They would only come to know about illegal residence as part of the execution of their tasks, which does not constitute sufficient grounds for the obligation to forward information.

2.1.5. Controls on the labour market

In principle, illegal employment and the shadow economy are deemed harmful to the social system, as they destroy jobs and cause revenue losses for the social security funds. All participating stakeholders (employers, principals,

58. Fodor (2001), pp. 173-8.
59. Stobbe (2004), p. 116.

employees, service providers, craftsmen and customers) are regarded as criminal offenders, threatened by sanctions.[60] The federal government and bargaining parties consider illegal employment of foreigners a considerable burden for the German labour market, because it is believed that as a result German employees lose their jobs because of 'dumping' wages and companies are disadvantaged in competition. In accordance with §§ 284ff., German Social Code (*SGB III*), employment is considered illegal if no work permit has been obtained before commencing employment. Consequently, illegal employment of foreigners does not only affect illegally resident foreigners, but also those with a legal residence status. At the same time, visa-free residence becomes illegal when illegal employment is taken up.

Checks on the labour market are carried out at several levels, with data exchange as the overarching element. A quasi-legal employment, such as in the United States, is not possible in Germany, because the employer must ask for the social security card and income tax card before hiring a person. If the person cannot provide a social security card, the employer may apply for it. It is issued by the insurance company, without enquiries at the foreign-resident authorities. A forged social security number (or that of another employed person) would attract attention in the data verification process carried out by the health insurance company. In such a case, the health insurance company would inform the local office of the Federal Labour Agency (*Bundesagentur für Arbeit*), which, in turn, would approach the employer. The income tax card is issued by the local registry office, which gets in touch with the foreign-resident authorities beforehand in order to enquire whether (according to the Central Register of Foreign Nationals – *AZR*) the appropriate residence title with work permit has been obtained. As a consequence, registered employment by an illegally resident foreigner is not possible in Germany. This means that illegal employment by migrants can only be detected by doing checks at workplaces. It should be pointed out that these checks do not only address illegally employed persons, but are also applied, to a large extent, in order to trace their employers.

Checks at workplaces – also called external controls – have been carried out by labour offices and the head offices of the customs administration for a long time. In densely populated areas, the labour offices have formed special task force groups, which since 2000 have again been re-integrated into the normal labour administration. Since 2004, the Federal Customs Administration, under the auspices of the Department for Financial Control of Illegal Employment at the regional finance office in Cologne, has exclusive responsibility for this task, though supported by other authorities. Both offices, as well as the assisting authorities, had and have the right to enter business premises and business buildings of employers during office hours, in order to check the files on wages, registration and comparable documents. If employees are contracted by a third

60. Cyrus (2004), p. *67.*

party, the authorities are authorised to carry out checks there, too. They are also authorised to check the particulars of employed persons (to date, § 305, German Social Code – *SGB III*; for the customs from now on, §§ 3, 4, Act on Intensifying the Fight against Illegal Employment and Ensuing Tax Evasion – *SchwarzArbG* 2004). Since 1998, officers of the head offices of the customs administration have the same rights and duties as police officers, if they find reason to suspect an offence or misdemeanour in their investigation. This facilitates proceedings; previously, the labour inspectors had to call upon the police, if necessary, while their checks were ongoing and certain suspicious facts emerged.

External controls like this are triggered as a result of their own investigations by the labour offices and the head offices of the customs administration, by findings of other authorities (police, finance administration, social insurance agencies, public prosecutors, foreign-resident authorities etc.), or on the basis of leads reported by the public (competitors, neighbours, trade unions, regular employees). If the illegal status of an employee cannot be ascertained on the basis of document checks as part of the external control, it can be determined afterwards by verifying the data with the Central Register of Foreign Nationals (§ 18, Act on the Central Register of Foreign Nationals – *AZRG*). For foreign employees who are in possession of a work permit (e.g. in the case of illegal temporary work or contract workers), the data are verified by comparing the actual salary paid by the companies with the social insurance contributions reported to the social insurance agencies. If illegal foreign employees use forged EU passports though, the identification process gets more difficult, as the Central Register of Foreign Nationals (*AZR*) does not contain information on work permits for EU citizens from the 15 old member states. Assuming that the employee is an asylum seeker, more information can be obtained by verifying and comparing the data with the fingerprint file AFIS at the Federal Office of Criminal Investigation (*BKA*). In other cases, one has to resort to an extensive document analysis or a time-intensive inquiry in the relevant EU member state.

