UNIVERSITAT DE BARCELONA

IDP INSTITUT DE DRET PÚBLIC

INSTITUT DE DRET PÚBLIC

Col·lecció

WORKING PAPERS

Defenceless workers? The protection of irregular migrant workers in Europe with a focus on the situation in France and Spain

Katharina Anna HÄUSLER

WORKING PAPER NÚM. 1/2010

01/06/2010

ISSN 2013-9217

(Working paper sotmès a avaluació externa)

Institut de Dret Públic
Parc Científic de Barcelona
Baldiri Reixac, 4-6
08028 Barcelona
Tel. 93.403 45 35
Fax 93.403 45 36
www.idpbarcelona.net

Defenceless workers?
– The protection of irregular migrant workers in Europe with a focus on the situation in France and Spain[1]

Katharina Anna HÄUSLER

Introduction

As one of the most fundamental social and economic rights, Article 7 of the International Covenant on Social and Economic Rights (ICESCR) grants "the right of everyone to just and favourable conditions of work". Furthermore, other social and economic as well as civil and political rights (e.g. the prohibition of slavery, the freedom of association and the right to life) are equally important guarantees for people in employment relationships. Irregular migrant workers are facing the same risks at their workplaces but nevertheless very often do not enjoy the same legal protection as regular workers. In fact their rights are often ignored by governments who justify their failure to act by noting that those workers are not legally employed or not even legally residing in the subject country. In addition, irregular migrant workers are in a specifically vulnerable position to claim those rights as they – due to their irregular status – mostly do not want to expose themselves to the authorities of the state; thus leaving themselves vulnerable to exploitation by employers who know that they are dependent on them.

It is difficult to say how many people there are currently living in the European Union without a valid residence permit. Precisely due to the irregularity of their status, irregular migrants are normally not registered and estimations (based on different methods such as the data of

[1] This paper is based on the author's Master's thesis for the "European Master's Programme in Human Rights and Democratisation" (European Inter-University Institute for Human Rights and Democratisation, Venice-Lido, Italy) in the academic year 2008/09. I would like to express my deep appreciation and sincere gratitude to everybody who has supported me during my research, first and foremost to my supervisor Caroline Picheral (Université de Montpellier I) and to Professor David Moya (Universitat de Barcelona) for their advice and critical remarks.

refused aliens at the border, removed aliens or data obtained through regularisation programmes)[2] always remain rather vague.

In a recent Issue Paper, the Council of Europe cited about 4.5 million irregular migrants staying in the European Union.[3] Despite this fact, none of the Member States of the EU has ratified the ICRMW and only a very few of them have ratified the respective ILO Conventions N°97 and 143. While both France and Spain, along with fifteen other European countries (seven of which are members of the European Union), have ratified the 1949 ILO-Convention N°97 "Migration for Employment", neither of the two countries have ratified the following ILO-Convention N°143 "Migrant Workers (Supplementary Provisions) from 1975, which for the first time also expressly took into account the rights of migrant workers in an irregular situation.

The purpose of this paper is therefore to take those Conventions as a point of reference for a minimum protection of human rights for irregular migrant workers and starting from that point to analyse how – and if at all – those rights are guaranteed in Europe.

In the first part of the paper, the international and regional framework for the protection of irregular migrant workers will be presented. A central focus will be put on the analysis of the ICRMW, as this Convention constitutes the most comprehensive instrument in this field and a possible guideline for national legislation. It will also be analysed why this Convention has such a poor ratification record, especially concerning countries that are traditionally strong promoters of human rights and the adoption of corresponding instruments on the international level. In the following chapters, the thesis will then focus on Europe, analysing especially the framework of the European Union, which is currently characterised by a strong emphasis on measures against irregular migration while putting only little attention on the protection of irregular migrant workers.

The second part of the thesis consists of a comparative case study whereby the concrete protection regimes for irregular migrant workers in France and Spain will be analysed.

The comparative analysis will be undertaken primarily on the rights that directly flow from the employment relationship, such as labour conditions, remuneration, accident compensation and union's rights. Apart from those directly labour-related rights there will also be analysed in as far as irregular migrant workers can access publicly-funded health care aid. This is of

[2] For a detailed overview on statistical techniques used to estimate irregular migration (and their shortcomings) see: Mitsilegas, 2004, pp. 33-37.

[3] Council of Europe, *The Human Rights of Irregular Migrants in Europe*, CommDH/IssuePaper (2007)1, available online: https://wcd.coe.int/ViewDoc.jsp?id=1237553&Site=CommDH&BackCo (consulted on 21 October 2008).

particular importance where irregular migrant workers are excluded from health care insurance and thus have to rely on subsidiary health protection provided by the state.

PART I

Chapter 1: The international protection of irregular migrant workers

1.1. The insufficiencies of the protection offered by general international human rights law

The Universal Human Rights instruments, as enshrined in the "International Bill of Human Rights" (The Universal Declaration of Human Rights 1948 and the two Covenants from 1966) are designed to grant basic rights to all human beings, expressively excluding any sort of discrimination based on, inter alia, sex, age, religion, race, or nationality. Thus, human rights are by nature independent of a person's legal status in the country where they are staying. It is worth noting that the Covenant on Civil and Political Rights (ICCPR) contains only one article that guarantees citizens' rights: Article 25, which foresees democratic participation and the right to vote. All the remaining civil and political freedoms (e.g. right to life, prohibition of slavery and servitude, and freedom of association) can be enjoyed by "everybody". This "universality" is further underlined by the United Nations Human Rights Committee, which stressed in its General Comment No.15 entitled "The position of aliens under the Covenant", that in principle citizens and aliens should enjoy the same rights.[4] Two restrictions, however, are imposed on persons irregularly residing in a country: Article 12 para. 1 guarantees the "right to liberty of movement" and the "freedom to choose his residence" only to people lawfully residing within the territory, while the limited possibilities to expel aliens listed under Article 13 are only applicable for lawfully residing aliens (hence, illegal migrants can in principle – with the notable exception of the principle of *non-refoulement* – always be expelled).

The ICESCR does not include any restrictions based on nationality and grants all its rights to "everybody", such as the right to work (Article 6), the – already mentioned – right to "just and favourable conditions of work" (Article 7), the right to form trade unions and the right to strike (Article 8), the right to social security (Article 9), and the right to education

[4] United Nations Human Rights Committee, General Comment No.15, 1986, para. 2. The legal conclusions expressed in this General Comment are also repeated by the Committee in its General Comment No. 31, adopted in May 2000 (CCPR/C/21/Rev.1/Add.13).

(Article 13). But several states that have ratified the Covenant (including France)[5] made reservations against some of those rights and restricted their applicability to aliens. [6] Again, the responsible treaty body, the United Nations Committee on Economic, Social and Cultural Rights, has elaborated General Comments, some of which explicitly refer to the human rights obligations with regard to irregular migrants.[7]

If those international treaties would be given full efficiency, irregular migrants would benefit from a large amount of rights and guarantees simply arising from their quality as human beings being under the jurisdiction of a state party. However, a huge discrepancy lies between the theoretical provisions of those treaties and the states' practices. While some of the states might lack material resources to fulfil their obligations, many others simply lack the political will to make civil and political and/or economic, social and cultural rights in their national legal systems unconditional of the legal status of a person. Instead, those states adhere to the "principle" that illegality of residence entails an automatic deprivation of some basic rights.[8]

1.2. The development of a specific protection framework for migrant workers

The insufficient protection for migrant workers by general human rights instruments was the prime reason for starting the elaboration process for a specific migrant workers' convention on the level of the United Nations in the 1970s.[9] The lengthy process of drafting such a convention demonstrates though how difficult it was to reach an agreement on the international level in the delicate field of migration where states have often diverging interests.[10]. Changing trends in international migration during the 1980s, especially an increase of irregular migration and – responding to it – changes in national immigration

[5] "*The Government of the Republic declares that articles 6 [right to work], 9 [social security], 11 [right to an adequate standard of living] and 13 [right to education] are not to be interpreted as derogating from provisions governing the access of aliens to employment or as establishing residence requirements for the allocation of certain social benefits*." (available on: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en#EndDec consulted on 16 May 2010).

[6] For a recent, more detailed discussion of migrants' ESC-rights see Oberoi, 2009.

[7] Committee on Economic, Social and Cultural Rights, General Comment No. 14, 2000, para. 34 (right to health).

[8] Chemillier-Gendreau, 2005, p. 328.

[9] De Guchteneire/Pécoud, 2008, p. 9.

[10] In 1972 the United Nations' General Assembly adopted a resolution requesting the Human Rights Commission to examine with priority the discriminations suffered by migrants (General Assembly, Resolution 2920 (XXVII), 15 November 1972), seven years later a working group was established to elaborate a Convention on the rights of migrant workers (General Assembly, Resolution 34/172, 17 December 1979). Nevertheless only eleven years later a final agreement was reached and the work could be concluded in June 1990. For details on the process see : Battistella, 2008

policies had a significant influence on the final outcome of the Convention.[11] Finally, on 18 December 1990 the draft passed the General Assembly and was adopted without vote as "International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)".[12] But it still took another thirteen years before the ICRMW would be ratified by a 20th nation – Guatemala – and it could finally come into force on 1 July 2003.[13]

Specific protection instruments for migrant workers – whether in regular or irregular situations – were, however, already elaborated before. Since its foundation in 1919, the ILO showed a special awareness for the particularly vulnerable position of migrant workers and it has adopted several conventions and numerous recommendations in this field. Indeed, already the ILO Charter preamble recognises among its objectives the "*protection of the interests of workers when employed in countries other than their own*". Thus, before analysing the ICRMW in more detail in Chapter 1.3 below, we will have a brief look on those previous instruments adopted in the framework of the ILO.

As one of the oldest international labour standards, the ILO-Convention N°19 "Equality of Treatment (Accident Compensation)" from 1925, which France, Spain and most of the other Member States of the European Union have ratified, foresees the granting of damages in case of accidents in the workplace, under the same conditions as for national workers, to all migrant workers and their beneficiaries "*without any condition as to residence*" (Article 1 para. 2). The only limitation the Convention mentions is that migrant workers concerned have to be nationals of another contracting party, which seems to be less of an obstacle though as the Convention has been widely ratified.[14]

The first largely implemented international instrument related to migrant workers, the "Migration for Employment Convention (Revised)", was adopted by the ILO on 1 July 1949 (ILO-Convention N°97). This convention establishes a number of rights for migrant workers, most notably the principle of equal treatment with citizens of the host country concerning basic labour-related rights, e.g. remuneration, membership in trade unions, living conditions,

[11] Battistella, 2008, p. 25.
[12] General Assembly, Resolution 45/158, 18 December 1990. In 2000 the General Assembly declared 18 December as "International Migrants Day" (Resolution 55/95, 4 December 2000).
[13] Article 87 para. 1 stipulates: "*The present Convention shall enter into force on the first day of the month following a period of three months after the date of the deposit of the twentieth instrument of ratification or accession.*"
[14] As of April 2010 121 states have ratified it. See http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C019 (consulted on 18 April 2010).

fiscal issues, access to justice and social security (Article 6). However, those rights are only limited to lawfully residing migrant workers.

In turn, the "Migrant Workers (Supplementary Provisions) Convention", adopted in 1975 (ILO-Convention N°143) included – for the first time in an international instrument – also migrant workers in an irregular situation.[15] Article 9 of the Convention states that, even when not having entered the country or being employed lawfully, a migrant worker shall "*enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits*". This implies that migrant workers can always claim their wages and – provided the case they are entitled to it – also other benefits arising from their employment relationships, independent of whether they were employed legally or illegally. On the contrary, the principle of equality with nationals (Article 10) is similarly to the one contained in ILO-Convention N°97 limited to migrant workers lawfully residing.

Nevertheless, as of June 2009, the Convention has only been ratified by 23 states, five of which (Cyprus, Italy, Portugal, Slovenia and Sweden) are members of the European Union.

1.3. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) 1990 and the obstacles to its ratification

The 1990 Migrant Workers' Convention is a multilateral treaty negotiated and adopted in the framework of the United Nations human rights' institutions (see above) and is ranking among the "core international human rights instruments" as defined by the Office of the High Commissioner for Human Rights[16]

The rights guaranteed in the Convention are largely not new rights but rights which are already enshrined in international human rights instruments, most notably the Universal Declaration of Human Rights and the two Covenants from 1966. The goal of the Convention is to specify the way in which those rights apply to migrant workers given the difficulties for them (above all, their status as non-nationals and their over-representation in sectors where labour law is often poorly respected in general) to invoke them in practice.[17] Thus the Convention encompasses classic civil and political (e.g. freedom from torture and slavery,

[15] Taran, 2008, p. 35.

[16] The others are: the two Covenants from 1966 (ICCPR and ICESCR), the Convention on the elimination of all forms of racial discrimination (CERD), the Convention against all forms of discrimination against women (CEDAW), the Convention against torture and other cruel, inhuman or degrading treatment or punishment (CAT), the Convention on the rights of the child (CRC) and as the most recent one (and the only one adopted after the ICRMW) the Convention on the rights of persons with disabilities (CRPD).

[17] De Guchteneire/Pécoud, 2008, p. 7.

freedom of conscience and religion, freedom of expression or right to family life) as well as economic, social and cultural rights (e.g. Article 25 establishing the equality of working conditions, Article 26 concerning union's rights in and the access to social security foreseen in Article 27) but also minimum procedural guarantees in the case of detention or expulsion.

The major innovation of the Convention is therefore to stress that those rights are, due to their nature as "unalienable" human rights, in principle applicable to all migrant workers independent of their legal status or any other difference. In this point the ICRMW goes beyond ILO-Convention N°143 which guarantees mainly only rights directly related to the employment relationship (remuneration, working conditions and possibly social security). Of particular importance is Article 25, which stresses the obligations of the state to ensure that workers are not deprived of their labour rights (e.g. remuneration, maximum hours of work, holidays or safety provisions) due their status of irregularity. These rights – of course provided that they are implemented in national contexts – would not only entail a basic protection of irregular migrant workers but also guarantee fair conditions at national labour markets as a whole by repressing methods of exploitative employment.
Nevertheless the Convention still suffers from a lack of ratification, particularly by typical "countries of destination", those that would precisely be responsible for guaranteeing most of the rights. As of May 2010 only 42 states have ratified the ICRMW[18] of which most are primarily "countries of origin" in Africa, Asia and Latin America. In Europe, only Albania, Bosnia-Herzegovina and Turkey (as well as Azerbaijan as an Asian country but part of the Council of Europe) have ratified the Convention, showing a complete absence of the 27 Member States of the European Union. But also other classic immigration countries such as the United States of America, Australia and Canada have so far been reluctant to ratify the Convention. Immediately after the adoption in 1990, the modest interest in the Convention was not entirely expected by experts. In particular, it was generally expected that in Europe at least the so-called MESCA-countries (Mediterranean and Scandinavian countries) – a group of seven European states[19] that had played an active role in the drafting process – would ratify the Convention but none of these countries did so yet.[20]

[18] A current list of ratifications is available online: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en (consulted on 06 May 2010).
[19] Finland, Greece, Italy, Norway, Portugal, Spain and Sweden.
[20] Pécoud/De Guchteneire, 2004, p. 7.

The reasons behind this widespread hesitation are complex and a detailed analysis would go beyond the scope of this paper. Briefly, the studies so far conducted on this topic[21] indicate that the reasons brought forward by the states can mainly be summarised into three categories: legal reasons, political reasons and financial/administrative obstacles. However, very often behind those official reasons there seems to be a lack of awareness and knowledge of the Convention, respectively a misperception of its character and goals or even just of single articles.[22] Some governments have argued that granting explicitly rights to irregular migrant workers would attract even more clandestine migration. This preoccupation can be seen in the wider context of the way (irregular) migration is discussed at the moment in Europe, framing it primarily as a security (and to a lesser extent as an economic) issue but often neglecting the humanitarian aspect. Thus a manifest contradiction can be stated between the spirit of the Convention, namely the protection of human rights, and the one inspiring national migration policies in many countries which focus on restricting immigration in general and especially the fight against irregular migration.[23]

Chapter 2: The Protection of irregular migrants in Europe

2.1. The framework of the Council of Europe

As the largest inter-governmental organisation in Europe concerned with human rights – comprising 47 states and a population of about 800 million people – the Council of Europe showed an early interest in the situation of migrant workers on the continent, since national legislation often excludes them from legal protection and social benefits. But only recently has the organisation started to put more emphasis on the particularly vulnerable situation of irregular migrant workers who are mostly nationals of third countries.

