Comparative and International Legal Study on the Position of Irregular Migrants in the United Kingdom, Russia and South Africa: Issues of Their Internal Legal Capacity and Immigration Control Regimes

Leonidov, Ivan I.

University of London
Queen Mary College
PhD Programme in Law

Thesis Supervisor: Dr. Prakash Shah.

PhD Examination Candidate: Mr. Ivan I. Leonidov.

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ABSTRACT

The present thesis deals with the legal position of irregular migrants in the three receiving societies, i.e. Britain, Russia and South Africa. Irregular migrants are an exploited underclass enjoying very few, if any, entitlements in the host countries and so long as their numbers are substantial their status becomes problematic both for them and the receiving society. To deal with these challenges, I propose that immigration policies or regimes, directly or indirectly related to regulation of the irregular migrants' position (internal legal capacity) are too restrictive and discriminatory for the position of irregular migrants and do not constitute an effective means of immigration control.

In order to test this hypothesis, a socio-legal analysis of irregular migrants' position is made in the following spheres: entry, residence, employment (including temporary labour migration policies) and social welfare. The position of asylum seekers constitutes an integral part of the present analysis.

The research led to two general conclusions in relation to irregular migration. First of all, irregular migrants should be granted at least a limited internal juridical capacity in the countries of residence. Secondly, there should be a more liberal labour migration policy and more balanced approaches to the humanitarian needs of immigrants. These liberal solutions could nevertheless be combined with rigorous internal control.

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1 Theoretical Issues and Trends in Social and Legal Studies on Illegal Immigration

One of the less well researched issues in contemporary legal science concerns the position of illegal aliens in countries of residence. Currently, little is known about the legal status of irregular migrants, primarily because their illegality affects their capacity to possess legal entitlements in receiving societies. From a strictly legalistic point of view, it is possible to argue that this topic is too insubstantial to warrant legal, as opposed to sociological, research, precisely because of the irregularity; but, in reality, considerable numbers of individuals live, operate and survive on the margins of host societies, despite restrictions and lack of legal capacity. One could contend, though, that it is precisely because of this latter feature that illegality should be researched within a legal framework, since it embraces multiple, often random factors of survival, where some de facto legal rights may unexpectedly become part of the agenda.

At the same time, sociological science plays an important role in identifying legal problems and evaluating immigration policy. General legal and sociological research should counterbalance arguments that illegal immigration can be treated only as a phenomenon exclusively related to criminology, and to criminal or administrative legal mechanisms. Immigration law in itself could be understood within much broader terms of the 'living law', thus clearly embracing the interpretation of law by Ehrlich and Petrazycki.[1] Although the relevance of irregular migration to public concerns should not be underestimated, the lack of prominence of such migration may be a direct outcome of the neglect by general legal and social science of the topic. A more significant extension of legal science to the problematics of irregular migration is one of the proposed contributions of this thesis.

It is precisely in these socio-legal terms that this study deploys multiple forms of terminology with regard to irregularity of foreigners' position. Indeed, there is no clear, universally agreed definition of irregularity. Overall, illegally and irregularity are not identical, since the term 'illegal immigrant' is a term expressing the notion of

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[1] Ehrlich, E. "Fundamental Principles of the Sociology of Law", Harvard University Press, Cambridge (Massachusetts), 1936; Petrazycki, L. "Law and Morality", Harvard University Press, 1955; infra, pp. 24-25 of this Chapter.

people that are 'outside the law' and 'irregular migrants' are those whose position needs to be regularised to be fully compliant with the law. On the one hand, all international organisations and international legal instruments identify such individuals as being in irregular situation and, therefore, as irregular migrants.

On the other hand, however, domestic legal systems adopt a diversity of terminology. This is indicated in the legislative mechanisms involved in regulating this phenomenon. Indeed, in South Africa, the scientific discourse and legal acts relate to "illegal foreigners" and "illegal immigrants", while in Russia it is "illegals" and "illegal immigrants" which fully express the meaning of irregular migration and these terms are used as being almost interchangeable throughout the thesis. Additionally, the thesis has to rely heavily on newspapers and some random informal sources in discussing the position of irregular migrants in receiving societies and the usage of the term illegal immigrant is perhaps unavoidable. Even the term "illegal/s", despite its pejorative meaning, cannot be fully avoided, in order to demonstrate the true reflection of public attitudes towards irregular migrants. Therefore, these various terms are not used fully interchangeably in the thesis, but, rather, as a 'tribute' to the diversity of not always agreed definitions, which are determined not least by the mass media and the understanding of the general public. In addition, although international law has a leading part in providing rights to 'irregular migrants', it frequently lacks precision and recognition from the states.

As far as irregularities in the employment position of aliens are concerned, the term "undocumented workers" best reflects their status. Although originally this signifies any employment outside the permitted channels, i.e. of both domestic and foreign workers, in the thesis the term is used only with reference to foreign migrant labour.