A central control and investigation database is located at the Department for Financial Control of Illegal Employment (§ 16, Act on Intensifyinbg the Fight against Illegal Employment and Ensuing Tax Evasion – *SchwarzArbG* 2004). Data exchange and the obligation of co-operation between authorities are the central elements of the German system in counteracting illegal employment. The system is characterised by fragmentation and organisational decentralisation (as a consequence of German federalism) on the one hand, and co-operation and central databases as important features on the other hand. With fragmentation, the organisational structure is depicted; in this structure, many public competences were delegated to different intermediary organisations (e.g. social insurance agencies, Federal Labour Agency – *Bundesagentur für Arbeit* etc.). The databases (local registries of foreigners, Central Register of Foreign Nationals – *AZR*, AFIS, statistics on employees etc.) were developed

in order to compensate for the consequences of decentralisation and fragmentation. By pooling the tasks at the Federal Customs Administration office and by introducing the "one-stop government" system at the foreign-resident authorities pursuant to the Immigration Act, this decentralisation has been reduced significantly.

Owing to the relatively large number of checks, the intensive co-operation and data interconnection, the frequency and intensity of checks on the German labour market can be regarded as high, in comparison to other industrial countries. However, this does not apply to all sectors. Unlike building sites, which are a focal point of controls due to their visibility, private households are rarely checked, though a considerable number of illegal employees works there. There are several reasons for this:

- the protection of private living space, which is guaranteed by the constitution;
- the low efficiency of checks because, according to the inspection officers, only very few illegal employees can be detected in one search;
- providing evidence is complicated as to whether there is indeed an irregular employment situation or whether it is "neighbourly help";
- the low visibility of a job behind closed doors.

Some authors argue that the fight against illegal employment has not always been totally consistent. In certain conurbations, for example during the expansion of the capital Berlin in the 1990s, illegal employment has been tacitly approved. There has been no systematic research yet as to whether the administrative organisational structures did impact on the efficiency, and whether the means available are in due proportion to the results.

2.2. Implementation and change of policy

In a historical perspective, it becomes obvious that policy approaches to illegality have changed in recent decades. At the time of the so-called guest-worker migrations, the approach to illegal entry was, though not positive, certainly pragmatic and mainly focused on economic interests. With respect to human smuggling, attitudes seem to have changed completely, with human smuggling being valued as something positive during the East–West conflict. For example, it was legally possible at that time to sue for agreed smuggling fees. It was only in the late 1990s that human smuggling was included in German criminal law.

In contrast to south European countries, which responded to illegal immigration by implementing legalisation programmes, Germany imposed restrictions on asylum law and family migration for non-German residents, as these two areas were regarded as the main source of illegal residence. It was only in the 1990s that public debate and policy began to change perspective on illegality. On

the one hand, measures were taken to compensate for the abolition of border checks at EU-internal borders under the Schengen Treaty of 1990. On the other hand, the "criminalised horror scenario of mafia-like criminal organisations smuggling countless migrants into Europe" began to take hold of the public imagination. In its 2001 report, the Independent Migration Commission focused on the issue of illegality and this fuelled public debate. In the aftermath of the terrorist attacks on New York on 11 September 2001, the perspective shifted even further towards security and crime-prevention issues. In the public debate, there was a tendency to link the issues of terrorism risks and illegal migration. As a consequence, measures against terror suspects were complemented by countermeasures against illegal immigrants and human smugglers or traffickers.

In the public debate on the issue of illegality in Germany, which has only started to develop in recent years, one can distinguish certain key positions: first, an administrative or state-control approach, which has been adopted by the Federal Ministry of the Interior and the state interior ministries; and second, a human-rights approach, which has been adopted by civil-society actors (churches, charitable organisations, refugee support groups).