The most important legal instrument adopted in the framework of the Council of Europe and ratified by all its Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome in 1950, does not – with the notable exception of restrictions that can be imposed on the political activity of foreigners – differentiate between citizens and foreigners. Indeed in its first article, the ECHR recognises the fundamental rights of every person, independent of their nationality, being under the

[21] See especially a study conducted by the ILO: Taran, 2000 and a recent study by the United Nations Educational, Scientific and Cultural Organization (MacDonald, Euan/Cholwinski, Ryszard, 2007)
[22] Taran, 2000, p. 92-94.
[23] De Guchteneire/Pécoud, 2008, p. 13.

jurisdiction of one of the contracting states. The right to enter, stay, or settle on the territory of a contracting party, however, is not guaranteed as such and therefore remains under the sovereign discretion of each state. Furthermore also the freedom of movement of foreigners is restricted.[24]

Nevertheless, in practice, the protection of irregular migrants by the Convention is insufficient. While the European Court of Human Rights decided in recent years a few cases regarding the access to social benefits for regularly residing migrant workers (e.g. *Gaygusuz v. Austria*, 16 September 1996, *Koua Poirrez v. France*, 30 September 2003, *Luczak v. Poland*, 27 November 2007, *Andrejeva v. Latvia*, 18 March 2009), there is no significant jurisprudence so far on the level of the Council of Europe concerning rights invoked by irregular migrant workers under the jurisdiction of a contracting party.

Complementary to the ECHR, which provides only civil and political rights[25], the European Social Charter, adopted in 1961 in the framework of the Council of Europe and revised in 1996, guarantees a series of social and economic rights. Although all 47 Member States of the Council of Europe signed this Charter (either the original or the revised version), four have yet to ratify it.[26] Even though most of the rights in the Charter are formulated as applying to "everybody", both the original and the revised version specifies that the rights enshrined are applicable to foreigners only if they are nationals of another contracting party.[27] Nevertheless, as we will see below, this does not mean that the states can completely ignore the provisions of the Charter when dealing with core social rights of third country nationals, even when they might not reside lawfully (European Committee of Social Rights, *FIDH v. France*, 8 September 2004).

Compared to the ECHR, the European Social Charter imposes fewer obligations on the states as they are free to choose which rights they want to ratify (often referred to as an "À la carte – system"). Furthermore, those rights cannot be invoked before the European Court of Human Rights and states' compliance is only monitored by biannual state reports. Those reports are examined by the European Committee of Social Rights (ECSR), a committee of fifteen

[24] Sudre, 2008, p. 591.

[25] It has to be noted, however, that the jurisprudence of the European Court of Human Rights (ECtHR) has gradually recognised the "social dimension" of certain civil and political rights enshrined in the ECHR and went thus partly very far in granting indirectly social, economic and cultural rights to individuals (Sudre, 2008, p. 137). See among others the recent decision *Demir and Baykara v. Turkey* (ECtHR Grand Chamber, 12 November 2008).

[26] Those states are: Liechtenstein, Monaco, San Marino and Switzerland (http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/SignaturesRatifications_en.pdf consulted on 06 May 2010).

[27] See para. 1 of the Appendix of the revised Charter.

independent experts[28] elected by the Committee of Ministers[29]. While individuals still lack the power to directly address the Committee, an Additional Protocol adopted in 1995 provides for a system of so-called "collective complaints", with the possibility for NGOs enjoying participatory status with the Council of Europe[30] to lodge complaints against a state – that has necessarily accepted this procedure[31] – because of an alleged violation of the Charter. Where a state has accepted the Additional Protocol, also any other national NGO "which has particular competence in the matters governed by the Charter" can lodge such a complaint (Article 2 Protocol). This possibility is innovative in the international context since it is the only international instrument on social and economic rights so far which offers the possibility for organisations of the civil society to invoke all articles of the Convention before the competent treaty body.[32]

Similar to the former complaints' procedure of the ECHR (before the entrance into force of Protocol No. 11 in 1998), after examining the admissibility and the merits of the claim, the Committee drafts a report which is transmitted to the Committee of Ministers. If the Committee of Independent Experts found a violation of the application of the Charter, the Committee of Ministers can adopt, by a majority of two-thirds of those voting, a recommendation addressed to the Contracting Party concerned (Articles 9-10 Protocol). But even if such a recommendation is adopted, it constitutes more a political than a strict legal obligation for the state party concerned since the state is only obliged to provide information on the measures it has taken to give effect to the recommendation in the next regular report which it submits to the Secretary General.

---

[28] The number of members was established by decision of the Committee of Ministers at the 751st meeting of the Ministers' Deputies (2-7 May 2001).

[29] Article 25 of the Turin Protocol adopted in 1991 would actually stipulate that members of the ECSR are to be elected by the Parliamentary Assembly. This is the only provision which is still not being applied.

[30] For this purpose a special list of NGOs entitled has been established by the Governmental Committee (the current list is available on: http://www.coe.int/t/dghl/monitoring/socialcharter/OrganisationsEntitled/INGOList2010_en.pdf consulted on 06 May 2010). Furthermore the European Trade Union Confederation (ETUC), BusinessEurope (formerly UNICE) and the International Organisation of Employers (IOE) are entitled to lodge complaints with the ESCR as well (Article 1a Protocol).

[31] As of May 2010 twelve states have accepted the procedure among which France while Spain has so far neither signed nor ratified the Protocol. http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=158&CM=7&DF=26/10/2008&CL=ENG (consulted on 06 May 2010).

[32] Daugareilh, 2005, p. 557. The Optional Protocol to the ICESCR, adopted in 2008 (A/RES/63/117), foresees the possibility for individuals or groups of individuals to submit communications to the Committee on Economic, Social and Cultural Rights. However, as of May 2010 this protocol has not been ratified by any state (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en, consulted on 06 May 2010)

Concerned about the vulnerability of persons deciding to work in a country other than their own, the discussions about a specific instrument of protection for this group started in the Council of Europe at the beginning of the 1970s. Just at the same time the ILO was working on a revised Convention regarding the protection of migrant workers and the United Nations were starting to consider the elaboration of such an instrument as well (see above Chapter 1.2.). Influenced by the increase of inter-European migration (especially from the Mediterranean countries to Central and Northern Europe) during the 1960s and the beginning of the 1970s, the European Convention on the Legal Status of Migrant Workers – adopted in 1977 – is wholly inspired by the principle that foreigners from Contracting Parties who lawfully reside and work within a fellow Contracting Party should receive equal treatment with nationals. This principle, however, implicates that third country nationals who are not lawfully residing are excluded. Consequently, article 1 of the Convention defines "migrant worker" as "*a national of a Contracting Party who has been authorised by another Contracting Party to reside in its territory in order to take up paid employment*". Up to now there were no attempts undertaken by the Committee of Ministers or the special "Consultative Committee" responsible for providing regular opinions and recommendations on the application of the Convention, as well as proposals for amendments, to make the Convention applicable also for nationals of non-contracting states.

Even though the Council of Europe has started in recent years to put more attention to the situation of migrant workers from third countries, especially when they are residing and/or working irregularly on the territory of one of its member states, the Council's actions have been limited to "soft law" instruments. The Recommendation R (2000) 3 on the "Right to Satisfaction of Basic Material Needs of Persons in Situations of Extreme Hardship"[33], for example, recommends that Member States recognise an individual, universal, and enforceable right to a minimum of food, clothing, shelter and basic medical care, which should be applicable to all persons irrespective of their legal status (Principle 4 of the Recommendation).

The most significant input for the discussion on irregular migrants came in recent years from the Parliamentary Assembly of the Council. In a resolution in 2006 the Assembly expressed its deep concern about "the ever-growing number of irregular migrants in Europe" and stressed the urgent need to provide clarity on the issue of the rights of irregular migrants.[34] This resolution proposed a specification of which basic civil and political (para. 12 of the

[33] Council of Europe, 2000, Recommendation R (2000) 3.
[34] Council of Europe, Parliamentary Assembly, 2006, Resolution 1509 (2006).

resolution) as well as social and economic rights (para. 13) concerning irregular migrants must be observed with particular attention.[35] In addition, it explicitly invited the governments of the Member States to sign, ratify and subsequently implement the relevant human rights instruments contributing to the protection of the rights of irregular migrants, in particular the ICRMW.

Finally, in 2007 the Council's Commissioner for Human Rights presented an issue paper dealing with human rights of irregular migrants in Europe. This paper encouraged the Council and its Member States to comply with twelve concrete proposals that sought more effort on the protection of irregular migrants.[36]

Despite those recent efforts, the Council of Europe's framework for the protection of irregular migrant workers remains very weak. The only legally binding Conventions (ECHR, the European Social Charter and the Convention on the Legal Status of Migrant Workers) are either insufficient in their protection of irregular migrant workers (e.g. the ECHR does not cover social and economic rights as such) or they a priori exclude third country nationals from their application. Furthermore, the documents that do specify the rights states should guarantee to irregular migrants are mere non-binding resolutions or recommendations. This weakness is highly regrettable because the Council – as a primarily human rights-orientated organisation – could take a leading role in the protection of this vulnerable group in Europe (just as it did before e.g. with its Conventions for the protection of linguistic or ethnic minorities). However, it has to be born in mind that the Council of Europe, as an inter-governmental organisation, cannot operate without a consensus among its Member States. Therefore, this weak level of protection reflects first, the reluctance of European states in establishing legal norms concerning irregular migrant workers; and second, the continuous controversy regarding the regulation of the sensitive and complex field of immigration on an international level.

2.2. The European Union framework – a misbalance of the fight against clandestine migration compared to protection schemes?

Facilitating the economic exchange between its Member States by establishing inter alia the principle of a free circulation of persons, services, capitals and goods has been one of the

[35] E.g. the right to life, freedom from torture and slavery, guarantees in case of detention, respect of private and family life as well as minimum rights to housing, health care and social security.

[36] Council of Europe, Commissioner for Human Rights, 2007 (CommDH/IssuePaper(2007)1), available online: https://wcd.coe.int/ViewDoc.jsp?id=1237553&Site=CommDH&BackCo (consulted on 21 October 2008).

most important goals of the European (Economic) Community since its foundation by the Roman Treaties in 1957. In fact, the revised version of the Treaty dedicates a whole chapter under the Title III "Freedom of persons, services and capitals" to the free movement of workers within the community (Articles 39-42 Treaty establishing the European Community, in the following short: TEC).

In the decades that followed the Community has adopted several directives and regulations directed at the facilitation of movements of persons within the Community and the protection of migrant workers, while the Court of Justice of the European Communities (in the following: European Court of Justice) developed a rich and often progressive jurisprudence in this matter.[37] This development, which did not only concern provisions of classic labour law but also social security aspects, made it step by step possible for citizens of the Community to choose their work and residence freely within the territory of the Community. However, this process of unification of legal norms and reduction of obstacles for the free movement of workers was strictly limited to the nationals of the Member States.

The introduction of Title IV ("Visas, asylum, immigration and other policies related to free movement of persons") to Part III of the TEC by the Treaty of Amsterdam in 1997 – and thus the "communitisation" of parts of the so-called "third pillar" – paved the way for a common policy of the Community in the field of immigration.[38] In this framework the Community started to extend parts of those rights that were before only granted to nationals of the Member States also to third country nationals – a growing number of whom was residing and working often for years within the territory of its Member States.[39]

While we can thus conclude that the European Union has started to include third country nationals who are legally residing and working on the territory of its Member States into its policy framework, there is a striking lack of provisions related to the protection of irregular migrant workers on the communitarian level. This lack is even more bewildering as work carried out by irregular migrants is by no means a marginal phenomenon in the European Union. The estimated amount of 500.000 persons entering the European Union annually without authorisation[40] constitutes a not unimportant economic and social factor.

---

[37] Guild/Staples, 2003, p.196-197.

[38] Apap, 2002, p. 151.

[39] See in particular Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents as well as the proposal of a directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (Commission of the European Communities, 2007, COM(2007) 638 final; for details see Cavallini, 2008, p. 58)

[40] Estimation by EUROPOL, cited by Cholewinski, 2004, p. 161. Again it has to be stressed that estimations concerning irregular migrations are fairly inexact.

As a strong contrast to this absence of protective rules for irregular migrant workers, the Community – acting under Article 63 para. 3 (b) TEC as amended by the Treaty of Amsterdam 1997 – has developed over the last decade a remarkable regime of what can be summarised as "fight against irregular migration".

The first attempts for a common policy and legal framework in this field were thereby for all intents and purposes designed as a "holistic" framework stressing especially the need to respect human rights. Based on the new cooperation in the field of immigration, established by the Treaty of Maastricht (formally: Treaty on European Union, TEU) in 1992[41], the European Commission proposed in a communication on common immigration and asylum policies issued in 1994 a comprehensive approach to address the problem of irregular migration. Therein the Commission stressed that restrictive policies to control irregular migration can only be credible within a framework of protecting the human rights of irregular migrants.[42] Furthermore it expressively recommended the signature and ratification of the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families by the Member States[43] and proposed that if necessary the ratification of the Convention by the Member States could be supplemented by an own instrument of the Union.[44] Those statements are a clear sign that at that time the Commission was still eager to develop a policy on irregular migration that took the special situation and needs of those affected into account. However, over the following years it was mostly the Council of the European Union that was taking the lead in the adoption of measures in the framework of the "third pillar", focusing on the prevention of irregular migration, the facilitation of expulsion and readmission as well as addressing the problem of trafficking in human beings.[45]

The following years hence brought an increase of measures aimed at containing irregular migration into the European Union with the adoption of several legally binding as well as "soft law" instruments in this field. The topic also obtained a prominent role on the agenda of the semi-annual meetings of the heads of state and government where traditionally the

[41] In fact the legal possibilities of the cooperation in "Justice and Home Affaires" (the so-called "third pillar" of the EU) remained unclear since the text did not clarify whether the cooperation should include legislative initiatives or in as far only practical, operational cooperation was the objective (see: Apap, 2002, p. 151).
[42] Commission of the European Communities, 1994 (COM/94/23 final), para. 109.
[43] Commission of the European Communities, 1994 (COM/94/23 final), para. 132; View also point 22 of part IV of the Communication, summarising the key goals.
[44] Commission of the European Communities, 1994 (COM/94/23 final), para. 110.
[45] Cholewinski, 2004, p. 168. See e.g. the Recommendation of the Council on "harmonizing means of combating illegal immigration and illegal employment and improving the relevant means of control" (96/C 5/01) and Council Recommendation of 27 September 1996 on combating the illegal employment of third-country nationals (96/C 304/01).

guidelines for the common European policies are decided.[46] Furthermore, a new Communication on a common policy on illegal immigration presented by the Commission in November 2001[47] stood in an apparent contrast with the comprehensive framework proposed in its Communication only seven years earlier (COM/94/23 final, see above). In fact only one small chapter of this document is devoted to human rights ("Compliance with International Obligations and Human Rights") while it is entirely silent on the question of the rights of irregular migrant workers and does not mention a possible ratification of the ICRMW anymore.

The instruments that were subsequently adopted[48] confirmed this approach taken by the Commission and the Council, having a clear focus on preventing the entry of clandestine migrants, punishing those responsible for facilitating their entry and presence in the European Union and facilitating the return of irregularly residing migrants to their countries of origin.[49] The protection of the rights of those affected received, if at all, only marginal attention. In a Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions[50] in 2003, which was primarily focused on strategies for regular immigration and in particular on improving measures to integrate regular migrants already staying on the territory of the Member States, the Commission consecrated also one subchapter to irregular migrants. While it underlined again the negative effects of irregular immigration for the national labour markets and stressed the importance of reducing the number of people immigrating clandestinely to the Union as well as – were possible – returning those already present to their countries of origin[51], it also reminded the Member States that they nevertheless have to respect basic rights of irregular migrants[52]. However, this

[46] See in particular the action plan adopted at the summit in Vienna in December 1998: Council and Commission Action Plan of 3 December 1998 on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice (Official Journal C 19 of 23 January 1999) and the conclusions of the European summit in Tampere in October 1999 (available on: http://www.europarl.europa.eu/summits/tam_en.htm; consulted on 16 May 2010).

[47] Commission of the European Communities, 2001, COM (2001) 672 final.

[48] See e.g. Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals; Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence; or Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence.

[49] Cholewinski, 2006, p. 901.

[50] Commission of the European Communities, 2003, COM (2003) 336 final.

[51] Commission of the European Communities, 2003, COM (2003) 336 final, p. 26: "*Within the context of the common immigration policy the only coherent approach to dealing with illegal residents is to ensure that they return to their country of origin*."

[52] Ibidem: "(…) *illegal immigrants are protected by universal human rights standards and should enjoy some basic rights e.g. emergency health care and primary school education for their children.*"

programmatic document does not contain any concrete measures on how to protect irregular migrant workers.[53]

The most significant recent initiatives in the field of irregular migration, the adoption of the so-called "return directive" in December 2008[54] on the one hand and the directive on minimum standards on sanctions against employers of illegally staying third-country nationals in June 2009[55] on the other hand, demonstrate a continuation of these policy directions aimed at the "fight against illegal immigration".

As this outline of the adopted instruments within the Community framework illustrates, the policy in the matter of irregular migration has shifted during the last fifteen years from a "holistic" approach also comprising the analysis of the reasons for irregular migration and the protection of those being in an irregular situation, to a primarily "security" approach that focuses on the illicit aspect of irregular migration (trafficking, illegal entrance) and possible economic disadvantages resulting from it. Even though the concept of a global approach in migration policies was formally not abandoned – in documents the Commission still refers to the need for "holistic" concepts in immigration issues[56] – the imbalance between the focus on repressive measures and the concern for the protection of irregular migrants is striking.