Since the legal position of irregular migrants is largely unclear and varies from country to country, it is essential to formulate questions for the study, thus defining the structural elements of the thesis. In this regard, all parts of the thesis will be directly invoked to answer the main questions of the study:

1. What is the legal position of irregular immigrants in these countries, especially in relation to internal legal capacity?
2. Are the legal mechanisms deployed precise and balanced enough so as to assist in both internal and external immigration control in so far as these policies concern illegal immigrants?

3. Thirdly, it is essential to respond to the question of whether the immigration control measures that are deployed are sufficiently successful in stemming illegal immigration.

These questions assist in formulating the hypothesis of this study which centres upon the fact that the status of illegal immigrants is inadequately spelt out, both in international and domestic law, inasmuch as it is predetermined by excessive constraints on economic migration on the one hand, and by excessive measures penalising and combating illegal immigration on the other. This state of affairs does not contribute to feasible immigration control.

The hypothesis is developed on the basis of country-specific research. The choice of the states under scrutiny was determined by the whole range of factors, such as geographical, developmental, jurisdictional and socio-economic. The construction of these comparisons presents a genuine richness for legal science and sociology. The design for this comparative study is to compare immigration legislation in its response to irregular migration in Britain and Russia and South Africa, with a view to present some recommendations for the emerging and transitional immigration policies in the Russian Federation and South Africa. There is a generally accepted assumption that Britain has the longest civic society tradition with a stable system of legislation encompassing a human rights agenda. There are shared underlying expectations that Britain may constitute more of a standard setter to the two other jurisdictions. The adherence of immigration mechanisms to human rights has been tested there more rigorously than either in Russia or South Africa.

South Africa is a former British Colony with distinct features of immigration legislation significantly influenced by the UK laws at the beginning of the 20th century, especially in the emphasis on the entry policies, but also in currently reshaping legal control after the Apartheid period. The emerging combination of globalisation and Afro-centrism in immigration policies makes for a fascinating case study on South Africa.

Russia, on the other hand, had had a legacy of two stages of legislative development, the Soviet and the more recent liberal, and now with an emerging "third way", determined by some "national interests" and security-focused agenda. In this light, Russia has borrowed and adopted ideas of immigration control from a range of developed states, such as work permit policies, employer sanctions, as well as the general means of administrative control over the illegal alien population. Additionally,

the position of migrants in Russia has been very fragile and it was thought indispensable to view their problems in the light of another state's policy, that are also receiving substantial numbers of immigrants. Therefore, South Africa and Russia are the states with emerging regulatory mechanisms of immigration and the very serious situation of irregular migrants in those countries. Opposed to that, and despite changeable nature of immigration law and the quite problematic position of migrants in Britain, the UK exhibits a sense of continuity in its migration agenda. However, there are additional grounds for validity of the choice of states and the resulting study.

The three states also represent different continents and geopolitical areas. While Britain is a Western European country, Russia is "caught" in between Eastern Europe and Asia, and South Africa is located in the totally different environment of one of the most impoverished continents. There is thus a range of similarities and differences presenting grounds for original research.

Initially, there is a similarity in the fact that all these states are receivers of migrant labour, the presence of which, at the same time, has generally challenged their irregular migration agenda. At the same time, certain elements may differ, such as economic and social impacts. The sense of diversities in the challenges and agendas is captivating for any scholar and, thus, it is of utmost importance to identify those, so as to propose a quite unique study on irregular migration.

Secondly and consequentially, the socio-economic and developmental agenda vary in all three states. This assists in depicting various elements of irregular migrants' position in relation not only to the circumstances of the most prosperous receiving states, but also poorer and more problematic countries, such as Russia and South Africa. Indeed, although a lot has been written about the states in Western Europe and North America and their responses to the irregular migration phenomenon, it needs to be questioned to what extent these studies really represent a globally valid picture of the XXI century. The world is becoming more complex, where movements of people and corresponding irregularities of their statuses occur also in "different" and sometimes in socially transient environments. In this respect, the rather "odd" choice of these states reflects the quite chaotic reality inherent in the sphere of freedom of movement and while not necessarily global in scope, can be seen as broadening our focus in this field.

Thirdly, the jurisdictional aspects also vary. The choice of states goes deeper than geopolitics, because, for instance, there are various emphases in policies in each state,

i.e. in Russia there is an emphasis on residential control, in Britain control is largely centred upon entry clearance policies, and post-Apartheid South Africa has had emerging residence and admission policies in this regard, without a definite direction in policy being as yet discernable. These assist in distinguishing modes and means of immigration regulation characteristic of the states under scrutiny. Indeed, socio-juridical traditions determine different approaches. Testing each of these resulting policies in its own environment contributes to the emergence of valuable policy standards or recommendations that could be valid at comparative and international levels.