In the state-control perspective, illegal immigration is, above all, a violation of applicable law. This position also implies that illegal residence poses a threat to public order and security. Proponents of this position argue that there is a link to the rising crime rates faced by society as a whole, a trend which is inevitably fuelled by the actions of human smugglers and illegal migrants. This position emphasises further negative effects on society (e.g. tax evasion, non-payment of social-insurance contributions), which put additional pressure on public spending and state budgets. According to the Federal Ministry of the Interior, there is no alternative to preventing illegal entry and residence, as it is one of the main duties of the state to establish a consistent legal order that applies to all residents. Otherwise, the situation would deteriorate until illegal residence became a permanent occurrence, undermining public efforts to regulate migration. In this perspective, which has also been called a "threat perspective", the focus has to be on how to fight illegality in a way that is as effective and economical as possible.

The human-rights perspective, on the other hand, emphasises that illegally resident migrants cannot be made solely responsible for their situation. On the contrary, it is pointed out that demand and support by German society have contributed to the problem, too. It is argued that a consistent legal order can not realistically be achieved through state legislation alone, as other areas of social reality are also marked by inconsistencies; in addition, there have always been collisions between different legal interests, making it inevitable in legal practice to take discretionary decisions. As for illegal immigration, these conflicting interests regularly occur, because human rights such as health, education and protection against exploitation are concerned. In

consequence, it is seen as the duty of the state to strike a balance between establishing a consistent legal order and guaranteeing just and fair treatment in individual cases. In a more direct manner, this approach has also been called the "victim perspective", the main political aim being to help "illegalised" refugees to achieve a long-term perspective for their lives.

An intermediate position, trying to reconcile these seemingly irreconcilable difference, is the "dual perspective". In accordance with EU demands to complement state-control policies by approaches that take account of the rights of illegally resident migrants, their voluntary return and the use of regularisation programmes, several charitable organisations, churches and trade unions have presented similar proposals. Their main aim is to achieve "situational de-illegalisation" which works towards a "pragmatic solution of humanitarian and health problems or risks faced by foreign nationals that already live illegally in our country". Consequently, these groups have called on politicians to, among other things, abolish restrictions on family reunion, grant residence titles to tolerated refugees (pursuant to § 23, paragraph 3, Residence Act – *AufenthG*), implement hardship regulations, initiate voluntary return programmes for migrants who have "gone underground", protect victims who act as witnesses in court cases and establish minimum standards of social protection that are not undermined by the obligation to be registered by local authorities (pursuant to § 87, Residence Act – *AufenthG*).

3. Evaluation

3.1. Proposal for limited legalisation *(beschränkte Bleiberechtsregelung)*

3.1.1. Group of persons involved

The revision of the Immigration Act (*Zuwanderungsgesetz*) made it possible to resolve those situations where the right of residence has been unsettled so far. The practice of continually renewing exceptional leave to remain (*Kettenduldungen*) for certain groups has been abolished with the repeal of the former Immigration Law. Foreigners, for whom a deportation order could not be issued, according to § 60 paragraph 2, 3, 5, 7 of the former Immigration Law (*Zuwanderungsgesetz*), now have in general a right to a residence permit (*Aufenthaltserlaubnis*) according to § 25, paragraph 3, sentence 1 Residence Act *(AufenthG*). When the Minister of the Interior, Otto Schily, stated that the *Kettenduldungen* were to be abolished with the repeal of the former Immigration Act, he referred to this group of persons. Thus, the success of the new Immigration Act does not only derive from the residence permits issued in accordance with § 25, paragraph 5, Residence Act (*AufenthG*). Since 31 May 2006, when the new Immigration Law came into force, the competent Immigration Authorities have notified the Central Register of Foreign Nationals (*AZR*) of 41 560 residence permits issued according to § 25, paragraphs 3 and

5, Residence Act (*AufenthG*). But this figure cannot be considered complete, since by the transitional provision of § 20 of the Implementing Regulation for the Act of the Central Register of Foreign Nationals (*Durchführungsverordnung zum Ausländerzentralregistergesetz – AZRG-DV*) residence permits issued in 2005 have to be registered later on. Furthermore, advances in the protection of refugees have to be taken into account since persons who have up to now just been tolerated, due to the threat of non-governmental persecution in their home country, can now be issued with a residence permit.