The reasons for this shift are not easily identifiable. It seems that the growing presence of migrants in Europe – of which only a part is residing irregularly – is perceived more and more as a danger by the public opinion, especially in times of economic crises. Additionally, as some have argued[57], the terrorist attacks in New York, Madrid and London might have contributed to the perception of a link between immigration and security and reinforced the focus on restrictive measures on immigration and border control even though those bombings had no obvious connection with irregular migration. In fact, with its policy of linking irregular migration strongly to the phenomenon of organised crime, as that was repeatedly the case in documents by the Commission and the Council[58], the European Union might have also itself

[53] In a similar spirit see also the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Study on the links between legal and illegal migration, COM (2004) 412 final.

[54] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. For a more detailed presentation of the development of this directive and its possible human rights implications see e.g.: Canetta, 2007; Kauff-Gazin, 2009;

[55] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

[56] See e.g. Communication of the European Commission on immigration, integration and employment: Commission of the European Communities, 2003, COM (2003) 336 final.

[57] View for instance Cholewinski, 2006, p. 901.

[58] e.g. Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, or the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence.

contributed to the image of a close connection between crime and irregular migration in the public opinion.[59]

The poor ratification record of the ICRMW and the ILO-Convention N°143 are a further indicator that states, particularly those in Europe, have become reluctant to enter into commitments protecting basic human rights of irregular migrants. This shift of priorities is consequently also reflected on the level of the European Union.

Whether the entry into force of the Charter of Fundamental Rights[60] will lead to an amelioration of the protection of irregular migrant workers on the level of the European Union cannot be answered clearly yet. Many of the rights guaranteed therein provide protections to all those present on EU territory, regardless of the regularity of their status.[61] However, the legal quality of the social rights guaranteed under Chapter IV of the Charter ("Solidarity") is disputed as in earlier drafts the Charter still differed between "social rights", which have to be respected and protected (e.g. Freedom to choose an occupation and right to engage in work, right to unionise) on the one hand and "social principles" on the other hand, which have to be actively fulfilled but are intended rather as obligations and orientations for the institutions and thus cannot be directly invoked.[62] This formal distinction disappeared in the final version of the Charter but Article 51 para. 1 still distinguishes between "respecting the rights" and "observing the principles" without defining either of them.[63] Furthermore, when comparing the phrasing of the civil and political rights in the Charter (mostly stating "everybody has the right to…") with that of the social rights, differences are obvious. Most of the social rights are granted only in accordance with "national law and practice" (see e.g. Article 28) or are phrased more like principles in terms of the Union's "duty to recognise and respect" (e.g. Article 34 states that the "Union recognises and respects the right to social security benefits and social services").[64]

In principle a stronger obligation for the institutions[65] to respect and guarantee human rights can already be seen as a positive sign for a higher priority of human rights protection on the

[59] Terrádez Salom, 2008, p. 89.

[60] The Charter became legally binding for the EU institutions and Member States (the latter as regards the implementation of Union law) with the entrance into force of the Treaty of Lisbon amending the Treaty on the European Union and the Treaty establishing the European Community on 1 December 2009. However, the application of the Charter is limited in certain aspects with respect to Poland and the United Kingdom (see: Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, OJ C 206/156, 2007).

[61] See e.g. Art 35 (health care); social security rights (Art 34/2) are limited to persons regularly residing though. More in detail: MacDonald/Cholewinski, 2009, p. 378.

[62] De Schutter, 2000, 41-43.

[63] De Witte, 2005, p. 160.

[64] Fredman, 2006, p. 56.

[65] According to its Article 51 para. 1 the Charter is addressed to the institutions and bodies of the Union and to the Member States only when they are implementing Community law.

level of the European Union. The important question will be though, how those rights are interpreted in practice and especially whether individuals (citizens as well as foreigners) will be able to invoke rights guaranteed under Chapter IV before the European Court of Justice, some of which – such as the right to fair and just working conditions (Article 31), various union's rights (Article 28) and the right of access to preventive health care (Article 35) – would be of particular importance for irregular migrants.

PART II

Chapter 1: The general legal framework regarding irregular migrant labour

1.1. France

1.1.1. A general outline of the phenomenon of irregular migrant labour in France

France has a long tradition as an immigration country, in particular since the beginning of the era of industrialisation in the middle of the 19th century and consequently the attraction of workforce by various sectors of the economy. This trend continued and accelerated during the decades of huge economic growth after the end of World War II where large numbers of migrants were coming to work in France often taking up (manual labour) jobs that French workers gradually refused to take due to their arduous and low-wage character. During the 1950s and 1960s those immigrants were primarily coming from – neighbouring – European countries e.g. Italy, Spain and Portugal while with the end of the 1960 the number of non-European immigrants started to increase significantly, especially the number of immigrants coming from the former French colonies in North Africa (Algeria, Morocco and Tunisia).[66]
This development came to an abrupt end in the course of the so-called "oil-shock" in the middle of the 1970s and the following decrease of the economic performance throughout Western Europe. While before the foreign workforce was urgently needed to fulfil the demands of the booming economy, France then saw itself confronted with growing numbers of unemployment and rising social problems. At that time it had also become obvious that "temporary" immigration for work (symbolised by the German "*Gastarbeiter*"-model) turned out to be an illusion as lots of migrant workers decided to stay in their host countries, resulting in difficult questions on how to integrate them best into the societies.

[66] Milza, 2005, p. 15-16.

As a reaction the French government decided in October 1974 to suspend the immigration of migrant workers from countries outside the European Community. While this decision was first seen as a temporary measure during a period of economic crisis – intended to protect the national labour market –, it marked in fact a change in French migration policies leading to a stricter control of the migration streams and putting into place more obstacles for those wishing to immigrate to France.[67] Nevertheless, due to family reunification (accounting today for around 70% of all immigrants coming from countries outside the European Economic Area[68]) and the still existing demands for workers by the industry, the amount of immigrants coming to France even slightly increased during the last three decades, while their proportion in the total population remained stable.[69] According to the data of the last census in 2005, foreigners constituted 5.7% of the nearly 61 Mio. people living in France, which is slightly less than the 6.5% of foreigners present in France in 1975.[70] This number, however, only comprises regularly residing – and thus registered – immigrants.

As has already been outlined several times above, it is very difficult to establish how many irregular migrants there are living in a certain country, respectively how many immigrants are carrying out work without the necessary authorisation. Only at the moment at which the irregularity of a person is discovered by the authorities of the state – either because their status is regularised or the authorities undertake measures to return an illegally residing person to their home country – irregular migrants appear in official statistics. In a publication dating from 2004, the General Accounting Office (*Cour des Comptes*) is citing estimations between 13.000 and 140.000 migrants living in France without a valid residence permit, thus moving within a statistical variation of 1 to 10![71] Such as other European states France undertook several general regularisation campaigns during the 1980s and 1990s, the last, however, more than ten years ago in 1997. Thus the data received during this campaign is not suitable anymore to provide a clearer picture of the current dimension of irregular immigration in France. Consequently we have to assert that at present there are no reliable numbers on the amount of irregularly residing migrants in France available, respectively we equally do not know how many of those who dispose of a (temporary) residence permit are working without authorisation on the French labour market.

---

[67] Lochak, 1997, p. 33.
[68] MacDonald/Cholewinski, 2007, p. 30.
[69] Schor, 1996, p. 230.
[70] Institut nationale de la statistique et des études économiques, 2005, available online: http://www.insee.fr/fr/themes/tableau.asp?reg_id=0&ref_id=NATTEF02131 (consulted on 08 May 2010).
[71] Cour de Comptes, *L'accueil des immigrants et l'intégration des populations issues de l'immigration, Rapport public particulier*, Novembre 2004, p. 14. Available online: http://www.epim.info/docs/documents/Cour%20des%20Comptes%20-%20migrant%20integration.pdf (consulted on 08 May 2010).

Nevertheless, as will be demonstrated by the following outline, the presence of a considerable amount of *sans-papiers*, as irregular migrants are often referred to in France, played an important role in the discussion about French immigration policies over the last 15 years.

1.1.2. The legislative development concerning the rights of irregular migrants in France

Except for the right to asylum[72], the French Constitution – unlike the Spanish Constitution – does not contain a specific provision on the rights of foreigners, nor is there any French statutory law on the subject. Consequently the rights and entitlements of foreigners are regulated in the specifc codes concerning e.g. the entrance and residence of foreigners but also the labour and social security regimes in general. The first post-World War II regime regulating the immigration of foreigners to France was put into place by the ordinance n°45-2658 of 2 November 1945[73] which regulated in its initially only 36 rather short articles the procedures concerning the issue of residence permits and the expulsion of foreigners. Albeit the enormous increase of immigration to France during the following decades, this regime remained stable for a long period, counting only eleven amendments in the 35 years between 1945 and 1980. In the new framework of migration policies starting with the economic crisis in the mid-1970s legislative activity increased, however, considerably. The 26 reforms of the original ordinance of 1945 adopted between 1980 and 2006 affirmed on the one hand the restrictive dimension of migration control, notably with four amendments in 1993, 1997, 2003 and 2006 concerning the "fight against irregular migration" but established on the other hand also stronger guarantees for irregular migrants in procedures pending deportation and facilitated the stabilisation of residence for foreigners staying in France over a long period.[74] In 1993 the newly formed conservative government under Prime Minister Édouard Balladur passed a series of laws that reflected a new attempt to further restrict immigration by inter alia establishing stricter laws on naturalisation (so-called Law "Méhaignerie") and, in particular, adopting new provisions on the entrance and residence of foreigners in France that amended another time the ordinance from 1945 (in the academic literature often referred to as Law "Pasqua" named after the Minister of Interior at that time, Charles Pasqua). Under the premises of a "fight against irregular migration" it is precisely this law with which French legislation started to establish special rules for irregular migrants inter alia by restricting their

[72] See Alinéa 4 Preamble of the Constitution of 1946, to which the Constitution from 1958 currently in force makes explicit reference.
[73] Ordonnance n°45-2658 du 2 novembre 1945 relative aux conditions d'entrée et de séjour des étrangers en France.
[74] Tchen, 2006, p. 9.

access to rights and benefits.[75] The law was, however, not limited to a simple amendment of ordinance n°45-2658 but also changed numerous provisions in other laws such as the Penal Code, the Civil Code and – entailing serious consequences for the protection of irregular migrant workers in France – the Social Security Code.

In the amended version of the Social Security Code the possibility for the employee to get insured in the public social security system (respectively the obligation for the employer to pay contributions) is not conditioned anymore only to the fact that a person is carrying out dependent work but also to the requirement of a "steady and regular residence" in France.[76]

This law was the first one that explicitly excluded irregularly residing migrants from certain social benefits but in the years that followed the distinction between regularly and irregularly residing migrants became one of the main principles of social legislation in France.[77] When the health care system was reformed in 1999, introducing a "universal health coverage" (*couverture maladie universelle*), this system – despite its name – excluded irregular migrants from its benefits and relegated them to the state medical assistance (*Aide médicale d'Etat*).[78] In 2003 this system was further restricted, conditioning the access to the state medical assistance to the proof of a continuous residence in France of at least three months, which could, however, also be irregular.

Anticipating a more detailed analysis of these provisions under the specific chapters below, we can thus already conclude that with a legislation that seems to be justified by a growing concern about irregular immigration and the political wish to combat it, the French legislator bit by bit attempted to limit social protection for irregular migrants over the last 15 years. Whether these reforms are in line with the constitutional guarantees is highly doubtable as Alinéa 11 of the Preamble of the Constitution of 1946 guarantees health care and the coverage of essential material needs to "everybody" but so far the Constitutional Council and the Council of State (*Conseil d'État*) have remained rather prudent in their jurisprudence.[79]

The latest important reform in French immigration law was realised from 2003 to 2005. As the numerous amendments of the ordinance n°45-2658 – already in force since 1945! – strongly impeded the readability of the original text, the French parliament authorised the

[75] Dupeyroux/Prétot, 1994, p. 69.
[76] Article 115-2 Code Securité Sociale. The system will be discussed in more detail below (Chapter 2.2.).
[77] *Daugareilh* describes this requirement of a "steady and regular residence" as "[…] *the backbone of French social security law* […]": Daugareilh, 2008, p. 66.
[78] Daugareilh, 2008, 67. The system will be discussed in more detail below in the chapter about health care protection of irregular migrant workers (Chapter 3).
[79] See notably: Conseil d'État, 7 juin 2006, *Association aides et autres*, req. n° 285576. The question of the constitutionality of those reforms will be discussed in more detail below.

government with a law in 2003 (Loi n°2003-1119 of 26 November 2003) to codify the aliens law by ordinance.[80] Consequently a new Immigration and Asylum Code was adopted by an ordinance concerning the legislative part in 2004[81] – which entered into force on 1 March 2005 – and another two decrees concerning its executive regulations in 2006.[82] However, the new code constitutes mostly only a codification of already existing laws and thus did not bring about major changes affecting irregular migrant workers or undocumented migrants in general. Anyway, it has to be taken into account that most of the rights guaranteed to irregular migrant workers in France are directly established in the Labour or Social Security Code (see below in Chapter 2 under the respective subchapters).

1.1. Spain

1.2.1. A general outline of the phenomenon of irregular migrant labour in Spain

While Spain has for long been a classic emigration country since the 1980s it has been faced with steadily growing streams of immigration, especially for the purpose of work. In fact it was not until 1991 that Spain had a positive migration balance, since then, however, the trend has reversed and the annual statistics by the Ministry of Labour and Social Affairs demonstrate a constantly growing number of foreign nationals residing in Spain.[83] At the end of the 1990s documented foreigners represented still less than 2% of the total registered population, while by 1 January 2005 that figure has risen to 8.4%[84], making Spain the second biggest immigration country within the OECD in 2004 (in the absolute amount of immigrants received) just behind the United States of America and with a considerable distance to more traditional immigration countries in Europe such as France, Germany and the United Kingdom.[85] Reasons for this rapid growth might be found both in external factors e.g. the effects of globalisation as well as internal factors, especially the relative political and social stability in Spain during the last 30 years, its historical or geographical proximity to major regions of emigration (e.g. North Africa and Latin America) and the enormous economic growth in the country over the last decades. Analyses have illustrated that especially the

[80] Tchen, 2006, p. 10.
[81] Ordonnance n° 2004-1248 du 24 novembre 2004 relative à la partie législative du code de l'entrée et du séjour des étrangers et du droit d'asile.
[82] Décret n° 2007-1352 du 13 septembre 2007 and Décret n°2006-1378 du 14 novembre 2006.
[83] Fernández Bessa/Ortuño Aix, 2006, p. 1.
[84] MacDonald/Cholewinski, 2007, p. 36.
[85] Cited according to Pérez Infante, 2008, p.114.

request for cheap and low skilled labour in the growing industries, not rarely resulting in irregular employment, can be considered as one of the pull-factors of immigration to Spain.[86]
Although it is estimated that the percentage of irregular migrants working in Spain is considerably high, concrete numbers are – as mentioned before – hard to obtain. Due to an administrative system that allows – and even legally orders – persons who are staying without a valid authorisation on Spanish territory, to register nevertheless with the local authorities ("*empadronamiento*") without having to fear immediate repressive consequences[87], the data on irregular migrants residing in Spain is, however, a lot more precise than that of other countries. If taking thus the number of foreigners registered with the local authorities minus the number of those who are registered as residing legally we obtain a quite clear picture on how many irregular migrants there are currently living in Spain (still with the statistic impreciseness that some irregular migrants might not register with the local authorities). Applying this method, more than 1.2 million irregular migrants were staying in Spain as of January 2008, which means an increase of more than 370,000 persons compared to the numbers six years earlier (January 2002) but a decrease of 500,000 people compared to the 1.7 million before the last regularisation campaign in 2005 (figures as of January 2005).[88]
With all in all five regularisation campaigns carried out between 1986 and 2005 various Spanish governments – conservative as well as socialist led ones – tried to integrate this large number of irregularly residing foreigners into the regular economy. Those campaigns have always been much disputed in Spain as well as in other European countries and within the institutions of the European Union.[89] On the one hand it can be argued that regularisation campaigns only attract more irregular migration by sending the signal that it is only necessary to work for a certain period of time illegally in the country and then – if lucky – one might qualify for a regularisation programme and can obtain a residence and work permit. On the other hand a more pragmatic argumentation would be that regularisation is a step to integrate work, that is already carried out and is maybe even economically important, into the regular economic system, with the advantage that for this work there will be paid taxes and

[86] Moreno Fuentes/Arriba González de Durana/Moreno Fernández, 2006, pp. 57-58.
[87] The police is only allowed access to the data of the local registry (*padrón municipal*) if concrete criminal or administrative sanctions have to be executed against a person but not to obtain in general data about all irregular migrants living in a certain area (view the guarantees of the Ley 7/1985 Reguladora de las Bases de Régimen Local and of the additional provisions in the Organic Law 14/2003). Therefore a registration should not lead to measures with a view to expulsion of an irregular migrant. See e.g. Sempere Souvannavong, 2009, p. 62.
[88] Own calculations based on the data in: Pajares, 2008, p. 25-26.
[89] Moreno Fuentes/Arriba González de Durana/Moreno Fernández, 2006, p. 61; Arango/Jachimowicz, 2005.
See also the comment of the European Commission in its Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions COM (2003) 336 final: Commission of the European Communities, 2003, Chapter 3, p. 25; as well as in the study between links of legal and illegal immigration: Commission of the European Communities, 2004, COM (2004) 412 final, p. 9-10.

contributions in future and exploitative working conditions that profit from the precarious situation of irregular migrants can be suppressed. For the last general regularisation process in 2005 a new criterion was introduced, conditioning the granting of a work permit not only to the residence on Spanish territory over a certain period but also to the proof of a concrete job (offer). Over the application period about 690,000 requests were filed with the authorities of which more than 580,000 were decided positively.[90]

In addition to these "extraordinary regularisations" some irregular migrant workers are also regularised every year via the quota system for the Spanish labour market. This system, which was the first of that sort in Europe when introduced in 1993, allows for a certain number of foreign workers to receive a (temporary) residence and working permit in Spain every year. The exact number is negotiated by the social partners for each province and economic sector per year. Since 1994 irregular migrant workers already present in Spain are eligible for this system as well (but have to apply in general through their home countries) which offers them a possibility to regularise their status once they found a regular employment.[91]

The rapid growth of the number of immigrants in Spain, within a relatively short period of time, has lead to sometimes fierce political debates on – as MacDonald/Cholewinski expressed it – "*the best way to manage the influx, in terms of balancing the often competing interests of human rights, state sovereignty and the needs of the labour market, in a country with little experience in the field*"[92].