International law and supranational regulations are also investigated in order to provide a comparative legal analysis of immigration policies in Britain, Russia and South Africa, thus affording reliable standards of treatment for irregular migrants in the various domestic legal systems. In this regard, the present chapter clarifies legal and social approaches to the phenomenon of illegal immigration which is indispensable for the analysis of each jurisdiction. Chapter 2 of the thesis deals with the legal and social aspects of irregularity in the United Kingdom, with specific attention to all essential spheres of immigration control. Chapters 3 and 4 uncover legal and social dimensions of irregularity in Russia and South Africa respectively. Chapter 5 of the thesis compares legal norms and social issues that emerge in Britain, Russia and South Africa, and also embodies endeavours which may be used to contribute to the immigration control theory, both by means of the proposed socio-legal model, and also through an evaluation of immigration control measures.

Throughout the thesis there is an attempt to adopt and to comply with the same structure of analysis, so as to pierce through the legal analysis for each of the jurisdictions, and yet the narrative takes its own distinct route in each chapter due to the peculiarity of social trends and legal system origins underlying the illegal immigration phenomenon in Britain, Russia and South Africa. Structurally, the narrative is also relatively diverse, in order most naturally to uncover the distinct and similar sides of immigration regulation in all the states under scrutiny. This is reflected, too, in the tendency towards a relative freedom in deploying concluding remarks in the thesis, since only certain parts, which are in need of summaries or conclusions, have them attached, while the other more obvious findings of the overall study are left without rigorous concluding or summarising details.

As far as irregular migrants' legal status in every country-specific chapter is concerned, it is important for the purpose of this thesis to identify what should be understood as the legal position of such migrants. Since the general treatment of all aliens and the status of illegal immigrants constitute one composite problem area in this regard, the hypothesis of the thesis is invoked specifically in relation to the status of illegal immigrants, with the focus being on internal legal capacity and the most essential immigration-control mechanisms. Internal legal capacity is assessed in terms of the fundamental social rights and de facto capacity of immigrants to operate in the social environment. Generally, fundamental rights consist of three substantive groups encompassing the civil, political and social rights of an individual.[2]

The circumstances of illegal immigrants impact on all these spheres, albeit with varying degrees of relevance. The legal discourse has hardly reached the issues of civil and especially political rights inasmuch as illegal immigrants face problems of basic survival. Most essential are the factors of residence, employment and access to public services or social welfare. In this regard, immigration controls exercised by the various governments embody the essence of the quasi-legal status of illegal immigrants, since such controls are enforced against illegal immigrants in ways which determine their real status, as well as their socio-economic standing.

In this respect, it is essential to delineate the scope of this thesis within the social and legal sciences. Most of the country-specific, and hence, comparative, analysis will deal with normative legal materials, intertwined with sociological and economic studies on irregular migration and immigration policy in Britain, Russia and South Africa. Considering all of this, some dimensions will fall outside the ambit of this thesis, such as an elaborate sociological and statistical analysis, or other quantitative or qualitative factors; i.e. much of the border-control problematics. Initially, the thesis was planned as a contribution to the normative study of irregular migration issues and, therefore, surveys, questionnaires or interviews were not regarded as indispensable research methods for uncovering the topic, not least because both time and resources are limited for a PhD thesis covering such a vast field of research. Despite the fact that the effectiveness of immigration policies is evaluated, this will be on the basis of sociological sketches which utilise the national scientific materials. In turn, the reliability of these sketches, which are often subject to emotionally or politically

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[2] The current distinction is given in Peletier, M. "Rights and Obligations of Undocumented Immigrants in the Receiving Countries. Protection of Fundamental Rights of Unauthorised Immigrants", 21(2)

motivated reasoning, is carefully monitored, as such sketches are infrequently based on personal scientific intuition.

The status of illegal immigrants as a multidimensional and complex phenomenon concerns a variety of issues. In this respect, the structure of the current chapter follows most essential topics of discussion, such as the philosophy of immigration, demographic and sociological dimensions, economic and social consequences, legal and, finally, international regulation. However, the present theoretical analysis only highlights the general socio-legal agenda surrounding irregular migration, in order to prepare the ground for the important scientific discussions which follow in ensuing chapters, so that the final theoretical and comparative contribution can emerge in the concluding chapter.

1.1 Defining the Qualitative and Quantitative Trends in Irregular Migration

The initial issue which arises in respect of irregular migration concerns the quantity and quality of immigration flows, both globally and regionally. The question of numbers is particularly topical, because this reflects the potential political, social and economic agendas of the future of the receiving states. It is widely recognised that little possibility exists for evaluating the exact scale of irregular migrant movements around the world. At present, apart from certain media speculations and politically motivated 'guesstimates', difficulties in establishing the correct methodological approaches for undertaking this estimation prevent science from providing reliable data.[3]

In Europe, for instance, it is very difficult to come across the precise figures but, according to Bimal Ghosh, there are about three million illegal immigrants residing in Western Europe, with the largest proportion of them living in Germany, Greece, Spain, Italy and Portugal.[4] The "Survey of Migration"[5] in *The Economist* magazine estimates that Germany hosts almost one million, and France about 500,000, illegal immigrants. The same study cites figures provided by the International Centre for Migration Policy Development, indicating that almost 500,000 irregular migrants enter Europe every

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(1983) *International Migration*, p. 183.