In addition, § 23a Residence Act (*AufenthG*) contains a rule for cases of hardship (*Härtefallregelung*). According to this rule, the commission dealing with cases of hardship (*Härtefallkommission*) of a federal state requests the highest regional authority that is competent for the Immigration Law to decide on a case of hardship. If urgent humanitarian or personal reasons require, the highest regional authority can issue a legally protected right of residence to foreigners who actually have to leave the country.

In § 25, paragraph 5, Residence Act (*AufenthG*), it states that persons who actually have to leave the country can be granted a residence permit if their leaving is impossible due to legal or factual reasons and if the obstacles to leaving will not end within the foreseeable future. But this only applies if the foreigner did not hinder the leaving through his or her own fault. Such a fault can be presumed if the foreigner gave wrong information, deceived about his or her identity or nationality or did not try to eliminate the obstacles to his or her leaving even though it was within the bounds of what is reasonable.

In most cases the reason the residence permit according to § 25, paragraph 5, Residence Act (*AufenthG*) could not be issued was because the person affected either could leave the country voluntarily or the person had been hindered from leaving the country through his or her own fault.

During the legislative procedure it was agreed that, in future, persons should continue to be tolerated even if they are required to leave the country, if their deportation is impossible and they cannot be granted a residence permit, according to either § 25, paragraph 5, Residence Act (*AufenthG*) or the rule for cases of hardship, § 23a, Residence Act (*AufenthG*). It was also agreed that the repatriation of persons who try to evade their duty to leave the country should be strictly enforced.

During the exchange of experiences and existing practice, it was pointed out that people who cannot possibly benefit from any future rule of legalisation, because of their own behaviour, should be repatriated. But the problem may arise that those obstacles to leaving the country that are caused through their own fault also hinder the deportation of this person.

There has been discussion about setting up a rule for the legalisation of those persons who are required to leave the country, who cannot be granted a

residence permit according to the new Immigration Law, but who for some reason cannot be deported.

In recent years the Conference of Ministers of the Interior (*Innenministerkonferenz – IMK*) decided, in agreement with the Federal Ministry of the Interior, on the following rules of legalisation on the basis of § 32 Foreigners Act (*AuslG*) and § 23, paragraph 1, Residence Act (*AufenthG*):

- In November 1999 they decided to give legalisation to persons seeking asylum who had long-term residence (about 30 000 persons would benefit from this rule);
- In November 2000 and May 2001 they set up rules for persons suffering from a trauma coming from Bosnia-Herzegovina and those had been forced to leave Bosnia-Herzegovina or other parts of former Yugoslavia including Kosovo (about 32 000 persons would benefit from this rule);
- In June 2005 they set up a rule for the legalisation of Afghan citizens who had been forced to leave their country (so far about 950 persons benefited from this rule, but not all applications have yet been decided).

Recently the representatives of different interest groups and institutions have started to argue in favour of a rule for legalisation that is generally applicable to all foreigners who have been tolerated on a long-term basis. During the exchange of experiences and existing practice, several speakers argued in favour of a rule of legalisation for families who are economically and socially integrated, and have lived in Germany already for several years. But still reservations have been put forward against a rule of legalisation.

3.1.2. Arguments for a rule of legalisation

Even children and youths who were born and/or brought up in Germany, who know neither the language nor the country of their parents, have to leave the country if voluntary leaving of the country is possible or if their parents caused the obstacles to leaving the country through their own fault and they cannot be classified as cases of hardship. Such children – who have gone to school in Germany, who are socially integrated and can speak German well – should together with their parents have their prospects for residence in Germany made secure.