1.2.2. The legislative development concerning the rights of irregular migrants in Spain

In order to identify the legal framework for the protection of irregular migrant workers in Spain, it is first of all needed to analyse the constitutional basis. The only article that explicitly refers to rights of non-nationals is Article 13 para. 1 of the Spanish Constitution (in the following short: CE), which states that "*Aliens in Spain shall enjoy the public freedoms guaranteed by the present Part, under the terms to be laid down by treaties and the law*.". At first sight this provision seems to leave an unlimited margin of specification to the legislator, who is free to decide in which way non-nationals can enjoy the rights and freedoms laid down in the Spanish Constitution. In practice, however, the Constitutional Court (*Tribunal Constitucional*) has – by taking into account the whole framework of the Constitution – limited this margin of the legislator and has developed over the years a theoretical concept on

[90] Moreno Fuentes/González de Durana/Moreno Fernández, 2006, p. 61.
[91] Sempere Souvannavong, 2009, pp. 53-54.
[92] MacDonald/Cholewinski, 2007, p. 36.

which rights and freedoms can be enjoyed by aliens in Spain and how the legislator can regulate their exercise.[93]

Just like other European countries Spain has seen a series of changes in its aliens' law over the last 20 years, from minor amendments to veritable reforms and counter-reforms, with changing governments trying to respond to new challenges and situations but also trying to realise their ideas about immigration management in the country. The first specific Spanish Aliens Act was adopted in 1985 (*Ley Orgánica 7/1985, de 1 de julio, sobre derechos y libertades de los extranjeros en España*) five years after the new democratic constitution came into force. Even though it was entitled "Law on the rights and freedoms of aliens in Spain", in fact only one cursory chapter (Articles 4-10) dealt with rights that could be exercised by non-nationals while the remaining chapters were simply regulating the conditions for entrance, residence and work in Spain as a foreigner, respectively established a systems of sanctions for infringements. This law has been the first one to formally introduce a distinction between legally residing immigrants and irregular immigrants with the later ones being excluded from the rights foreseen by the law, even though the Constitution does not provide for such a distinction.[94] However, the Constitutional Court has been subsequently called on several times to decide over alleged unconstitutionalities of the law (see e.g. the decisions SSTC 115/87, 94/1993, 242/1994) and in this way the scope of some of its provisions have undergone a reinterpretation – which were partly incorporated by regulation RD 155/1996 – but nevertheless the law remained in force for nearly 15 years, until 1 February 2000.

The draft of the Aliens Act LOEx 4/2000 (*Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*) was elaborated as a consensus of all political parties represented in the parliament and constituted a major innovation, reflecting the legislator's will to create a sound legal statute for aliens and to provide means to facilitate their social integration in Spain. Contrary to its precedent it did not

[93] The leading case, with which the Constitutional Court started to develop a concept of which limitations of rights for aliens are constitutionally permitted, was a decision from 1984, even before a specific Aliens Act was in force in Spain. In this case (STC 107/1984, 23 November 1984) the Constitutional Court constructed a three-tier classification of constitutional rights and freedoms which have to be respected by the legislator: 1. Rights that are "strongly liked to human dignity" and thus have to be guaranteed to everybody; 2. Rights that are explicitly reserved to Spanish citizens (in particular Article 23 para. 1 of the Constitution which establishes the right to political participation); 3. All the remaining rights are in principle guaranteed to everybody but the legislator is free to regulate to which extend they can be enjoyed by aliens. The Court soon had to clarify, however, that concerning this last category the legislator is by no means enjoying an absolute discretion in regulating the rights of aliens. See e.g. the decision STC 115/87 regarding several complaints against the Aliens Act 1985 brought before the Court by the Spanish Ombudsman (Fernández Bessa/Ortuño Aix, 2006, p. 6.). For further details on this concept see e.g.: Ramos Quintana, 2008, p. 55

[94] Fernández Bessa/Ortuño Aix, 2006, p. 6.

condition the enjoyment of the rights provided to the status of legal residence but introduced a completely new category, namely the legal status of the alien registered in the municipal registry where they are residing (*empadronado*). As it is not necessary for the registration to be residing lawfully, the law considerably relativised the importance of the administrative status of a person for the enjoyment of a series of fundamental rights and freedoms.[95] However, after controversial debates in the parliament, the party in power – the conservative *Partido Popular* (PP) – broke the consent and the law was adopted with the votes of the opposition parties only.[96] Arising out of a political defeat of the governing party, the innovative provisions of this law were not destined to have a long life. After winning the absolute majority of the seats in the parliament in the general elections of 12 March 2000 the new government under the leadership of José María Aznar (PP) quickly started to work on an amendment of the LOEx 4/2000, not being dependent on the consent of the opposition anymore. While technically the law finally adopted by the end of 2000[97] was only an amendment to the LOEx 4/2000 leaving the law as such intact, it profoundly changed its content, affecting 80% of the articles and leaving only four articles (Articles 2, 4, 12, 14) completely untouched.[98] The most radical change brought about by the LO 8/2000 was the re-introduction of a differentiation between legally and illegally residing immigrants, limiting the excise of most of the rights only to persons legally residing on Spanish territory. This decision provoked major criticism by civil society organisations as well as legal scholars and resulted in the several objections of unconstitutionality concerning provisions of the law before the Constitutional Court as well as a complaint by a major Spanish trade union (*Unión General de Trabajadores*) before the ILO Committee on Freedom of Association.[99]

Only two years later, a new (smaller) reform project of the Aliens Act was started. It is interesting to note that the amendment (adopted as LOEx 14/2003) listed the "fight against illegal immigration" as one of its goals, in this way not only sharpening the distinction between legally and illegally residing aliens but also following the path that was strongly promoted at that time by the European Union.

The decision STC 236/2007 over an objection of unconstitutionality raised by the Parliament of Navarra and the following SSTC 259-266 of the Constitutional Court in autumn 2007

[95] Fernández Collados, 2007, p. 39; Sempere Souvannavong, 2009, pp. 58-59.
[96] Fernández Bessa/Ortuño Aix, 2006, p. 14.
[97] Ley Orgánica 8/2000, de 22 de diciembre, de reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social.
[98] Fernández Collados, 2007, p. 40.
[99] For the findings of the Constitutional Court and the ILO Committee see below the sections about the single rights concerned.

demanded a change of parts of the restrictive provisions in the LOEx 4/2000, in the version of its amendments by LOEx 8/2000 and 14/2003. As will be illustrated below in more detail with respect to the single rights affected, the tribunal considered the exclusion of irregularly residing aliens from a series of mostly social and economic, but also important civil and political (in particular: union's) rights unconstitutional. In order to "save" those provisions in their applicability for regular migrants, the Court however did mostly not declare the entire rights void but left it with the declaration of unconstitutionality in as far as those rights were excluding irregular aliens, giving the legislator time to repair the provisions.

After consultations with state authorities and social partners the new Aliens Act[100] was finally enacted in December 2009. Apart from amendments in other sections, the law modifies the respective articles concerning freedom of association and assembly, the right to form and join trade unions and the right to strike as well as the right to education, in order to allow the exercise of those rights by irregular migrants in line with the jurisprudence of the Constitutional Court.[101]

Chapter 2: Directly labour-related rights

2.1. The legal qualification of a labour contract with an irregular migrant worker and its consequences for the application of labour law protection

As a preliminary question for analysing which directly labour-related rights irregular migrant workers can enjoy, it has to be clarified how the national law and jurisprudence qualify a labour contract with a person who is not authorised to work. The central problem in this regard is whether – due to the lack of authorisation – the labour contract is null and void from its beginning (*ex tunc*) and therefore the mere de facto-labour relationship cannot create any rights and duties or whether the contract is only annullable and thus produces full effects during the time before the defeasance (*ex nunc*).[102] Moving in the conflicting area between the provisions requiring previous authorisation to work for foreigners and thus, in order to be effective, cannot allow to consider a contract valid even though the authorisation is missing, and on the other hand the prevention of unjustified enrichment by the employer, the legal

[100] Ley Orgánica 2/2009, de 11 de diciembre, de reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social.
[101] The changes brought about by the reform will be considered in more detail below with regard to the single rights concerned. For a discussion of the reform project see e.g. Moya, 2009.
[102] Montoya Melgar, 2007, p. 92.

systems of different European countries are giving varied responses. Several legal systems have decided on a sort of "compromise", declaring the labour contract void – based on various legal-theoretical considerations – but at the same time providing for a special regime that nevertheless obliges the employer to fulfil their obligations during the existence of the de facto-labour relationship.[103]

The French law and jurisprudence is following a very similar approach. Legally, employment contracts with migrant workers who do not dispose of a valid work permit are invalid and thus labour law (resulting directly from the Labour Code or collective bargaining) is not applicable to de facto-employment contracts of irregular migrant workers.[104] Nevertheless French labour law recognises a series of rights to irregularly employed migrants that assimilate their contractual position to that of regularly employed workers right from the moment on they are hired.[105] The relevant provisions of the new French Labour Code[106] thus principally concern the employer's obligations, in particular to obey the rules concerning health and security in the workplace, maximum hours of work, holidays and maternity protection (Article L. 8252-1). Furthermore the law explicitly recognises the right of irregularly employed migrant workers to receive – for the period they are actually employed – a salary and all possibly corresponding supplements in compliance with legislative, regulatory and contractual provisions that would be applicable to the contract.

Granting these rights is based on two major theoretical considerations. First, as a general principle of French contract law (and that of other civil law countries as well) the contractual partner that has already rendered services due to a bilateral contract that foresees continuous obligations has to be compensated if the contract is later declared void *ex tunc* and the service cannot be returned.[107] Second, by assimilating the contractual position of irregular migrant workers to that of regularly employed workers, labour law is sending out the signal that employers should not profit from the fact that they are hiring foreign workers illegally under

[103] See inter alia § 29 of the Austrian Foreign Labour Act (*Ausländerbeschäftigungsgesetz*); similar provisions are foreseen in the legal systems of Germany, Italy and The Netherlands (Bundesministerium des Innern, 2007, pp. 25 and 36; Cholewinski, 2005, p. 56; Stobbe, p. 104).
[104] Daugareilh, 2008, p. 65.
[105] See the explicit formulation of Article L. 8252-1 of the Labour Code (*Code du travail*).
[106] The new French Labour Code entered into force on 1 May 2008. However, the provisions in question (Article L. 8252-1 to 8252-3) are substantially the same than L. 341-6-1 of the old Labour Code.
[107] If the contract is only declared void *ex nunc* it was valid until that very moment and thus the contractual partner is obliged to fulfil their obligations (e.g. paying money for rendered services) pursuant to the provisions of the contract.

conditions that are lower than the ones foreseen by law or collective bargaining agreements.[108]

In Spain the jurisprudence[109] traditionally considered the labour contract of irregular migrant workers null and void, explaining it either as logical consequence of the violation of an imperative rule[110] or with the lack of legal capacity of the irregular migrant.[111] This nullity, however, still entailed for the employer the consequences foreseen in Article 9 para. 2 Labour Act (*Ley del Estatuto de los Trabajadores*, ET), which provides that in the case a labour contract (for whatever reason) turns out to be void, the employer is nevertheless obliged to pay the remuneration for the time work was already carried out under the same conditions as for a valid contract. In this sense the Spanish jurisprudence of the 1980s and 1990s was very similar to that of other European countries, mentioned above.

The Aliens Acts 4/2000, however, introduced a provision (Article 33 para. 3) that expressively recognised the legal value of a labour contract stipulated with a migrant worker not possessing the necessary authorisation with regard to the employee's rights and thus completely revolutionised the system. Unlike other provisions favourable for irregular migrant workers the LOEx 8/2000 only changed the numeration of the provision – which became Article 36 para. 3 – but left its content unchanged. Hence the change in the legal regime got consolidated and was even expanded with the reform LOEx 14/2003, referring not only to the rights arising out of the labour contract but also to (social) benefits that might correspond to it. This radical change in the legal qualification of labour contracts stipulated without the necessary authorisation for foreign workers is also reflected by the jurisprudence of the Supreme Court which stated in a leading judgement in 2003 that "in the current legislation the labour contract of a non-authorised foreign worker is not a void contract".[112] Some authors stress, however, that the wording of Article 36 para. 3 does not entail that the whole labour contract as such is valid but only as far as it concerns the rights of the irregular migrant worker.[113] Thus the contract would only be "partially valid" or an "asymmetric

[108] Daugareilh, 2008, 64-65.

[109] Lousada Arochena/Cabeza Pereiro, 2004, p. 800. For jurisdictional reference in this sense see e.g. SSTS 31 diciembre 1991 (RJ 1991, 9243), 21 diciembre 1994 (RJ 1994, 10349), 21 marzo 1997 (RJ 1997, 3391).

[110] This interpretation is supported by the general provision of Article 1272 of the Spanish Civil Code which declares void contracts over things or services which are legally not possible (which is the case of unauthorised work). For details on this discussion see: Montoya Melgar, 2007, p. 96-97.

[111] The theoretical foundation of a "lack of legal capacity" is not unproblematic since usually such provisions are intended to protect "incapable" persons (e.g. minors) while in the case of irregular foreign workers the contrary is the consequence as the presumption of their inability to contract prevents them a priori from invoking their contractual rights.

[112] STS de 9 junio de 2003 (RJ 2003, 3936); in this sense also: SSTS 7 de octubre de 2003 (RJ 6497) and 29 de septiembre de 2003 (RJ/7446).

[113] In this sense: Roqueta Buj, 2005, p. 78; Montoya Melgar, 2007, pp. 102-103.

contract" allowing only the employee to invoke rights but not the employer. In this sense the provision would only widen the effects already foreseen in Article 9 para. 2 ET by extending it to all rights deriving from the labour contract and not only strictly remunerative ones. Already if recognising only this effect the provision of Article 36 para. 3 offers a fundamental protection for irregular migrant workers, considering that labour law provides a considerable amount of minimum rights for employees apart from salary such as maximum hours of work and the compliance with safety standards, holidays or sick and maternity leave.

In any case, the provision of Article 36 para. 3 LOEx seems to favour the inclusion of irregular migrant workers into the system applicable for regular work by granting them an important contractual status, even with the cost of risking to render the provisions requiring a previous work permit for foreigners less effective and thus maybe contravening attempts to combat irregular work.[114] The "asymmetric" contract thus seems to be justified by the presumption that an employer is recurring to irregular work merely to save costs which makes their conduct more condemnable than that of the irregular migrant worker who is carrying out the illegal work mostly only because of a state of economic necessity. In short it can be therefore concluded that the legislator obviously intended to provide a more effective protection for irregular migrant workers and at the same time make irregular work less attractive for employers by aligning the legal obligations resulting from it to those from legal labour contracts.

In this way, the Spanish law is offering a similar protection than French law labour but is going further, since French labour law limits the rights mainly to the payment of remunerations and the respect of working conditions, while according to Spanish labour law irregular migrant workers are able to invoke all rights that legally arise from a valid labour contract.

2.2. The right to social security insurance in connection with an employment relationship

The progressive realisation of social security systems against various risks that can be encountered by persons in an employment relationship constitutes one of the main achievements of social legislation since the end of the 19th century.[115] Considering the possible health risks resulting directly from the work carried out and the importance for the worker to earn money for a living, these social safeguards provide a sort of protecting net for

[114] Montoya Melgar, 2007, p. 105.