[3] "Illegal Aliens: A Preliminary Study", Secretariat of the Inter-Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia, June 1995, pp. 4-7.

[4] Ghosh, B. "Huddled Masses and Uncertain Shores: Insights into Irregular Migration.", under the auspices of the International Organisation for Migration, Martinus Nijhoff Publishers, 1998, p. 10.

year, amongst whom overstayers comprise about 150,000.[6] Generally, in both the US and Europe, undocumented migrants contribute to an inflow of almost 0,15% of the population each year.[7] Ethnic groups representing illegal immigrants vary substantially, but mostly these are comprised by North and Sub-Saharan Africans, Asians and Middle Easterners.[8]

Russia, Eastern and Central Europe have not only contributed to the unprecedented scale of irregular migration, but have also experienced the inflow of illegal immigrants during the last ten years, with these states becoming both receiving and transit points for the undocumented movements of immigrants. Britain received considerable inflows of illegal immigrants, while South Africa is facing even more acute challenges, since the situation is spiralling seriously out of control. Irregular migration dilemmas cannot be ignored, since undocumented movements and residence have become increasingly well organised, and are intertwined with crime and violence, both inside the countries and on an international scale.[9]

Irregular migration creates its own dynamics, provoking further irregular flows into the receiving countries: those irregular migrants who are already present provide support and attraction to new illegal immigrants from the same ethnic community.[10] There are many instances of this trend worldwide, ranging from the Chinese Diaspora, to Polish and Ukrainian immigrant groups in Europe. Illegal immigration movements carry their own tendencies which, in turn, produce serious consequences for the receiving state. Migration flows prove to be largely irresistible and irreversible for these states. In this regard, globalisation plays a vital part in encouraging undocumented migration, inasmuch as it creates new venues for the realisation of open travel and the exchange of goods or services.[11] Due to the 'irresistible attraction' of migration for individuals from less developed countries, the message is not encouraging for policy makers. As the Survey of Migration points out:

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[5] *The Economist* magazine, "The Best of Reasons", *Survey of Migration*, November 2nd, 2002, p. 8.
[6] Ibid.
[7] Ibid.
[8] Ghosh, supra, n. 4, p. 11.
[9] Ibid. Also in the article by Albrecht, H-J. "Fortress Europe?—Controlling Illegal Immigration", 10(1) (2002) *European Journal of Crime, Criminal Law and Criminal Justice*.
[10] Ghosh, supra, n. 4, pp. 69-70.
[11] *The Economist*, " The Longest Journey", *A Survey of Migration*, supra, n. 5, p. 4; also in Ghosh, supra, n. 4, p. 69.

> "Borders will leak; companies will want to be able to move staff; and liberal democracies will balk at introducing the draconian measures required to make controls truly watertight."[12]

Both on the international and domestic levels, it has become obvious that border control and its stringent enforcement cannot eliminate irregular migration movements. The situation in the United States is particularly notable in this regard, where substantial increases in expenditure on border enforcement have brought only a partial improvement of the situation:[13] moreover, stringency in enforcement has provoked more 'flexibility' and self-sacrificial behaviour on the part of clandestine entrants, who turn more often than they did previously to the services of professional smugglers.[14] The stringency of immigration control at the admission stage does not, in practice, succeed in reducing pressures of irregular migration either. These features relating to the relative failures of immigration control eloquently demonstrate the actual gap between specified policy measures and their effects.[15]

In order to constitute such an 'irresistible attraction' for migrants, there must be factors responsible for the trend. The so-called push factors are well known and have been evaluated by many researchers in law and social science: inequity of global income distribution, social or environmental degradation, economic crises, famine and wars. Additionally, however, pull factors exist that are also well known,[16] but which play an even greater role in shaping the in-country status of applicants, and which are actually largely responsible for amplifying the irregular migration process. The problematic issues tied up with illegal immigration nevertheless appear to be closely linked with the chaotic and unrealistic policies which prevail in the receiving countries. Currently, when the legal means of entry for economic purposes are few, existing primarily for the work force elite, there are legitimate concerns that, with the persistence of push factors in despatching countries, and a high earning potential in

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[12] *The Economist*, ibid., p. 3.
[13] "Bordering on Control: Combating Irregular Migration in North America and Europe", International Organisation for Migration, IOM Migration Research Series, 2003, p. 10.
[14] Ibid., p. 11.
[15] The idea of the gap hypothesis in immigration control is best presented in the book Cornelius W.A., Martin, P.L., Hollifield, J.F. "Controlling Immigration: A Global Prospective", Stanford University Press, Stanford, 1994, at pp. 3-5.
[16] These pull factors are represented by the whole range of socio-legal features, such as possibility of employment in the receiving state, opportunity to reside without much internal control, high standards of living and social welfare.

receiving states,[17] the attraction of illegal migration will hardly be reduced by restrictive measures alone.