According to the wording of § 25, paragraph 5, Residence Act (*AufenthG*), it is the impossibility of leaving the country that is decisive rather than whether leaving the country is within or outside the bounds of what is reasonable. But leaving the country can be outside the bounds of what is reasonable, particularly for families whose life has been centred for several years in Germany, meaning that they have integrated into the economic, social and legal system of Germany. If they were to return to their home country, they would have to give up a

secure basis of their existence that they had established on their own. In these circumstances, their return to the "home country" is not within the bounds of what is reasonable. Thus, the persons affected should be given a secure right of residence.

3.1.3. Arguments against a rule of legalisation

A rule of legalisation that applied in an indiscriminate way to every foreigner who had been tolerated in Germany for several years would also privilege people who did not seek asylum as victims of political persecution but rather for economic reasons, as well as people who deliberately disregarded the legal system. To legalise the residence of these foreigners would be an unjustified discrimination against those foreigners who had complied with their duty to leave the country within the given period of time. Finally, this reward for infringing the law would undermine willingness to obey the law and create further incentives to violate the law.

It seems probable that other persons who were required to leave the country and who had lived in Germany only for a short time would not comply with their duty to leave the country, but try to prolong their residence in Germany in the hope of new regulations on legalisation. Also, a rule of legalisation that was generally applicable would not have the positive effect of making a clean break. Moreover, it would create the hope that new rules of legalisation might be enacted and, hence, would create incentives to migrate to Germany and so necessarily increase the illegal smuggling of immigrants. The pull of such rules of legalisation can be observed in several European countries.

Finally, existing economic problems and the situation of the German labour market should be taken into account as well, when discussing a generally applicable rule of legalisation. Considering those problems, public acceptance of such a general rule seems likely to be low.

3.1.4. Options for a rule of legalisation

If a rule of legalisation were created by a decision of the Conference of the Ministers of Interior (*IMK*), amendment of the Immigration Law would not be necessary. According to § 23, paragraph 1, Residence Act (*AufenthG*), a rule of legalisation can be set up by a decision of the Conference of the Ministers of Interior (*IMK*). There it is stated that the highest regional authorities competent for the Immigration Law can – for reasons of International Public Law, for humanitarian reasons or in order to defend the political interests of the Federal Republic of Germany – order that foreigners of certain home countries or foreigners classified according to other features may be granted a residence permit. In the past, rules of legalisation have been set up this way.

By this means, the pre-conditions for the legalisation and the time allowed for the application of the legalisation could be prescribed by the ministers and senators of the interior of all federal states in a standardised manner.

Since those decisions have to be taken unanimously and in agreement with the Federal Minister of the Interior, the same administrative procedure would apply uniformly throughout the Federal Republic.

It is also possible to include a transitional provision in the Residence Act (*AufenthG*). For example, the Foreigners Act (*AuslG*) of 1990 contained a transitional provision by which a residence permit could be issued after a stay in Germany of at least eight years if further preconditions had been met (§ 100, Foreigners Act – *AuslG*). The disadvantage of such a transitional provision to a decision of the Conference of the Ministers of Interior (IMK) is that it cannot state all the preconditions and reasons for exclusion in such detail. The formulation of the details would then rather be at the discretion of the several federal states. For a standardised practice it would be necessary to set up administrative provisions stating the relevant details. This procedure would be more complicated and in practice would take more time than a decision of the Conference of the Ministers of Interior (IMK).

3.1.5. Recent decision for a rule of legalisation

On 17 November 2006 the Conference of the Ministers of Interior (IMK) adopted a new rule of legalisation:

> I. The Conference of the Ministers of Interior (IMK) welcomes the fact that the Federal Minister of the Interior and the sections of the coalition of the Christian Democratic Union/Christian Social Union (CDU/CSU) and the Social Democratic Party (SPD) attended in the Federal Parliament (*Deutscher Bundestag*) to amend the Immigration Law, particularly, the legalisation of aliens who are virtually and economically integrated in Germany.
>
> Their proposed solution refers to the regulations developed by the Ministers of the Interior of the Federal States of 9 November 2006.
>
> The Conference of the Ministers of Interior (IMK) is confident that in the projected legislative procedure reasonable solutions will be found to guarantee the group of persons being involved a secured residence permit, to prevent charging of the welfare system and to support the efforts of the persons involved for their integration in the German society.
>
> Since the legislative procedure has not yet come to an end and the coming into effect of the regulation is not yet settled the Conference of the Ministers of Interior (IMK) decides on the legalisation as the following in order to create clarity for the persons being involved and the competent authorities.
>
> II. Foreign persons who have actually the duty to leave the country can be granted legalisation in accordance with § 23 paragraph 1 Immigration Law (*Zuwanderungsgesetz*) if they are factually economically and socially integrated in Germany.
>
> The stay of foreigners who cannot obtain a residence permit according to the regulation of the legalisation has to be ended consequently. The repatriation of those persons who have the duty to leave Germany shall be improved and