[115] For an overview over the development of modern social security systems see e.g. Dupeyroux/Borgetto/Lafore, 2008, pp. 13-37.

employees. Most of the European countries have organised social security systems connected to employment relationships in the form of public insurances for which the employer (and/or the employee) have to pay monthly contributions.[116] This system was also chosen by France and Spain for the cases of accidents at work, permanent disability, and unemployment. If we thus speak in the following chapter about "social security systems" or "social security benefits" there are intended only such systems which are first, based on a contributive insurance model and second, are linked to an employment relationship. This expression does hence not comprise social aid benefits which are granted by the state and are neither linked to an employment relationship nor to the previous payment of contributions (e.g. health care aid which will be analysed in Chapter 3 below).

Once again the question whether irregular migrant workers should be included into such social security insurances poses a series of difficult legal questions. On the one hand, considering that irregular migrant workers are exposed to the same risks as regular workers, it would be opportune to include them in a social security protection scheme. Following this approach some European countries (e.g. Czech Republic, Portugal, Sweden and Switzerland) have a social security system in place that does not condition the access to social insurance to regularly performed work, thus allowing irregular migrant workers to become socially insured and – as a consequence – to receive social security benefits.[117] On the other hand it is difficult to establish a system of payment of contributions for persons who are not officially registered. Regarding this aspect the situation of irregular migrant workers is comparable to that of national workers employed in the informal economy. Furthermore, the inclusion into social security systems normally presupposes the existence of an employment relationship which is leading us back to the question whether labour contracts with irregular migrant workers are recognised as legally valid or not. Faced with the dilemma of guaranteeing a basic protection for all workers and legal and/or practical difficulties concerning its realisation, the legal systems of France and Spain have developed different solutions, which are, however, partly harmonised in the field of accident benefits by ILO Convention N°19.

Before the changes brought about by the "Law Pasqua" in 1993[118] the possibility to be affiliated with the French social security systems was not conditioned to the presentation of a valid residence and/or work permit but foresaw as only condition a "residence in France".[119]

[116] Dupeyroux/Borgetto/Lafore, 2008, p. 41.
[117] Schoukens/Pieters, 2004, p. 243.
[118] See above: Part II, Chapter 1.1.2.
[119] See the former articles L. 311-2 and L. 311-7 of the Social Security Code (C.S.S.).

In fact, only the employer of an irregular migrant worker risked – as a punitive sanction foreseen by the former Article L. 374 of the Social Security Code – regress claims by the social security agencies, apart from administrative or criminal proceedings. These provisions followed the double logic of discouraging employers to hire migrant workers without the necessary authorisation and of providing social protection for the workers concerned, whereas at the end the public social security agencies did not have to cover the costs but could burden them on the employer.[120] With the entrance into force of the law of 24 August 1993 the conditions for the access to social security insurances changed radically, now only opening the system to foreign workers (and their beneficiaries) if they are residing regularly and steadily way in France. This requirement of "regular and steady residence" presupposes the presentation of one of the residence titles exhaustively listed in Article D. 115-1 C.S.S. which excludes persons who only hold certain temporary residence permits e.g. asylum seekers or persons who were granted subsidiary protection (as they cannot be sent back to their countries of origin due to principle of *non-refoulement*). In practice the social security agencies have to verify whether a person is disposing of a necessary document before insuring them in the social security system or – if necessary – have to renounce the affiliation later on if the person concerned loses their residence permit.[121]

The most notable exception of this condition of "steady and regular residence" constitutes the insurance against accidents at work and occupational diseases. This exception might result from the international obligations French has under ILO Convention No°19 Equality of Treatment (Accident Compensation) Convention (outlined in part I) Thus, neither the lack of a residence nor of a work permit forms an obstacle to the payment of benefits under the book IV ("*Accidents du travail et maladies professionnelle*") of the Social Security Code. However, in the case of irregularly employed migrant workers, the employer can be forced to fully reimburse the costs to the social security fund.[122] For the irregular migrant worker concerned this regime opens a protection against all risks of accidents in the workplace, accidents that happen on the way between home and workplace (*accidents de trajet*) and occupational diseases.

Some authors have strongly criticised the requirements set by the social security system currently in force as neither logical from its teleological nor its theoretical foundations[123]

[120] Michelet, 2002, pp. 262-263.
[121] Article L. 115-7 C.S.S.; Julien-Laferrière, 2000, p. 254.
[122] Michelet, 2002, p. 269.
[123] See notably the elaborations of *Michelet* in her doctoral thesis on the social rights of foreigners in France: Michelet, 2002, pp. 276-286.

since the obviously intended aim to fight against irregular immigration and employment[124] hardly fits into the protective aim of public social security insurances or with the principle of solidarity, a main theoretical fundament of modern French social legislation. Nevertheless, the Constitutional Council decided in a preliminary ruling on the law "Pasqua" in August 1993[125] that the law met the requirements set out by the Constitution. Since the entrance into force of this law the constitutionality of the exclusion of irregular migrants from the coverage under social security has not been challenged.[126]

In Spain there has to be differentiated between the situation before the entry into force of the LOEx 14/2003 and after this reform – amending Article 36 para. 3 – which introduced a new clause concerning the entitlement of irregular migrant workers to social security benefits. In principle LOEx 4/2000 recognised the right to receive social security benefits only to regular migrant workers (Article 10 para. 1 in conjunction with Article 14 para. 1 LOEx) – a provision that finds its equivalent in Article 7 para. 1 of the Social Security Act (LGSS) which limits the right to receive social security benefits to aliens who are legally staying or residing in Spain.

With the reform of the Aliens Act in 2003 (LOEx 14/2003) Article 36 para. 3[127] was amended in the sense that the lack of a work permit was no obstacle for receiving benefits that might correspond to the labour contract. This vague formulation poses a series of questions concerning its interpretation, especially whether the provision gives rise to obligations of the public social security agencies or if it only refers to contractual obligations of the employer.[128] In particular because Article 14 para. 1 LOEx, which reserves social security benefits only to legally residing migrant workers, remained unchanged. This legal confusion was further aggravated by the regulation Real Decreto 1041/2004 which provides that irregular migrant workers are not included in the system of social security "unless they can be considered as included by receiving certain benefits established by the law"[129], without specifying what kind of "certain" benefits it envisages. Therefore it is necessary to elaborate separately for each social security benefit whether irregular migrant workers are entitled to it.

[124] Dupeyroux/Prétot speak about the law "reinforcing the instruments for the fight against clandestine immigration" ("*renforce le dispositif de lutte contre l'immigration clandestine*"): 1994, p. 69.
[125] Conseil constitutionnel, Décision N° 93-325 DC de 13 août 1993 sur la Loi relative à la maîtrise de l'immigration et aux conditions d'entrée, d'accueil et de séjour des étrangers en France; Journal officiel du 18 août 1993, p. 11722.
[126] Daugareilh, 2008, p. 67.
[127] This article states (as was outlined above) that the lack of a work permit does not invalidate the labour contract per se.
[128] Montoya Melgar, 2007, p. 125.
[129] Article 42 para 2 RD 1041/2005: "(...) *sin perjuicio de que puedan considerarse incluidos a efectos de la obtención de determinadas prestaciones de acuerdo con lo establecido en la ley*."

For the practically very important case of insurance in the case of an accident at work this has been partly answered by jurisprudence. In a decision in 2001 (STS 21 de junio 2001) the Supreme Court decided that there exists a social security protection in case of accidents in the workplace even if workers did not have a work permit[130] and confirmed in two leading decisions in 2003 that given the fact that the labour contract of irregular migrant workers is considered valid, irregular migrant workers cannot be deprived of a protection which is in the Spanish labour law regime inherent to the labour contract.[131] In those later decisions the Court thus avoided entering into a detailed discussion on whether irregular migrant workers can invoke rights based on Article 36 para. 3 LOEx but based its reasoning on the labour law regime as a whole leaving, however, open whether these rights "inherent to the labour contract" establish rights vis-à-vis third parties id est public social security agencies.
In addition it has to be born in mind that ILO Convention N°19 Equality of Treatment (Accident Compensation) Convention, which is in force in Spain since 1929, obliges the state to provide for foreign workers who have sustained an accident at work on its territory, the same protection as for national workers independent of their administrative status. As this convention is based on reciprocity this obligation is only applicable if the migrant worker's home country has also ratified it. Nevertheless there have been tendencies in the recent jurisprudence – among which the cited STS 9 junio de 2003 – that grant this right to all migrant workers, independent whether their home country has ratified ILO Convention N°19 or not.[132] While Spanish jurisprudence is thus recognising in principle the right of irregular migrant workers to receive social security benefits in the case of an accident in the workplace the concrete obligation for the public social security agencies remain unclear.

2.3. Union's rights: the right to unionise and the right to strike

The right to unionise is a basic labour-related right since it gives workers the possibility to stand up for their labour rights and working conditions as well as to act more powerfully as a collective organisation than they would be possible to do alone. This importance is recognised by a series of international human rights instruments (e.g. Article 22 ICCPR, Article 8

[130] See the discussion in: Trinidad García/Martín Martín, 2005, p. 204.
[131] SSTS 9 junio de 2003 and 7 octubre de 2003.
[132] Roqueta Buj, 2005, p. 83-84. For further decisions in this sense see e.g. SSTSJ Castilla y León, 4 de dieciembre 2000; Cataluña, 5 de septiembre 2001; Madrid 5 de septiembre 2002 and Castilla-La Mancha, 30 de julio 2004.

ICESCR, Article 11 para. 1 ECHR[133]) and conventions agreed under the auspices of the International Labour Organisation, in particular ILO-Convention N°87 on the Freedom of Association.

The French Constitution of 1946 contains the principle that everybody has the right to defend their rights by unionist actions and to join a union of their choice.[134] In application of this constitutional principle, Article L. 2141-1 Labour Code provides that "every worker can freely join a professional union of their choice" without posing this right or its exercise to the fulfilment of any further requirements e.g. the civil capacity to act, to vote or also to reside regularly in France.[135] Thus in France the right to unionise is guaranteed in principle to every worker, including those foreign workers who are irregularly residing and/or employed. In fact, there are examples of successful involvements of irregular migrant workers in trade unions. During the 1980s for example, irregular migrant workers employed in the clothing industry struggled successfully for their regularisation through their affiliation with the CFDT (*Confédération française démocratique du travail*). Similar events repeated in the 1990s with the big unions supporting the cause of the migrant workers especially during and after the "occupation" of the Saint Ambroise church in Paris by "sans papiers" in March 1996.[136]

Whether irregular migrant workers are allowed to participate in the elections of the workers' representatives in the companies[137] remains, however, unclear. The French Constitution guarantees the right to "participate in the collective regulation of working conditions as well as the management of the company via its delegates"[138] to every worker while labour law puts as only requirement for the active right to vote a minimum job tenure of three months.[139] While for the right to be elected as representative the doctrine has deduced from the labour jurisprudence that a candidate has to have a valid work contract[140], so far neither the law itself nor the jurisprudence have specified whether the requirement of "holding a job for at least

---

[133] See in this context the decision of the Grand Chamber of the ECtHR in the case *Demir and Baykara v. Turkey* (ECtHR Grand Chamber, 12 November 2008) in which the Court expressly recognised that the right to collective bargaining was included in Article 11 ECHR (freedom of association); On this decision and its consequences: Hervieu, 2009.

[134] Alinéa 6 of the Preamble of the Constitution of 1946.

[135] Clavel-Fauquenot/Marignier, 1999, p. 42.

[136] European Platform for Migrant Workers' Rights, *The Rights of Migrant Workers in the European Union 2006. Shadow Reports for Estonia, France, Ireland and the United Kingdom*. Brussels, 2007, p. 78. Available, online: http://www.december18.net/sites/default/files/EPMWR_The_Rights_of_Migrant_Workers_in_Europe.pdf (consulted on: 16 May 2010).

[137] French labour law foresees a "mixed system" of partly elected and partly unions nominated representatives: Mazeaud, 2008, p. 114.

[138] Alinéa 8 of the Preamble of the Constitution of 1946.

[139] Mazeaud, 2008, p. 121.

[140] Clavel-Fauquenot/Marignier, 1999, p. 199.

three months" for the active right to vote includes only regular work or if irregularly working migrants can participate in the elections of their representatives as well.

In Spain Article 11 para.°1 Aliens Act LOEx 4/2000, as amended by LOEx 2/2009, grants the right to join a union and to unionist organisation to all foreign workers under the same conditions as to Spanish workers. This article has a turbulent history though. While LOEx 4/2000 had already recognised this right as a right of all workers, LOEx 8/2000 limited its exercise to foreigners who are legally residing in Spain. This de facto-impossibility for irregular migrant workers to engage in any collective unionist action to defend their rights, had raised serious doubts about the compatibility of this provision with the Constitution and international treaties Spain has ratified in the academic literature[141] but also within the administrations of some Autonomous Communities and notably the trade unions themselves. As a consequence one of the major Spanish unions – the General Union of Workers of Spain (UGT) – brought a complaint before the ILO Committee on Freedom of Association, invoking a violation of ILO Convention N°87 (Freedom of Association and Protection of the Right to Organise Convention). In its decision the Committee upheld the allegations by the complainant and recalled that Article 2 of Convention N°87 recognised the right of workers to establish and join organisations of their own choosing without previous authorisation and without any distinction whatsoever. Thus, in the Committee's opinion, Convention N°87 includes all workers, with only one exception provided for in Article 9 of the Convention concerning the armed forces and the police.[142] However, it has to be noted that the Committee's recommendations, as those of most international treaty bodies, do not entail any binding judicial consequences for the state concerned.

Legally and politically more important than the non-binding decision of the ILO-Committee were thus the objections of unconstitutionality regarding the right to unionise in its formulation by organic law 8/2000, which were brought before the Constitutional Court.

In its decision STC 236/2007 the Constitutional Court declared the amendment of Article 11 para. 1 unconstitutional in as far as it regarded the right to join a union (FJ, para. 9 of the decision). The Court elaborated that the limitation of the right to unionise, imposed by LOEx 8/2000, did not fit into the framework the Spanish Constitution recognised for the exercise of this right. In particular, the Court outlined that several international texts in this field (the Court cited Article 23 para. 4 UDHR, Article 22 ICCPR, Article 8 para. 1 ICESCR and Article 11 para. 1 ECHR) clearly grant the right to unionise to "everybody" without

[141] See e.g. Lousada Arochena/Cabeza Pereiro, 2004, p. 805; Montoya Melgar, 2007, p. 158.
[142] ILO Committee on freedom of association, Case No. 2121.

foreseeing any restrictions with regard to nationality or administrative status. Thus, while the Court admitted, that certain (concrete) exceptions or limitations on the exercise of the right to unionise are permissible (as long as they remain within the general constitutional framework), the legislator is not allowed to completely exclude irregular migrant workers from the exercise of the right.[143]

The right to strike is not recognised as such in all European legal systems[144] and is usually seen either as a last resort in a labour dispute or as a more general mean to call public attention to current social problems – depending on different theoretical concepts and traditions of social relations in a country.[145]

In France the right to strike is recognised as a freedom of constitutional value but according to the Preamble of the Constitution 1946 it has to be exercised "within the legal framework regulating it"[146]. In being an individual freedom guaranteed by the Constitution, only a formal law can – in the opinion of the Supreme Court[147] – limit or regulate the exercise of the right. Nevertheless, the Labour Code does neither define, nor outline the contours of this freedom. This does, however, not mean that in return the right to strike is a completely unlimited right but it has to be balanced on an individual basis with other rights affected that might even be of constitutional value as well e.g. the right to work (including the right not to participate in a strike), the right to property and the equality between citizens, who could become victims of damages caused by others.[148] Neither the Constitution itself nor labour legislation has developed, however, any restrictions with regard to workers who do not dispose of a valid residence and/or work permit, for which reason it can be concluded that at this stage irregular migrant workers are in the same way as other employed workers free to exercise the right to strike in France.[149] Yet in practice the exercise of this right by irregular migrant workers poses a series of difficult legal questions. According to a well-established doctrine, the individual labour contracts are temporarily suspended during and are resumed after the end of the strike. In the case of irregular migrant workers the employer would not be allowed to readmit them to their posts though but would have to dismiss them because they are lacking the necessary

[143] Pérez Sola, 2008, p. 44.
[144] E.g. the Austrian legal system does not only not recognise a (constitutional) right to strike but also lacks any sort of regulation concerning the exercise of a strike. On the other hand a right to strike is explicitly recognised inter alia in Article 40 of the Italian Constitution ("*Il diritto di sciopero si esercita nell'ambito delle leggi che lo regolano*.") as well as the Constitutions of France and Spain (see below).
[145] Mazeaud, 2008, p. 276.
[146] Alinéa 7 of the Preamble.
[147] Cass.soc. 7 juin 1995, n° 93-46448 (*Droit social* 1995, p. 835, observations J.-E. Ray).
[148] Mazeaud, 2008, p. 275.
[149] Leclerc/Wolmark, 2009, p. 177.

authorisation to work.[150] Even though such a dismissal can be legally justified by the lack of a work permit this consequence is contradicting the protection labour law offers to workers on strike. Article L. 2511-1 Labour Code explicitly prohibits – except for a serious failure on the part of the employee – a dismissal on the sole ground of having participated in a strike. The fact that irregular migrant workers cannot profit from this protection because their dismissal could always be justified by the legal impossibility to reemploy them is thus likely to seriously discourage them from exercising in practice their right to strike. Even more so as they do not even profit from the general labour law regime concerning the dismissal of employees (Articles L. 1232-2 to L. 1232-14 Labour Code).