It is also possible to argue that immigrants are pulled into the receiving societies by structural tendencies, particularly in the economies of these states. Indeed, the post-industrialisation stage of many economies has changed circumstances and, in fact, provided a niche for irregular migrants.[18] Most notably, such processes shifted working conditions towards a more casual, female, small-scale entrepreneurial and weakly unionised environment.[19] Needless to say, this trend has resulted in an increase of moonlighting and an underground economy, both of which have prepared the ground for non-transparency in terms of taxation or other control mechanisms by the state. In order to reduce irregular migration, states should probably not ignore weaknesses within their own socio-economic systems, in addition to intensifying the enforcement procedures connected with their immigration policies. Meanwhile, the numbers of illegal immigrants continue to grow in the economies and societies of Europe and North America, thus creating a whole strata and network of people in similar circumstances.

The arguments relating to the numbers and dimensions of irregular migrant movements are intertwined with the agenda on the composite structure of this group in general. The core issue in this regard concerns the question of whether or not irregular migrants could be viewed as grave offenders of the law, with the subsequent application and enforcement of considerable sanctions against them. Undocumented immigrants comprise an extremely diverse group of people with multiple life circumstances, despite the fact that entry, residence or other activities of these individuals take place outside the regulatory framework of legal migratory movements. As was comprehensively argued in a study on illegal immigration,[20] the social portrait of irregular migrants presents a continuum of various circumstances with different degrees of integration, where the following factors should be taken into account:

- Length of stay;
- Utilisation of social and welfare services;
- Payment of taxes and social security;

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[17] *The Economist*, supra, n. 5, p. 4.
[18] Melossi, D. "'In a Peaceful Life': Migration and the Crime of Modernity in Europe/Italy", 5(4) (October 2003) *Punishment & Society*, p. 275.
[19] In Melossi, ibid.; Kalavita, K. "A 'Reserve Army of Delinquents': The Criminalization and Economic Punishment of Immigrants in Spain", 5(4) (October 2003) *Punishment & Society*, p. 406.
[20] "Illegal Aliens: A Preliminary Study", supra, n. 3.

- Type of employment;
- Housing status;
- Family situation in the receiving country;
- Degree of socio-cultural integration;
- Degree of illegality involved;[21]
- Intentional or unintentional character of irregularity on behalf of immigrants.

As the study further contends, the level of integration of illegal immigrants much depends on their personal characteristics, as well as on the national immigration regimes in the receiving countries.[22] In this vein, it is possible to argue that most migrants, and particularly asylum seekers, present extreme cases who experience very little integration, especially since most states discourage irregular migration by nullifying any prospective legal status for undocumented migrants. These policies are in fact preventive, inasmuch as they try to ensure the effective enforcement of punitive measures against illegal immigration by impairing immigrants' capacity to integrate with the host society. Indeed, the integration level of irregular migrants into such societies is linked to administrative regulation.

Alienation and social segregation are accompanying features of migrants' irregularity. However, what is also notable in relation to illegal immigrants is that many of them deliberately live without authorisation, so that they are *knowingly* in breach of the law. In these circumstances, undocumented migrants manage to find gaps or loopholes within the legal rules of the receiving countries, which in itself is an equivalent of some virtual socio-economic status, albeit with the accompanying negative connotations, since they possess no substantive legal entitlements in the socio-economic sphere.[23] Indeed, as Kitty Calavita contends in her article,[24] illegal immigrants often possess a quasi-legal status, especially when they are not being deported, at the same time remaining without authorisation. The life of many immigrants becomes daring, adventurous and often intertwined with intentional or unintentional fraud.[25] Therefore, the connection of illegal immigration to segregation and 'ghettoisation' creates a formidable challenge to every society's law and order.

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[21] Ibid., p. 8.
[22] Ibid.
[23] This is well demonstrated in the article by Kitty Calavita, supra, n. 19.
[24] Calavita, ibid., p. 407.
[25] Jordan, B., Duvell F. "Irregular Migration: The Dilemmas of Transnational Mobility", Edward Elgar, Cheltenham (UK), 2002.

The process of alienation takes place, despite the fact that irregular migrants generally represent a very industrious social stratum in the countries of origin and therefore a voluntary breach of the immigration law is a measure and, in the case of possible punishment, a payoff, for the improvement of personal circumstances. At the same time, irregular migrants are either too desperate or under too great a delusion to comprehend their prospective status in the receiving society. From a strictly economic point of view, irregular migration occurs when possible benefits for immigrants may outstrip the potential dangers and negative consequences attached to their irregular status.[26] Consequently, in order to improve their life prospects, illegal immigrants are employed in the low-wage and low-skilled sectors of the receiving society, doing temporary or seasonal types of work connected with an informal hiring and work process,[27] in small and sometimes family-owned firms in the underground economy. They are thus involved in the occupations that no domestic workers would agree to perform. Although their employment in the receiving countries is a means of empowerment which heralds considerable improvement in their personal circumstances, it is precisely the lack of any legal status that, over time, becomes exhausting and degrading.