appropriate measures to meet with the obstacles to their deportation, particularly of the deportation of criminal offenders, shall be taken. The Ministers of the Interior of the Federal States agree that those aliens to whom the legalisation does not apply shall not be given any incentive to stay in Germany by admission to the social welfare system. Accordingly, they ask the legislator to assess the necessary amendments in the social welfare system. Furthermore, the Ministers of the Interior of the Federal States will enact ordinances directing discretion for the application of the existing social acts.

The stay of foreigners can be authorised,

3.1.

– if they have at least one child under age, who goes to kindergarten or to school, and if they have been living in Germany continuously for six years,

– in all other cases if they have been living in Germany continuously for eight years and

3.2.

3.2.1. if they are employed permanently (the employment relationship can consist of several contracts, and apprenticeships aiming at employment are also considered to be employment relationships) and if the maintenance of the family is guaranteed by legal employment and will be guaranteed in the future so that there will not be any social welfare utilisation.

3.2.2. exceptions can be made for:

– persons in an apprenticeship for a recognised profession,

– families with children who are just temporarily using social security benefits as complementary support,

– single parents with children who are just temporarily using social security benefits and for whom it would not be reasonable to be employed according to § 10 paragraph 1 number 3, Social Security Code (SGB II),

– persons permanently unable to work, whose maintenance (including any supervision and care necessary) is permanently guaranteed without the utilisation of the social welfare system, or if the social security benefits derive from their own social contribution,

– persons aged at least 65, if they do not have any family in their home country, but have relatives (children or grandchildren) permanently living in Germany or with German nationality and for whom no social security benefits will have to be utilised.

3.3. Federal States can order that a residence permit will be issued only if the aliens give a declaration according to § 23 paragraph 1 sentence 2 and section 68, Immigration Law (*Zuwanderungsgesetz*).

Furthermore, the following criteria have to be met:

4.1. The family has sufficient living space.

4.2. It can be proved by school reports that children who have the duty to go to school actually go there. In addition, the competent authority can ask for a prognosis that the children will finish school successfully.

4.3. All persons involved are able to speak German by 30 September 2009. Their oral language ability has to correspond with Level A 2 of the GERB.

An exception can be made from this criterion if the alien cannot meet it due to his or her physical, intellectual or mental abilities or diseases.

The legalisation includes even adult children, if they are not married, if they were under age at their entry into Germany, and if it is guaranteed that they will integrate permanently due to their previous formation and circumstances.

A residence permit can be granted to those young adults independent of whether their parents have been granted such a permit.

Persons excluded from that regulation are:

6.1. those who have deceived the competent authority deliberately with information relevant to their right of residence,

6.2. those who have deliberately retarded or prevented administrative measures to end their stay in Germany,

6.3. those who can be repatriated under § 53, 54, 55 paragraph 1, 2 number 1 to 5 and 8, Immigration Law (*Zuwanderungsgesetz*),

6.4. those who have been convicted of deliberately committing a criminal offence. Fines of up to 50 daily rates will not be taken into account. Persons are not excluded if they are fined up to 90 daily rates for offences that can be committed only by aliens according to the Immigration Law (*Zuwanderungsgesetz*) and the Asylum Procedure Code (*AsylVG*).

6.5. those who are involved in extremism or terrorism.

6.6. The exclusion of one family member for criminal offences causes the exclusion of the whole family. The separation of children from their parents is only admissible in exceptional cases. In such an exceptional case § 37 paragraph 1, Immigration Law (*Zuwanderungsgesetz*) has to be taken into account and the supervision of the children in Germany has to be guaranteed.