Similar to the right to unionise, the reformed Spanish Aliens Act now re-recognises the right to exercise a strike to all workers, a right that organic law 8/2000 had previously limited only to persons "who are authorised to work" (Article 11 para. 2). The unconstitutionality of this paragraph had been invoked by all objections brought before the Constitutional Court cited above, with the exception of the objection raised by the Parliament of Navarra (STC 236/2007). Thus, the leading case concerning the right to strike is the decision of the Constitutional Court STC 259/2007 from 19 December 2007 over the objection raised by the Government of Andalusia.

In its conclusions the Court recalled its previous jurisprudence in which it already pronounced that the right to strike was an inherent right of all workers based on the idea of a "social and democratic state, subject to the rule of law" (STC 11/1981)[151] and thus even though its concrete exercise might have to be balanced with other rights, its essential content must not be misjudged (STC 123/1992, FJ para. 4). It is important to note that the Constitution itself (see Article 28 para. 2 CE) does not pose any limits on the entitlement of the right to strike but only allows the legislator to introduce regulations in order to guarantee minimum public services during a strike. Additionally the Court stressed the importance of the right to strike not only for individuals but also as one of the most effective collective means of action of which trade unions possess, thus linking the right to strike closely to the right to unionise.[152] In the light of this contextual background the Court finally concluded that given the character of the right the legislator was not allowed to pose any restrictions on the enjoyment of the right by foreigners. Consequently the Court declared Article 11 para. 2 unconstitutional and

[150] See for a detailed discussion on these questions: Leclerc/Wolmark, 2009, p. 178-179.
[151] This formulation "*Estado social y democrático de derecho*" is part of the preliminary title and thus a programmatic principle of the Spanish Constitution.
[152] Ramos Quintana, 2008, p. 66.

void in its formulation "if they are authorised to work" as this provision was contrary to Article 28 para. 2 of the Constitution.

The reform of the Aliens Act (LOEx 2/2009) is thus reflecting the constitutional doctrine outlined by the Constitutional Court in the decisions SSTC 236/2007 and 259-265 in its amendment of Article 11 LOEx without using the margin of discretion to impose limits on the exercise of these rights conceded by the Court. Bearing in mind how difficult it is to elaborate a well-balanced formulation that does only limit the way rights can be exercised but not the right as such, the legislator most probably did not want to risk that the new provision could again be declared unconstitutional.[153]

Chapter 3: The access of irregular migrant workers to health care independent of an employment relationship

The access to health care is a key right in order to be able to enjoy other rights, including ultimately the protection of the right to life. For this reason the right to health (and the corresponding access to health care) is recognised in several international human rights documents. In awareness of this importance the United Nations Committee on Economic, Social and Cultural Rights – as has already been mentioned in Part I Chapter 1.1. above – has stressed in its General Comment No. 14 on the application of the ICESCR that states have to respect the right to health of everybody "*by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants*".[154] Nevertheless, the question on how far national health care systems should be opened for irregularly residing foreigners is disputed across Europe, especially since such benefits might involve considerable financial costs.[155] In most of the countries the minimum level of access to social benefits for irregular migrants is emergency care but the way in which this health care is organised and how "urgent" needs are defined, differs from country to country.[156]

In France, the idea of introducing a health insurance system to guarantee effective medical aid for everybody dates back to the end of the 19th century.[157] Those who were not themselves

[153] Moya, 2009, pp. 6-7.
[154] Committee on Economic, Social and Cultural Rights, General Comment No. 14, 2000, para. 34.
[155] Da Lomba, 2004, pp. 364-365.
[156] Schoukens/Pieters, 2004, p. 241.
[157] Cournil, 2007, p. 1019.

insured in a social security system or beneficiaries of an insured person could resort to state medical aide provided either on the national, regional (departmental) or the communal level. While the "Law Pasqua" in 1993[158] introduced the requirement of regular residence as a requirement for being able to get insured against health risks (as well as in other social security insurances), irregular migrants could still access publicly-funded health care (*Aide medicale d'État*, AME) under the same conditions as uninsured French citizens that lacked the necessary financial resources to pay for medical treatments.[159]

In 1999, however, a law was passed that profoundly changed the French health care system.[160] The reform aimed to introduce a new "universal" system that should in fact facilitate the access to health care by obliging all public health care entities to cover the costs for medical treatment a patient is claiming if they cannot prove that the person concerned is insured with any other entity, thus ensuring that economically deprived persons had equal access to health care.[161] Despite its name, the new *Couverture Maladie Universelle* (Universal Health Coverage; CMU) did not include all persons living in France but connected the access to the system expressly to the condition of "steady and regular" residence.[162] In the political discussions that preceded the enactment of the law it was argued that irregular migrants cannot be integrated into the CMU because the possibility of free medical aid would attract poor foreigners to come to France solely for the purpose of receiving good medical treatment free of charge (referred to as an "*appel d'air*").[163] As a consequence of this reform the AME as such was de facto abolished leaving in place only a reformed – and reduced – model for irregular (adult) migrants, which is financed by the state in the name of "national solidarity".[164] This reformed system gave irregular migrants access to free medical consultations at hospitals, but required proof of at least three years residence in France to be allowed free visits to private doctor's offices.[165] While this regime thus still guaranteed basic health care through a relatively easily accessible system[166], further reforms in 2002 and 2003, however, significantly exacerbated the access of irregular migrants to health care.

---

[158] Loi n°93-1027 du 24 août 1993 relative à la maîtrise de l'immigration et aux conditions d'entrée, d'accueil et de séjour des étrangers en France. See also above the introduction to the French system (Part II, Chapter 1.1.) and the elaborations on the social security benefits (Chapter 2.2.).
[159] Maille/Toullier/Volovitch, 2005, p. 543.
[160] Loi no 99-641 du 27 juillet 1999 portant création d'une couverture maladie universelle.
[161] Da Lomba, 2004, p. 368; Devys, 2006, p. 1037.
[162] Article L 380-1 Code de la sécurité sociale (as modified by the Law n° 99-641).
[163] Maille/Toullier/Volovitch, 2005, p. 544.
[164] Cournil, 2007, p. 1037.
[165] For the detailes on the coverage see: Article L. 251-2-1 Code de l'action sociale et des familles in combination with Article L. 321-1 Code de la sécurité sociale.
[166] Applications had to be filed with one of the authorised local entities which had to transfer it to the competent health care insurance agency (*caisse d'assurance maladie*). Once this registration was successful the person concerned could access all benefits provided by the AME regime.

In the context of the law on the supplementary budget (*Loi de finances rectificative*)[167], the parliament changed in December 2002 the conditions for the access to AME. First of all, it abolished the access of irregular minors to the CMU, one of the few exceptions that still existed until this point. This reform was heavily criticised by civil society organisations pointing out that the free access to full health care for minors was guaranteed under the Convention on the Rights of the Child, which France has ratified, and formed the basis for the later complaint of a NGO to the European Committee of Social Rights (see below).[168]

Secondly, a deductible ("*ticket modérateur*") was introduced, imposing on beneficiaries of the AME to pay a certain percentage of the costs of the medical treatment themselves, from which only minors were excluded. This provision was equally criticised since obliging people with poor financial resources to pay a part of their health care costs could mean a veritable exclusion of these persons from health care.[169] As a result of this criticism the government announced in March 2003 that it would not issue the necessary decrees to put the law in place but that in lieu of thereof the fight against abuse and fraud would be intensified.[170]

The only positive point of this reform for irregular migrants was the abolishment of the condition of at least three years residence in order to get the costs of medical consultations with doctors in private offices refunded.

One year later, it was again in the context of the supplementary budget law[171] that the conditions for the access to AME were further restricted by introducing a minimum duration of residence (which could also be irregular) of at least three months.[172] As a consequence irregular migrants need to prove e.g. with an expired entrance visa or electricity bills that they were already staying three months on French territory prior to their application for AME.[173] For those not fulfilling the requirement of the minimum duration (or cannot prove it) Article L. 254-1 Code de l'action sociale et des familles only provides the coverage of the costs by the state in the case of vital medical treatment in hospitals. The responsibility to decide whether a treatment is absolutely necessary because of a patient's life-threatening state of health lies upon the medical personnel of the hospital in charge but the national health care

[167] Loi n°2002-1576 du 30 décembre 2002 de finances rectificative pour 2002 (JORF du 31 décembre 2002, page 22070, texte n° 2).
[168] Daugareilh, 2008, p. 72.
[169] See e.g. Cournil, 2007, p. 1039; Maille/Toullier/Volovitch, 2005, p. 545.
[170] Maille/Toullier/Volovitch, 2005, p. 545.
[171] Loi n°2003-1312 du 30 décembre 2003 de Finances rectificative pour 2003 (JORF n°302 du 31 décembre 2003, page 22594, texte n° 2).
[172] See Article L. 251-1 Code de l'action sociale et des familles.
[173] Maille/Toullier/Volovitch, 2005, p. 547.

entity can control, and at most, decide that the treatment was not "vital". In this case the patient has to bear the costs themselves.[174]

The Constitutional Council, however, considered these provisions in a preliminary ruling on the law in December 2003 as in conformity with constitutional principles, in particular also with the right to health guaranteed to citizens and foreigners in Alinéa 11 of the Preamble of the Constitution of 1946.[175]

Nevertheless, in 2003 the NGO *Fédération internationale des ligues des droits de l'homme* (FIDH), filed a complaint before the European Committee of Social Rights, invoking that the restrictions on the access to health care for irregular migrants established in the supplementary budget laws 2002 and 2003 violated the Articles 13 (right to social and medical assistance) and 17 (special protection for children) combined with the Articles E (Non-discrimination) and G (Restrictions) of the revised European Social Charter, which France had ratified in 1999.[176] The French government on the other side was arguing that the Articles invoked – as well as the Charter as a whole – were only applicable to nationals and legally residing citizens of other contracting parties.[177]

The Committee considered the complaint admissible in March 2003 and decided on the merits in its meeting on 8 September 2004. First of all, the Committee underlined, that a legislation or practice which entirely denies the entitlement to medical assistance of foreigners staying within the territory of a State Party, is contrary to the Charter, even if they are residing illegally.[178] This first clarification is extremely important since the European Social Charter itself reserves in its Annex the rights enshrined expressly only to citizens and nationals of other contracting parties. The Committee, however, took the opportunity of this complaint to develop a more generous general interpretation of the Charter, referring to Article 13 para. 1 of the Vienna Convention on the Law of Treaties 1969 ("*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*."). In this sense the Committee stressed the complementary character the Charter has with regard to the ECHR, which entails that its provisions have to be equally effective. Additionally it underlined, that the ESC (like the ECHR) has to be understood as a vivid instrument whose area of application widens over

[174] Daugareilh, 2008, p. 70.
[175] Décision n° 2003-488 DC du 29 décembre 2003, Loi de finances rectificative pour 2003 (Journal officiel du 31 décembre 2003, p. 22652).
[176] The collective complaint procedure of the ECSR, which is only open for registered NGOs, was described above under Part I, Chapter 2.1.
[177] Daugareilh, 2005, p. 560.
[178] ECSR, *Collective Complaint No. 14/2003 from the International Federation of Human Rights Leagues (FIDH) v. France*, para. 32.

time. Therefore it concludes, that the restrictions imposed in the Annex of the Charter with regard to (regularly or irregularly residing) nationals of third countries, are not globally applicable but it has to be evaluated in every single case whether the strong link of a certain right with the human dignity does entail its universal applicability.[179]

In the concrete case of the invoked articles 13 and 17 ESC the Committee decided that the question of access to health care, as ultimately concerning the right to life, was undoubtedly strongly linked to human dignity (para. 30 of the decision). Nevertheless, it only partly condemned France for violating the Charter. With regard to Article 13 the Committee did "in doubt" not decide on a violation because irregular migrants were not completely excluded from health care (especially those who can prove that they were residing already for at least three months), even though it criticised that the concept of emergencies and life threatening conditions was only very vaguely defined and thus left lots of uncertainties (para. 34 of the decision). On the contrary, the Committee found a violation of Article 17, by concluding that this article was directly inspired by the UN Convention on the Rights of the Child which guarantees the free access to health care for all minors without any further condition (para. 36 of the decision).

As a reaction to this decision the French government passed a circular decree[180] specifying that providing health care to minors (who are not beneficiaries of the AME) always constituted an "urgent measure". In this way the government decided to leave the contested provisions of the law unchanged and to regulate only its application to minors.

Furthermore, in July 2005 the Council of Ministers passed the necessary decrees to enact the provisions of the supplementary budget law 2003 e.g. concerning the three-month minimum residence for being able to access the AME. With this step the reform of 2003 was completed and received immediate harsh criticism by civil society organisations but also by the national employees' health insurance (*Caisse Nationale d'Assurance Maladie des Travailleurs Salariés*) which had already given a negative opinion on the envisaged reforms in February 2004.[181] Four NGOs, specialised on supporting migrants, brought a claim before the Council of State, arguing that the provisions changed by supplementary budget law 2003 and enacted by the decrees in 2005, violated a series of international treaties France has ratified, among others the European Social Charter and the ILO Conventions N°97 and 118. In its decision

[179] Daugareilh, 2005, p. 562.
[180] Circulaire DHOS/DSS/DGAS no 2005-141 du 16 mars 2005 relative à la prise en charge des soins urgents délivrés à des étrangers résidant en France de manière irrégulière et non bénéficiaires de l'aide médicale de l'Etat.
[181] Devys, 2006, p. 1038.

from 7 June 2006[182] the Council of State concluded that in principle the distinction between the CMU and the AME regime was based on a factual difference (regular respectively irregular residence) and coherent with the aim of the law.[183] On the contrary the Council found that the provisions introduced by the supplementary budget law 2003 were incompatible with the standards of Article 3 para. 1 of the Convention on the Rights of the Child (principle of the "best interest of the child") and that these shortcomings of the law cannot be simply "repaired" by a circular decree regulating its interpretation. Thus the Council of State (as opposed to the Constitutional Council: see above the decision n° 2003-488 DC of 29 December 2003) concluded that the only assumption of costs for vital medical treatment in hospital can seriously affect the substantial right to health protection and medical assistance for migrant minors.[184]

Nevertheless this decision also implicates that the contested new health care regime for irregular adult migrants, introduced in 1999 and further restricted by the reforms in 2002 and 2003, remains as such in force. Even though a state can invoke legitimate reasons to differ between those foreigners who are residing with or without its official permission on its territory and furthermore France guarantees at least a very basic protection to every person irrespective of their status, the details of the regime are criticisable. On the one hand, the numerous administrative requirements (notably the requirement of the proof of identity and residence with official documents) render the effective access of irregular migrants very difficult.[185] On the other hand the complicated system is also causing more administrative hurdles as now – contrary to the intentions of creating a system of universal health coverage – the entitlement of a person for CMU has to be accurately examined before granting benefits.[186]

Complementary to the right to life and the right to physical integrity, the Spanish Constitution recognises in its Article 43 in very general terms the right to health care as well as the obligation of the authorities to protect the public health by organising a system of necessary health care services and promoting preventive measures. On the basis of these constitutional provisions the General Health Act (*Ley General de Sanidad*) regulates the national health care

[182] Conseil d'État, 7 juin 2006, *Association aides et autres*, req. n° 285576, A.J.D.A., p. 1189. See the conclusions by Devys, 2006.
[183] See in this sense already the previous decisions of the Council: C.E., 18 juillet 2006, *GISTI*, req. n° 274664 and C.E., 18 juillet 2006, *Majha Waly A*, req. n° 286122.
[184] Cournil, 2007, p. 1044.
[185] See e.g. the studies cited by Daugareilh, 2008, p. 71.
[186] Maille/Toullier, 2009, pp. 28-31.

system as a decentralised system based on the principle of universal coverage with overall control by the state. Thus, the law establishes the competence of the state among others for the framework legislation and the coordination of health care systems, while the Autonomous Communities are responsible for the executing legislation and the organising of health care services on the regional level (Articles 38-41 leg cit). Therefore we have to analyse the national legal framework in order to find out to which health care benefits irregular migrants are entitled, while the concrete services are established by the law of the Autonomous Communities.