Generally, this situation may be characterised by several notable elements which reveal areas of vulnerability, that are also relevant for the current thesis. Some of these are:

- Inadequate remuneration for employment;
- Lack of social insurance entitlements;
- Lack of possibility for adjudication in the sphere of labour rights;
- Dangerous and unhealthy conditions of work;
- Poverty in housing, frequent lack of social networks in residence and inconsistency with the surrounding culture;
- Precarious family situation for irregular migrants.[28]

Taken as a whole, these factors of employment and social life could possibly explain a causal link between a resulting marginality and segregated life in the host country on one hand, and further possible criminality on the other; i.e. a possibility of committing more serious offences and being voluntarily or involuntarily dragged into the criminal

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[26] UN, International Migration Policies and Programmes, *Population Studies*, no. 80, New York, 1982.
[27] *The Economist*, "Modest Contribution", *Survey of Migration*, supra, n. 5, p. 13.
[28] Peletier, supra, n. 2, p. 175.

world. In this respect, although constituting an inseparable part of the illegal immigration process, the trafficked persons are most oppressed in comparison with the rest of migrants, since they are forced to enter receiving countries through deception, or clandestinely, and thus develop burdensome bondages with their employers.

All the abovementioned characteristics prove three arguments that are fundamental for the entire thesis. Firstly, because irregular migrants are not a homogeneous group, legal regulation of each type of migrants should take its own route, with a possible combination of both punitive and compassionate steps. States should review immigration policies with a view to limiting aliens' irregularity and the consequences of this, as argued further on in this thesis. This is not always done by the state apparatuses involved in the enforcement of immigration systems. In fact, the principles underlying governmental involvement in legal regulation reflects the concept of 'either all or nothing', where, in practice, the state is unable to enforce rules against all illegal alien individuals. This leads to the second point, where governments should address internal structural problems relating to the economy and society which encourage irregular migration. This should act as a subsidiary means of curbing such migration through the usual enforcement channels. Thirdly, bestowing at least a limited degree of juridical capacity could be a positive measure directed at improvement of their circumstances.[29]

One of the main issues of this thesis is based on the hypothesis that enforcement of rules against illegal immigration, when conveyed in tandem with generally restrictive immigration laws, will probably be impossible, posing a considerable nuisance to the state and the public. Moreover, immigration policy has to be liberal in the first place in order to provide mechanisms for realistic measures against illegal immigration. A realistic approach to immigration policy cannot be divorced from the more liberal work permit system and wider facilitation of admission.[30] In turn, liberal notions in immigration policy may not be divorced from other spheres of life and, in this regard, the agenda should take into account studies on the economic and social effects of immigration.

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[29] Ibid., p. 182.

[30] This conclusion can be derived from *The Economist*, "The Best of Reasons", *Survey of Migration*, supra, n. 5, p. 7.

1.2 Economic and Social Consequences of Irregular Migration

1.2.1 Introduction

Consequences of illegal immigration may be considered within the scope of economic and social outcomes. The most important economic matter and point of concern for the discussion on illegal immigration refers to the balance between contributions to the economy and the actual spending on immigrants. Understanding of this essential issue, however, is constrained by the lack of obvious transparency over the precise impact of irregular migrants on the welfare state; neither is there an exact estimation of tax payments that illegal immigrants as a separate group are likely to contribute to the economy. At the same time, there are certain tendencies which reveal the economic effects involved in the agenda of irregular migration. From the social point of view, there is a range of more precise, but sometimes politically-inspired studies on the problems associated with illegal immigration, both internationally and domestically.

1.2.2 Economic Impact of Illegal Immigration

At the time of economic growth, receiving states may fill labour shortages through both regular and irregular channels.[31] Initially, before the economic recession of 1973, a range of states were keen on tolerating the presence of irregular migrants, especially since they had a positive impact on earnings in the host societies.[32] Circumstances were changing when the period of labour shortages came to an end, and when migrant workers began competing with the indigenous labour force within the same spheres, normally in low-skilled positions.[33]

However, labour migration brings significant macroeconomic advantages to the world in general, and to receiving states in particular, possibly because wages in the economy remain frozen, and the economies operate with a better turnout.[34] On the level of single countries, macroeconomic growth may be as good as it is for the world in general. In Britain, the positive effects of economic migration, including its irregular type, were confirmed by Home Office research, which praised contributions produced

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[31] Ghosh, supra, n. 4, p. 146.
[32] Bertinetto, G. "International Regulations on Illegal Immigration", 21(3) (1983) *International Migration*, p. 190.
[33] Ibid.; also in Ghosh, supra, n. 4, p. 76
[34] *The Economist*, "A Modest Contribution", *Survey of Migration*, supra, n. 5, pp. 14 and 15.

by the legal migrants and made favourable comments about undocumented migrant workers.[35]

As far as employers are concerned, unauthorised employment can nevertheless lead to adverse effects on the employment market. Those who employ migrants illegally may have an advantage over anyone who does not. This amounts to a neglect of social rules and legal culture in the employment sector.