An application for a residence permit according to this regulation has to be made within six months after the decision of the Conference of the Ministers of Interior (IMK) comes into effect. The residence permit will be issued on a temporary basis of a maximum of two years. After those two years the residence permit can be extended if the requirements are fulfilled.

The Federal States can rule that interviews and talks on the integration must be conducted or that agreements on the integration must be reached. For such reasons a residence permit can be issued for only six months.

Legal remedies and other applications aiming at the stay in Germany have to be brought to a close within the deadline for the application.

> The Conference of the Ministers of Interior (IMK) agrees that persons who are in general covered by the legalisation, but who do not meet the criterion of 3.2.1, can be tolerated according to § 60a paragraph 1, Immigration Law (*Zuwanderungsgesetz*) up to 30 September 2007, in order to hunt for a job.
>
> If they can prove a binding offer for a job that guarantees the maintenance of the family by legal employment without the utilisation of any social security benefits, and will guarantee it for the future, they will obtain a residence permit; 3.2.2. second bullet point applies analogically.

The regulation for this legalisation has just been adopted, but the scope of its application is already disputed.

At present, 20 000 tolerated aliens live in Germany in permanent fear of being deported. But according to the new regulation on legalisation, those aliens who are employed (and thus do not depend on social security benefits) can apply for their legalisation. However, the greater part of the 190 000 tolerated aliens living in Germany are not employed at present; for them, the hunt for a job has just started. But even after the agreement of the ministers of the interior of the federal states in Nuremberg, the dispute about legalisation continues. Particularly, the interconnection between legalisation and employment is a cause of dispute. Whereas the Christian Union refers to it as an indispensable criterion, the Social Democrats refer to it being disproportionate.

4. Recommendations

The German legislation on rights to social services guarantees illegal residents access to basic social services such as medical care and education. Furthermore, wage entitlements gained through illegal employment can be claimed in the courts. On the other hand, public authorities have the duty to pass information about illegal residence to the competent authorities. This duty of notification can interfere with access to medical care and education.

However, it has been shown that in the field of medical care only a few cases exist where the duty arises to pass information, since the doctor and his or her staff members do not carry the duty to notify information. The only exception can be raised in cases of contagious diseases. Hence, it should be discovered whether illegal residents could be informed better of that fact, in order to encourage them to make timely use of medical care.

With regard to education, the legal situation differs from one federal state to another. In most of the federal states, illegal resident children have the duty to attend school and no sanctions derive from their school attendance. In this matter, consideration should be given to standardisation throughout Germany. But this can not be enforced by the Federal Republic due to its lack of jurisdiction in this area.

In Germany none of the big political parties demands wide-ranging legalisation. Actually, the decision on limited legalisation taken in November 2006 has led already to some legalisation of the residence of illegal residents. But because this legalisation has a narrow scope of application with respect to the persons being affected and the time period covered, it cannot be compared with legalisations in Italy, Spain and Greece.

On the basis of the experience gained in Germany no arguments can be put forward in favour of a radical change in policy or the legal situation. A wide-ranging legalisation would set up incentives for illegal entry to the country that could only hardly be reversed afterwards. Thus, it seems to be more reasonable to have migration restricted by transparent criteria, but to guarantee the illegal residents access to social services according to human rights.

It must be pointed out that incentives for illegal entry must therefore be combated. Germany's far-reaching controls of the labour market fight illegal employment and reduce the incentive for employers to employ illegal residents. Hence, they reduce incentives for illegal entry and illegal residence in Germany. This applies as well to the prosecution of any kind of human smuggling and trafficking. In recent years, enormous efforts in these areas have achieved success. Such results require a well-operated public administration and sufficient funds.

Therefore, the basic concept of the German legal situation can be retained and taken as a basis for a common policy on migration. It combines the clear requirements of the rule of law with clear and effective access to social services of a high standard.

From a German point of view, wide-ranging legalisation is not an appropriate measure to control migration, since it overstrains the labour market and interferes with the effective prevention of criminally motivated migration.

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