Before the LOEx 4/2000 only regular migrants were included into health care assistance while irregular migrant workers could only profit from social security benefits in the case of an accident at work (see above Chapter 2.2.) or maternity. For all other health care services they were making use of, they were considered as private patients and thus had to pay for the costs themselves.[187]

The Aliens Act LOEx 4/2000 brought an important innovation for irregular migrants since it established in its Article 12 a right to health care assistance for foreigners, which is guaranteed to everybody who is registered in the local civil registry office (*padrón municipal*) under the same conditions as for Spanish nationals[188]. Unlike most of the other rights guaranteed by the LOEx 4/2000, the text of this provision has not been modified by the subsequent amendments of LOEx 8/2000 and 14/2003. In order to be able to access free health care services it is further necessary to apply for a health care card *(tarjeta sanitaria*), proofing precisely the fact of the registration in the *padrón* and presenting an identity card as well as a declaration on the insufficiency of own financial means.[189]

In principle the registration should not pose specific problems for the access of irregular migrants to health care services since every foreigner who is residing on Spanish territory has the possibility (and even legal duty) to register with the local authorities. The civil registry is designed as an administrative "database" for the authorities in order to know how many people and under which conditions are living in a certain area in order to be better able to plan communal policies and services.[190] Other public authorities thus have normally no access to the data of the civil registry; however, this principle has been weakened by the reform of

[187] Fernandez Collados, 2007, p. 183.

[188] Most importantly, that a person has no other access to health care assistance (e.g. through health insurance for employed workers) and is lacking sufficient financial means as specified by RD 1088/1989 (*Real Decreto 1088/1989, de 8 de septiembre, por el que se extiende la cobertura de la asistencia sanitaria de la Seguridad Social a las personas sin recursos económicos suficientes*).

[189] Ferandez Collados, 2007, p. 188.

[190] Its legal bases can be found in *Resolución del 4 de Julio de 1997 sobre el nuevo sistema de gestión del Padrón Municipal – Ley de 10 de enero* and *Real Decreto 2612 de 20 enero de 1996*.

LOEx 14/2003. The head office of the police is now allowed to access the data – without the consent of the person concerned – "exclusively for the fulfilment of their competences" in the matters established by the Aliens Act and the control of the residence of foreigners in Spain.[191] Due to the imprecise wording of this provision, the reach of these possibilities is not completely clear. Even though the law does not allow the police to search actively for all irregular migrants in a certain area, the data of the registry can be used when a certain person is already looked for. In fact, already before the reform some irregular migrants did not register with the local authorities because they were afraid that the revelation of their irregular status would entail negative consequences for them and the disclosure of their data (e.g. date of birth and current address) would facilitate repressive measures. The vague formulation of the law might have further increased the scepticism in this regard.[192]

Apart from these legal ambiguities irregular migrants are also confronted with practical problems when they want to register in the *padrón* e.g. that they lack the necessary papers to proof their identity, linguistic difficulties, or simply a lack of information about their duty to register as well as the rights that come along with it.[193]

Those irregular migrants who are not registered in the local civil registry – and thus do not dispose of a sanitary card – are excluded from normal health care assistance but they have access to free emergency health care in case of an accident or a serious sickness.[194] The law does not provide any clarification of what is understood by an "accident" or a "serious sickness", thus rendering this provision (just like the corresponding French provision) very vague, leaving a wide margin of discretion for the medical personnel deciding in individual cases. It is, however, remarkable that the wording of the provision is corresponding nearly literally to Article 28 ICRMW guaranteeing for migrant workers and their families the "right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned".

In any case though, minors under the age of 18 and pregnant women are excluded from the requirement of registration for the access to free medical assistance (Article 12 para. 3 and 4 LOEx). Thus, women can benefit from gratuitous medical treatment – which does not necessarily have to be linked to the pregnancy itself – during the pregnancy, when giving birth and six weeks after the birth of the child (a period which corresponds to the absolute

[191] See the addititional provision VII of Law 7/1985 Reguladora de las Bases del Régimen Local, which was introduced by LOEx 14/2003.
[192] Arbeláez Rudas, 2006, 479.
[193] Arbeláez Rudas, 2006, p. 480-481.
[194] See Article 12 para. 2 LOEx.

protection of working mothers in Spanish labour law).[195] Equally, minors under the age of 18 are entitled to every medical treatment necessary, irrespective of whether they are registered in the civil registry or not. This special treatment of children and adolescents is directly resulting from Article 39 para. 4 of the Spanish Constitution, which provides that children shall enjoy all the rights guaranteed to them by international agreements, in this case particularly by the provisions of the United Nations Convention on the Rights of the Child.

While, at a first glance, the Spanish health care system thus seems to be easily accessible for irregular migrants, a deeper analysis reveals some problems that can effectively hamper a migrant's access to necessary health care. Research has shown that even though there are criteria for the issue of sanitary cards established by national law, the practice of the local authorities varies considerably between the different Autonomous Communities.[196] Another apparent problem is the unclear regulation of the access of the police and other public authorities to the civil registry of the municipality. While it is clear that the public security forces need to have access to the addresses of persons against whom measures of expulsion where already initiated, the possibility to look for a specific name on the mere suspicion of irregular residence, would contravene the original purpose of the civil registry as a solely statistic-administrative tool as well as the health care protection offered by Article 12 para. 1 LOEx. Thus, further clarifications from the legislator and consequently strictly applied rules on the protection of data recorded in the civil registry, would be highly desirable.

Conclusions

The aim of this paper was to analyse what protection is guaranteed to irregular migrant workers in Europe, even though none of the Member States of the European Union has ratified the main international agreements in this field, the ILO Convention N° 143 and the ICRMW. Putting into consideration especially the situation in two concrete countries, France and Spain, we can conclude that at present there exists a basic protection of irregular migrants in Europe but this protection is still insufficient.

First of all, it can be noticed, that even though international human rights instruments recognise a large part of its rights to every human being independent of their legal status, states are not always following this unconditional approach. Deciding in as far as limitations

[195] Fernandez Collados, 2007, p. 192.
[196] Arbeláez Rudas, 2006, p. 482-493.

of human rights for irregular migrant workers can be justified – and are legally permitted by the national constitutions – is a difficult balancing act. In this context, the introduction of a concept of rights "inherent to human nature" or "strongly linked to human dignity" is not only problematic because of its legal impreciseness but also from a theoretical point of view since it contradicts the indivisibility of human rights which are by definition all "rights inherent to the human nature". In order to determine whether restrictions on certain laws are permitted and to which extend, it would be thus better to analyse if a concrete restriction can be justified by objective reasons in a democratic state. Such a "balance of interests" is a familiar concept for human rights lawyers since it is largely applied for the rights guaranteed in the ECHR and in national constitutions and it could provide clearer orientations to what extent states are allowed to restrict rights with regard to persons residing irregularly on their territories.

In any case, the analysis demonstrates that states are often guaranteeing at least a "core minimum content" of rights they are conditioning to regular residence, also to irregular migrants. This is particularly obvious for the right to health care, where both France and Spain have put conditions on its access (even if differing in their severity) but still guarantee at least "urgent medical care" to everybody residing on their territory. The main weakness in this case lies, however, in the unclear definition of "urgent measures" in the respective laws, putting medical personnel in the difficult situation to decide the question. In particular this can be difficult if an illness is not immediately life-threatening but can cause serious risks if not treated in time. Equally, the respective provisions in the labour law of both countries that oblige employers to pay at least the remuneration for the time of the de facto-employment relationship with an irregular migrant worker (in Spain also all other rights that are legally resulting from a regular employment contract) as well as the obligation to respect basic working and safety conditions, can be seen as reflecting the principle of "core minimum rights". In this case, it has to be considered though, that these provisions also have a strong deterrent component addressed at potential employers.

To a certain extent the principle of basic protection can also be observed in the social security systems, where irregular migrant workers are at least always considered as insured against accidents at work and occupational diseases. While ILO Convention N° 19 would foresee this guarantee of equal treatment in case of an accident at work only on the basis of reciprocity for nationals of other contracting parties, the jurisdictions of both France and Spain have extended this right to all migrant workers. From a theoretical point of view it is, however, hardly understandable why this inclusion into social security systems is permitted for accidents at work and not for e.g. health insurance or maternity protection. This

differentiation can only be weakly argued with the factual difference that in the case of an accident at work necessarily the work itself causes the sickness (or even disability) which is normally not the case with a "normal" illness. Nevertheless, the inclusion into regular social security systems would be an important measure both to combat exploitative working conditions and to guarantee basic health care to irregular migrant workers because otherwise employers can easily dismiss workers when they get ill or pregnant leaving them without any protection aside from the "urgent medical care" described above.

This concept of minimum rights has emerged as the clearest protection principle for irregular migrant workers on an international level in recent years. As it became obvious that the ICRMW will not be able to serve as a commonly shared standard any soon, referring to "core minimum rights" as basic protection became more and more widespread. Apart from the treaty bodies of the ICCPR and the ICESCR in their general comments it was most notably the Council of Europe that has stressed the minimum obligations of states with regard to irregular migrants at several occasions in recent years.[197] Even though the recognition that irregular migrant workers (or irregular migrants in general) cannot be deprived of their basic human rights is an important step, the main weakness of this concept lies in its impreciseness. While the ICRMW guarantees concrete rights to irregular migrant workers – still often leaving a wide margin of discretion to the states – "minimum rights" are exclusively defined by states; resulting, as we have seen, often in unclear schemes of protection.

With regard to the classic differentiation between civil and political rights and social, economic and cultural rights, the two states analysed in the case study do not present uniform concepts. While France puts hardly any restrictions on the exercise of classic "civil and political rights", including union's rights, Spain has attempted to completely exclude irregular migrant workers from the right to join a union or to go on strike but also limited the freedom of association and the freedom of assembly (see the amendments by LOEx 8/2000). However, it has to be noted that these restrictions where considered unconstitutional by the Spanish Constitutional Court in 2007 and that in the amended Aliens Act (LOEx 2/2009) they were, consequently, eliminated. On the other hand, Spain has facilitated in recent years the access of irregular migrants to health care and social security (see the LOEx 4/2000 and LOEx 14/2003), while France has – since the "Law Pasqua" in 1993 and the introduction of the CMU in 1999 – constantly rendered the access more difficult. Therefore it is not possible to generalise whether states are rather willing to grant "civil and political" or "social, economic

[197] See in particular Resolution 1509 (2006) "Human rights of irregular migrants" and a study on access to minimum rights for irregular migrants in Europe (Cholewinski: 2005), outlined above.

and cultural" rights to irregular migrant workers. In fact, the decision of guaranteeing certain rights and limiting others rather seems to be influenced by national legal traditions and current political debates.

Finally it can be concluded that from a legal point of view, the obstacles to ratify the ICRMW would not seem insurmountable in the two countries analysed. Particularly with regard to irregular migrant workers the implementation of the rights guaranteed in the ICRMW would primarily entail a specification of already existing rights that would put irregular migrant workers in a stronger position to invoke those rights. The Convention could especially provide clearer rules in areas where the protection is still partly insufficient e.g. concerning health care and social security systems but also how irregular migrant workers are protected by national labour law. Given the strong cooperation in the field of immigration inside the European Union, the Community must develop policies that put a stronger focus on protecting irregular migrant workers, in particular by developing common minimum standards that are geared to international human rights instruments. If not, the Community risks completely losing the "holistic approach" in migration policies it still invokes in programmatic documents. An organisation that increasingly stresses its character as a political union and its respect for fundamental rights and freedoms cannot neglect – without losing its credibility – the particular need for protecting vulnerable groups on the fringes of society. It should be noted in this context that Article 63 para. 3 (b) TEC, which serves as legal basis for common measures in the field of irregular immigration and residence, is in no way limited to the fight against illegal migration.

The most important task is, however, – and this is primarily a task of every state – to make irregular migrant workers aware of their rights and to ensure that they can effectively enjoy them. Even the highest standard of human rights protection is useless if persons cannot enjoy it due their special social or economic situation.

Bibliography

Agbetse, Yao, 'La Convention sur les droits des travailleurs migrants: un nouvel instrument pour quelle protection?', pp. 47-66, in *Droits fondamentaux*, n° 4, 2004.

Aja, Eliseo/Arango, Joaquín/Alonso, Josep Oliver (eds.), *La inmigración en la encrucijada. Anuario de la inmigración en España, edición 2008*. Barcelona, Edicions Bellaterra, 2008.

Aja, Eliseo/Montilla Martos, José Antonio/Roig, Eduard (eds.), *Las Comunidades Autónomas y la inmigración*. Valencia, Tirant lo Blanch, 2006.

Apap, Joanna, 'Shaping Europe's migration policy', pp. 151-157 in *ERA-Forum*, Volume 3, 2002.

Arango, Joaquín/Jachimowicz, Maja, *Regularizing Immigrants in Spain: A New Approach*, document available online: http://www.migrationinformation.org/Feature/print.cfm?ID=331 (consulted on 25 February 2009).

Arbeláez, Mónica, 'Los derechos sanitarios de los inmigrantes', pp. 473-506, in Aja, Eliseo/Montilla Martos, José Antonio/Roig, Eduard (eds.), *Las Comunidades Autónomas y la inmigración*. Valencia, Tirant lo blanch, 2006.

Battista, Graziano, 'La naissance d'une Convention. Les difficiles relations entre migrations et droits de l'homme', pp. 20-30, in *Hommes & Migrations*, N° 1271, 2008.

Bogusz, Barbara / Cholewinski, Ryszard / Cygan, Adam / Szyszczak, Erika (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*. The Hague: Martinus Nijhoff Publishers, 2004.

Bundesministerium des Innern, *Illegal aufhältige Migranten in Deutschland. Datenlage, Rechtslage, Handlungsoptionen. Bericht des Bundesministeriums des Innern zum Prüfauftrag „Illegalität" aus der Koalitionsvereinbarung vom 11. November 2005, Kapitel VIII 1.2*. Berlin: Bundesministerium des Innern, 2007. Available online: http://www.emhosting.de/kunden/fluechtlingsrat-nrw.de/system/upload/download_1232.pdf (consulted on 25 May 2009).

Carlier, Jean-Yves/De Bruycker, Philippe (eds.), *Immigration and Asylum Law of the EU : Current Debates / Actualité du droit européen de l'immigration et de l'asile*. Bruxelles: Bruylant, 2005.

Canetta, Emanuela, 'The EU Policy on Return of Illegally Staying Third-Country Nationals', pp. 435–450, in *European Journal of Migration and Law*, Volume 9, 2007.

Cavallini, Michela, 'La tutela dei diritti previdenziali dei lavoratori non comunitari tra diritto comunitario, Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali e ordinamento italiano', pp. 57-79, in *Pace diritti umani*, n. 1, 2008.

Chemillier-Gendreau, Monique, 'Un régime juridique pour l'immigration clandestine', pp. 319-341, in Carlier, Jean-Yves/De Bruycker, Philippe (eds.), *Immigration and Asylum Law of the EU: Current Debates / Actualité du droit européen de l'immigration et de l'asile*, Bruxelles: Bruylant, 2005.

Cholewinski, Ryszard, 'European Union Policy on Irregular Migration: Human Rights Lost?', pp. 159-192, in Bogusz, Barbara/Cholewinski, Ryszard/Cygan, Adam/Szyszczak, Erika (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*. The Hague: Martinus Nijhoff Publishers, 2004.

Cholewinski, Ryszard, *Study on obstacles to effective access of irregular migrants to minimum social rights*. Strasbourg, Council of Europe Publishing, 2005. Available online: http://www.coe.int/t/dg3/migration/Documentation/Legal_texts/5879-7-Effective%20access%20of%20irregular%20migrants%20to%20minimum%20social%20rights_en.pdf (consulted on 18 February 2009).

Cholewinski, Ryszard, 'Control of Irregular Migration and EU Law and Policy: A Human Rights Deficit', pp. 889-941, in Peers, Steve/Rogers, Nicola (eds.), *EU Immigration and Asylum Law. Text and Commentary*. Leiden/Boston: Martinus Nijhoff Publishers, 2006.

Cholewinski, Ryszard/De Guchteneire, Paul/Pécoud, Antoine (eds.), *Migration and Human Rights. The United Nations Convention on Migrant Workers' Rights*. Cambridge/Paris: Cambridge University Press & UNESCO Publishing, 2009.

Clavel-Fauquenot, Marie-Françoise/Marignier, Natacha, *Le droit syndical*. Paris: Editions Liaisons, 1999.

Cournil, Christel, 'Quand les politiques migratoires françaises "contaminent" l'accueil sanitaire et l'accès aux soins des étrangers', pp. 1017-1049, in *Revue trimestrielle des droits de l'homme*, N° 17, 2007.

Daugareilh, Isabelle, 'L'audace retenue du Comité européen des droits sociaux. A propos de la décision FIDH c/ France réclamation n° 14/2003', pp. 555-564, in *Revue de droit sanitaire et social*, N°4, 2005.

Daugareilh, Isabelle, 'Social rights of non-European illegal immigrants in France', pp. 61-74, in *European Journal of Social Security*, Volume 10, No. 1, 2008.