1.2.2.1 Irregular Migration and Its Effects on the Welfare System

There is no single and universally recognised concept on the effects on the social welfare system occasioned by irregular migration flows. However, from the works of social scientists and political economists, it is increasingly evident that irregular migration, like the entire process of migration in general, may have a powerful long-term impact on the receiving country's welfare system. Welfare considerations often pose dilemmas for social scientists in relation to the question of free movement and, as Milton Freedman pointed out in relation to migration: "You cannot simultaneously have free immigration and a welfare state".[36]

Basic economic and political factors accompanying irregular migration are characterised by possible competition for jobs that illegal immigrants might introduce in respect of the local and legal immigrant labour force. As a result, the financial burden on the working population may increase in order to finance unemployment benefits.[37] This effect may take place if illegal immigrants pay too few or no social security contributions,[38] but hypothetically this negative effect could be ameliorated by an increase in the net output and a subsequent increase in employment.[39]

Illegal immigrants are able to access the welfare state, either through fraudulent benefit claims or through access to main public services, as well as on the basis of personal destitution. Thus, irregular migrants' exclusion from the main social support schemes endorsed by the authorities does not always impair opportunities to access basic public services or benefits, particularly in cases of medical care or education.[40] Inasmuch as the undocumented migrants use these services, they accelerate social

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[35] Home Office, "Migration: An Economic and Social Analysis", Home Office RDS Occasional Paper No. 67, London, 2001, pp. 92-93.; also in "A Common Policy on Illegal Immigration", House of Lords, Select Committee on the European Union, Session 2001-02, 37th Report (with evidence), p. 13 (paras. 28-29).

[36] *The Economist*, supra, n. 5, p. 12.

[37] Ghosh, supra, n. 4, p. 79.

[38] 'Illegal Aliens: A Preliminary Study', supra, n. 3, p. 12.

[39] Ibid.

[40] Ghosh, supra, n. 4, p. 80.

welfare expenditure, and constitute an additional burden on the receiving state's public purse.[41] The level of social welfare expenditure on irregular migrants depends on the legal framework in each country for regulating access to the welfare state. Currently, immigrants overall are more likely to be claiming welfare benefits than in previous times.[42] However, because irregular migrants are mostly young people,[43] their actual burden on the welfare system is quite low, especially considering that migrants' entitlements at the stage of illegality are limited to the narrowest scale of benefits or services, including emergencies only.[44]

The final balance between expenditure and economic contributions varies from country to country, with the size of contributions based, in turn, on the system of tax payments. If payment of taxes follows automatically from any type of employment, then irregular migration may at least compensate for welfare bills. For instance, irregular migrants are paying taxes or contributions automatically upon being employed in the United States,[45] where it was revealed that almost 77% of illegal immigrants paid taxes. In a properly functioning system of taxation (which means transparent, as opposed to underground entrepreneurial activities), the structure and volume of net benefits coming from both direct and indirect economic contributions probably means that immigration flows positively influence the economies of receiving societies. Because irregular immigrants are the most restrained and employment-hungry category of immigrants, filling the most undesirable positions, they may bring more than they consume to the welfare state,[46] but probably only as long as their residence remains temporary.

In Britain, the situation with taxes is not very clear, since irregular migration does not embrace a homogeneous group. In this respect, for example, the wide immigrant category of foreign students employed for longer periods than those allowed by immigration law, still use official channels of employment through agencies and legitimate employers, and therefore taxes and contributions are paid directly to the state. On the other hand, the scale of the underground economy, especially in the

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[41] Ibid.
[42] Ibid., pp. 84-85.
[43] *The Economist*, "A Modest Contribution", supra, n. 5, at p. 13; also in the House of Lords Report, supra, n. 35, p. 13 (para. 31).
[44] Ghosh, supra, n. 4, p. 82; also in the House of Lords Report, ibid.
[45] North, D. and Houston, M. "The Characteristics and Role of Illegal Aliens in the US Labour Market: An Explanatory Study", Washington, DC, Linton and Company, 1976; in Ghosh, supra, n. 4, p. 82.
[46] This can be indirectly supported by *The Economist*, "A Modest Contribution", *Survey of Migration*; also in Ghosh, supra, 4, p. 82.

agricultural sector, or with informal types of employment such as ethnic catering, is very large, and correct tax contributions remain highly unlikely. For Britain, though, contributions of legal migrants, for example, slightly overbalance the expenditure on their welfare, where this positive margin comprises almost 2.5 billion pounds.[47] Considering the effect of lower wages and very few claimable welfare entitlements for irregular economic migrants, the net contribution may be lower, but still positive.[48]

In Russia and South Africa, illegal immigrants are employed mostly informally, and this automatically implies non-payment of the major taxes. Nevertheless, even if taxes were paid, in a federal system of government such as which exists in Russia, illegal immigrants may disproportionately burden regions or municipal entities in terms of social welfare, while the federal government may, almost exclusively obtain the economic contributions through the payment of federal levies, as was revealed in the US experience.[49] At the same time, with business activity increase (in macroeconomic terms), it is highly likely that indirect macroeconomic gains are possible for the receiving economy as a whole.