De Búrca, Gráinne/ De Witte, Bruno (eds.), *Social Rights in Europe*. New York: Oxford University Press, 2005.

De Bruycker, Philippe (ed.), *The emergence of a European Immigration Policy / L'émergence d'une politique européenne d'immigration*, Bruxelles: Bruylant, 2003.

De Guchteneire, Paul/Pécoud, Antoine, 'La Convention des Nations unies sur les droits des travailleurs migrants', pp. 6-19, in *Hommes & Migrations*, N° 1271, 2008.

De Schutter, Olivier, 'La contribution de la Charte des droits fondamentaux de l'Union européenne à la garantie des droits sociaux dans l'ordre juridique communautaire', pp. 33-47, in *Revue universelle des droits de l'homme*, Vol. 12, N°1-2, 2000.

Devys, Christophe, 'La réforme de l'aide médicale d'État censurée par le Conseil d'État. Conseil d'État, 7 juin 2006 Association Aides et autres', pp. 1037-1041, in *Droit Social*, N° 11, 2006.

De Witte, Bruno, 'The Trajectory of Fundamental Social Rights in the European Union', pp. 153-168, in De Búrca, Gráinne/ De Witte, Bruno (eds.), *Social Rights in Europe*. New York: Oxford University Press, 2005.

Dupeyroux, Jean-Jacques/Prétot, Xavier, 'Le droit de l'étranger à la protection sociale', pp. 69-74, in *Droit social*, N°1, 1994.

Dupeyroux, Jean-Jacques/Borgetto, Michel/Lafore, Robert, *Droit de la sécurité sociale*. Paris: Éditions Dalloz, 2008 (16th edition).

European Platform for Migrant Workers' Rights, *The Rights of Migrant Workers in the European Union 2006. Shadow Reports for Estonia, France, Ireland and the United Kingdom*. Brussels, 2007. Available, online: http://www.december18.net/web/docpapers/doc5097.pdf (consulted on: 20 March 2009).

European Platform for Migrant Workers' Rights, *The U.N. Migrant Workers Convention. Steps Towards Ratification in Europe. Positions of Civil Society Actors, Government Agencies and Policy Makers in the EU Member States*. Brussels, 2007. Available online: http://www.december18.net/web/docpapers/doc5096.pdf (consulted on 20 October 2008).

Fassin, Didier/Morice, Alain/Quiminal, Catherine (eds.) *Les lois de l'inhospitalité. Les politiques de l'immigration à l'épreuve des sans-papiers*. Paris: Éditions La Découverte et Syros, 1997.

Fernández Bessa, Cristina/ Ortuño Aix, José María, *Spanish Immigration Policies and Legislative Evolution in that Field as a New Exceptional Framework*. Challenge Liberty&Security, Working Paper 9: Exceptionalism and its impact on the Euro-Mediterranean relations, 2006. Available online: http://www.libertysecurity.org/IMG/pdf/WP9-The_reforms_of_the_Immigration_.pdf (consulted on 10 May 2009).

Fernández Collados, María Belén, *El estatuto jurídico del trabajador extracomunitario en España*. Murcia: Ediciones Laborum, 2007.

Fredman, Sandra, 'Transformation or Dilution: Fundamental Rights in the EU Social Space', pp. 41-60, in *European Law Journal*, Vol. 12, No. 1, 2006.

Guild, Elspeth/Staples, Helen, 'Labour Migration in the European Union', pp. 171-248, in De Bruycker, Philippe (ed.), *The emergence of a European Immigration Policy / L'émergence d'une politique européenne d'immigration*, Bruxelles: Bruylant, 2003.

Guild, Elspeth, 'Who Is An Irregular Migrant?', pp. 3-28, in Bogusz, Barbara / Cholewinski, Ryszard / Cygan, Adam / Szyszczak, Erika (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*. The Hague: Martinus Nijhoff Publishers, 2004.

Hervieu, Nicolas, 'La Cour européen des droits de l'homme, alchimiste de la liberté syndicale', pp. 288-293, in *Revue de droit du travail*, N° 5, 2009.

Julien-Laferrière, François, *Droit des étrangers*. Paris: Presses Universitaires de France, 2000.

Kauff-Gazin, Fabienne, 'La directive "retour": une victoire du réalisme ou du tout-répressif?', pp. 3-6, in *Europe*, N°2, 2009.

Kupiszewski, Marek/Mattila, Heikki (eds.), *Addressing the irregular employment of Immigrants in the European Union: Between sanctions and rights*. Budapest: International Organization for Migration Regional Mission for Central and South Eastern Europe, 2008. Available online: http://www.iom.hu/PDFs/Addressing%20the%20Irregular%20Employment%20of%20Immigrants%20in%20the%20European%20Union_Between%20Sanctions%20and%20Rights.pdf (consulted on 20 February 2009).

Leclerc, Olivier/Wolmark, Cyril, 'La grève des salariés sans-papiers: aspects juridiques', pp. 177-179, in *Revue de Droit du Travail*, N°3, 2009.

Lochak, Danièle, 'Les politiques de l'immigration au prisme de la législation sur les étrangers', pp. 29-45 in Fassin, Didier/Morice, Alain/Quiminal, Catherine (eds.) *Les lois de l'inhospitalité. Les politiques de l'immigration à l'épreuve des sans-papiers*. Paris: Éditions La Découverte et Syros, 1997.

Lousado Arochena, José Fernando/Cabeza Pereiro, Jaime, 'Los Derechos de los trabajadores extranjeros irregulares', pp. 799-813, in *Aranzadi social IV*, 2004.

MacDonald, Euan/Cholwinski, Ryszard, *The Migrant Workers Convention in Europe. Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives*. Paris: United Nations Educational, Scientific and Cultural Organization, 2007. Available online: http://unesdoc.unesco.org/images/0015/001525/152537E.pdf (consulted on 20 October 2008).

MacDonald, Euan/Cholewinski, Ryszard, 'L'Union européenne face à la Convention sur les travailleurs migrants', pp. 54-65, in *Hommes & Migrations*, N° 1271, 2008.

MacDonald, Euan/Cholewinski, Ryszard, 'The ICRMW and the European Union', pp. 360-392, in Cholewinski, Ryszard/De Guchteneire, Paul/Pécoud, Antoine (eds.), *Migration and Human Rights. The United Nations Convention on Migrant Workers' Rights*. Cambridge/Paris: Cambridge University Press & UNESCO Publishing, 2009.

Maille, Didier/Toullier, Adeline/Volovitch, Pierre, 'L'aide médicale d'Etat : Comment un droit se vide de son sens faute d'être réellement universel', pp. 543-554, in *Revue de droit sanitaire et social*, N° 4, 2005.

Maille, Didier/Toullier, Adeline, 'Les dix ans de la CMU. Un bilan contrasté par l'accès aux soins de migrants', pp. 24-33, in *Hommes & Migrations*, N° 1282, 2009.

Mazeaud, Antoine, *Droit du travail*. Paris: Editions Montchrestien, 2008 (6th edition).

Michelet, Karine, *Les droits sociaux des étrangers*. Paris: L'Harmattan, 2002.

Milza, Pierre, 'Une immigration ancienne et structurelle', pp. 13-16, in *Problèmes politiques et sociaux*, N° 916, 2005.

Mitsilegas, Valsamis, 'Measuring Irregular Migration. Implications for Law, Policy and Human Rights', pp. 29-40, in Bogusz, Barbara/Cholewinski, Ryszard/Cygan, Adam/Szyszczak, Erika (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*. The Hague: Martinus Nijhoff Publishers, 2004.

Montoya Melgar, Alfredo, *El empleo illegal de inmigrantes*. Cizur Menor: Editorial Aranzadi, 2007.

Moreno Fuentes, Francisco Javier/Arriba González de Durana, Ana/Moreno Fernández, Luis, 'Inmigración, Diversidad y Protección Social en España', pp. 53-98, in *Revista española del tercer sector*, Nº. 4, 2006.

Moya, David, *La reforma de la Ley de Extranjería*. Madrid: Real Instituto Elcano, 2009. Working Paper, available online: http://www.realinstitutoelcano.org/wps/portal/rielcano/contenido?WCM_GLOBAL_CONTEXT=/Elcano_es/Zonas_es/Demografia+y+Poblacion/DT20-2009 (consulted on 29 April 2009).

Oberoi, Pia, 'Defending the Weakest: The Role of International Human Rights Mechanisms in Protecting the Economic, Social and Cultural Rights of Migrants', pp. 19-35, in *International Journal on Multicultural Societies (IJMS)* Vol. 11, No. 1, 2009. Available online: http://unesdoc.unesco.org/images/0018/001838/183859m.pdf (consulted on 01 February 2010).

Oger, Hélène, 'Les obstacles à la ratification de la Convention en France. Un refus politique au nom de l'Europe', pp. 42-52, in *Hommes & Migrations*, N° 1271, 2008.

Pajares, Miguel, *Inmigración y mercado de trabajo. Informe 2008*. Madrid: Ministerio de Trabajo e Inmigración, 2008. Available online: http://extranjeros.mtin.es/es/ObservatorioPermanenteInmigracion/Publicaciones/archivos/Inmigracixn_y_Mercado_de_trabajo._Informe_2008.pdf (consulted on 29 April 2009).

Pécoud, Antoine /De Guchteneire, Paul, 'Migration, human rights and the United Nations: an investigation into the low ratification record of the UN Migrant Workers Convention', Global Migration Perspectives N°3, Global Commission on International Migration, 2004, available online: http://www.gcim.org/gmp/Global%20Migration%20Perspectives%20No%203.pdf (consulted on 25 February 2009).

Peers, Steve/Rogers, Nicola (eds.), *EU Immigration and Asylum Law. Text and Commentary*. Leiden/Boston: Martinus Nijhoff Publishers, 2006.

Pérez Infante, José Ignacio, 'La inmigración y el empleo de los extranjeros en España', pp. 96-119, in Aja, Eliseo/Arango, Joaquín/Alonso, Josep Oliver (eds.), *La inmigración en la encrucijada. Anuario de la inmigración en España, edición 2008*. Barcelona, Edicions Bellaterra, 2008.

Perez Sola, Nicolás, 'La reciente jurisprudencia constitucional en materia de extranjería: comentario a las sentencias del Tribunal Constitucional relativas a la inconstitucionalidad de la Ley Orgánica 8/2000', pp. 33-57, in *Revista de Derecho Migratorio y Extranjería*, No. 17, 2008.

Picheral, Caroline (ed.), *Les standards du droit communautaire des étrangers*. Montpellier: Université de Montpellier, Les cahiers de l'IDEDH N° 12, 2008.

Ramos Quintana, Margarita Isabel, 'Extranjeros en situación irregular en España: derechos atribuidos, limitaciones a la libertad y medidas de carácter sancionador: la jurisprudencia del Tribunal Constitucional', pp. 47-80, in *Revista de Derecho Migratorio y Extranjería*, No. 19, 2008.

Revenga Sánchez, Miguel (ed.), *Problemas constitucionales de la inmigración : Una visión desde Italia y España. II Jornadas Italo-españolas de Justicia Constitucional*. Valencia: Tirant lo Blanch, 2005.

Roig, Annabelle/Huddleston, Thomas, 'EC Readmission Agreements: A Re-evaluation of the Political Impasse', pp. 363–387, in *European Journal of Migration and Law*, Volume 9, 2007.

Roig Molés, Eduardo, 'Los derechos de los extranjeros: titularidad y limitación', pp. 587-631, in Revenga Sánchez, Miguel (ed.), *Problemas constitucionales de la inmigración : Una visión desde Italia y España. II Jornadas Italo-españolas de Justicia Constitucional*. Valencia: Tirant lo Blanch, 2005.

Roqueta Buj, Remedios, 'Las condiciones de trabajo y de Seguridad Social de los extranjeros en España', pp. 67-84, in *Revista de Derecho Migratorio y Extranjería*, No. 10, 2005.

Salt, John/Clarke, James/Wanner, Philippe, *International Labour Migration*. Strasbourg: Council of Europe Publishing, Population studies N°44, 2004. Available online: http://www.coe.int/t/e/social_cohesion/population/N%C2%B044%20International%20Labour%20Migration.pdf (consulted on 18 February 2009).

Samers, Michael, 'An Emerging Geopolitics of 'Illegal' Immigration in the European Union', pp. 27-45, in *European Journal of Migration and Law*, Volume 6, 2004.

Slinckx, Isabelle, 'Migrants' rights in United Nations human rights conventions', pp. 122-149, in Cholewinski, Ryszard/De Guchteneire, Paul/Pécoud, Antoine (eds.), *Migration and Human Rights. The United Nations*

Convention on Migrant Workers' Rights. Cambridge/Paris: Cambridge University Press & UNESCO Publishing, 2009.

Schor, Ralph, *Histoire de l'immigration en France de la fin du XIX^e siècle à nos jours*. Paris: Armand Colin/Masson 1996.

Schoukens, Paul/Pieters, Danny, 'Illegal labour migrants and their access to social protection', pp. 229-254, in *European Journal of Social Security*, Volume 6, No. 3, 2004.

Sempere Souvannavong, Juan David, 'Évolution de la situation migratoire de l'Espagne de 1991 à nos jours', pp. 49-70, in *Migrations Societé*, Vol. 21, n°125, 2009.

Stobbe, Holk, *Undokumentierte Migration in Deutschland und den Vereinigten Staaten. Interne Migrationskontrollen und die Handlungsspielräume von Sans Papiers*. Göttingen: Universitätsverlag Göttingen, 2004.

Sudre, Frédéric, *Droit européen et international des droits de l'homme*. Paris: Presses Universitaires de France, 2008 (9th edition).

Taran, Patrick A., 'Status and Prospects for the UN Convention on Migrants' Rights', pp. 85-100, in *European Journal of Migration and Law*, N°2, 2000.

Taran, Patrick A., 'Clashing Worlds. Imperative for a Rights-Based Approach to Labour Migration in the Age of Globalization', pp. 403-433, in Carlier, Jean-Yves/De Bruycker, Philippe (eds.), '*Immigration and Asylum Law of the EU: Current Debates / Actualité du droit européen de l'immigration et de l'asile*', Bruxelles: Bruylant, 2005.

Taran, Patrick A., 'La Convention. Symbole d'une approche alternative des migrations internationales', pp. 32-41, in *Hommes & Migrations*, N° 1271, 2008.

Tchen, Vincent, *Droit des étrangers*. Paris: Ellipses, 2006.

Terrádez Salom, Daría, 'La evolución de la política comunitaria en materia de inmigración a través de los Consejos Europeos', pp. 73-88, in *Revista de Derecho Migratorio y Extranjería*, No. 16, 2008.

Tonelli, Simon, 'Irregular Migration and Human Rights: A Council of Europe Perspective', pp. 301-309, in Bogusz, Barbara / Cholewinski, Ryszard / Cygan, Adam / Szyszczak, Erika (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*. The Hague: Martinus Nijhoff Publishers, 2004.

Trinidad García, María Luisa/Martín Martín, Jaime, *Una forma nueva de ordenar la inmigración en España. Estudio de la Ley Orgánica 14/2003 y su reglamento de desarollo*. Valladolid: Lex Nova, 2005.

Verkindt, Pierre-Yves, 'À propos de la rupture du contrat de travail d'un salarié étranger irrégulièrement employé', pp. 40-41 in *La Semaine Juridique Social*, N° 8-9, 2009.

Vial, Claire, 'Une lutte prioritaire contre l'immigration irrégulière', pp. 272-293 in Picheral, Caroline (ed.), *Les standards du droit communautaire des étrangers*. Montpellier: Université de Montpellier, Les cahiers de l'IDEDH N° 12, 2008.

Vidal Fueyo, Maria del Camino, *Constitución y extranjeria. Los derechos fundamentales de los extranjeros en España*. Madrid: Centro de Estudios Políticos y Constitucionales, 2002.

Documents and jurisprudence

Cour des Comptes, *L'accueil des immigrants et l'intégration des populations issues de l'immigration, Rapport public particulier*, Novembre 2004, available online: http://www.epim.info/docs/documents/Cour%20des%20Comptes%20-%20migrant%20integration.pdf (consulted on 03 June 2009).

Institut nationale de la statistique et des études économiques (Insee), *Population selon la nationalité*, 2005, available online:
http://www.insee.fr/fr/themes/tableau.asp?reg_id=0&ref_id=NATTEF02131 (consulted on 03 June 2009).

European Committee of Social rights, *Collective Complaint No. 14/2003 from the International Federation of Human Rights Leagues (FIDH) v. France*, decided on 8 September 2004. Available online:
http://hudoc.esc.coe.int/esc2008/document.asp?related=1&item=0&relateditem=0 (consulted on 17 June 2009).

International Labour Organisation, Committee on Freedom of Association, Complaint against the Government of Spain presented by General Union of Workers of Spain (UGT) Report No. 327, Case(s) No(s). 2121, Report No. 327 (Vol. LXXXV, 2002, Series B, No.l).
Available online: http://www.ilo.org/ilolex/english/caseframeE.htm (consulted on 13 May 2009).