Regardless of quite low contributions to the welfare state, the gross productivity of illegal immigrants could be substantial. Even considering the variable effects of illegal migration, in addition to a possibility that irregular migrants remain in the ranks of temporary work force indefinitely, as is occurring in Europe, a sound conclusion may be that, with the reduction of guarantees from the receiving state and the public sphere, illegal migrant workers are still exploited through public means, because the receiving societies obtain more than they spend on them.[50] It has become obvious that irregular migrants are actually a driving force of modern economies. Thus, on the economic policy level, the task of eliminating irregular migration should actually be supported by measures such as increasing the payment of taxes and contributions payable by irregular immigrants, therefore bringing about a reduction of the informal economy fostering the 'moonlight' employment environment. At the same time, strong incentives exist to curb irregular migration, because of some adverse social outcomes in receiving societies.

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[47] Gott, C. and Johnston, K. "The Migrant Population in the UK: Fiscal Effects", RDS Occasional Paper No.77, 2002; a research study under the auspices of the Home Office conducted jointly with the Performance and Innovation Unit and the Institute for Public Policy Research.
[48] The House of Lords Report, supra, n. 35, p. 13 (para. 31).
[49] In Ghosh, supra, n. 4, p. 83.
[50] Julian Simon, "Immigration: the Demographic and Economic Facts", Cato institute, Washington, DC, 1995; Ghosh, ibid, p. 84.

1.2.2.2 Effects on Competitiveness, Productivity and Structural Flexibility of the Economy

One of the matters confronting the receiving public and society in connection with illegal immigration, concerns the functional flexibility of the receiving economy. Illegal immigrants challenge the host society with a reduction of wages, particularly when the immigrants are ready to work longer hours for wages that native inhabitants would not be prepared to accept.

In this respect, illegal immigration contributes to the 'segmentation and dysfunctioning'[51] of the labour market, and undermines restructuring and upgrading of the receiving economies. This is because the industries attracting illegal aliens are non-competitive and would probably either be upgraded,[52] or would cease to exist if not for the intake of irregular migrants. These firms often operate in the informal economy, where many basic conditions are not observed, such as a system of wages, minimum hours of work, health and safety, or protection from being fired. As a result, the companies survive, but technologies remain the same and competitiveness plunges into a decline with the labour-abundant technologies.[53] These sectors then mount pressure on their governments to promote trade protection.[54]

At the same time, the receiving economies employ illegal immigraqnts in farms, hospitals, laundries and restaurants: without them, many small businesses would not survive if forced into an open competition.[55] In this respect, it is noteworthy that liberal free trade in the United States has indeed generated a boost within the technological sectors, but has also led to the closure of many of its own production capacities. Currently if it were not for undocumented Mexican workers, this trend could lead to the closure of many more vulnerable enterprises.[56] Indeed, in this regard, hotels, restaurants and pubs in Britain, owned by small-scale entrepreneurs and actually embodying the British way of life, employ irregular migrants and benefit the country. Small businesses could possibly face serious consequences should there be no additional opportunity to attract irregular workers, considering the operation of the work permit system.[57] Therefore, the reality of a reduction of competitiveness should

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[51] Ghosh, ibid., p. 85.
[52] Ibid.
[53] Ibid., p. 86
[54] Ibid.
[55] "Illegal Aliens: A Preliminary Study", supra, n. 3, p. 10.
[56] Yoshida, C. "Illegal Immigration and Economic Welfare", Physica-Verlag, 2000, p. 4.
[57] This is a sound conclusion that could be drawn from the chapter on the UK, and particularly from the Department of Trade and Industry study referred to in the UK Chapter, infra, p. 79.

be balanced against considerations of small business profitability and, furthermore, small communities' subsistence based on such profitability.

1.2.3 Social Costs and Consequences of Irregular Migration

It becomes evident that illegal immigration raises social issues and has proved capable of producing certain negative effects on the receiving society. Despite the overall positive contributions according to general economic parameters, illegal immigration still produces some side effects, as obvious from the presentation above. These rather negative consequences may be neglected when viewed only within an economically focused discourse, but pose powerful social and political issues. As a House of Lords Report contends,[58] there are several negative factors to irregular migration, such as:

- A powerful negative impact on the most unskilled strata of the receiving society by means of the competition for jobs;
- Reduction of wage levels and employment standards with the potential to disrupt the social welfare system;
- Encouragement of unlawful competitive advantage to unscrupulous employers;
- Acting as a "pull factor" for other potential illegal immigrants;
- Exploitation of irregular migrants;
- Increase of organised crime involved in smuggling or trafficking.[59]

The degree to which all these factors are true and equally relevant will be established by the country-specific analysis produced in subsequent chapters. However, depreciation of social standards and the criminality of illegal immigrants have become two major concerns for receiving countries. Indeed, illegal immigrants are heavily exploited, live on the margins of societies, and often fall victim to criminal syndicates, factors which, when taken together, become socially disruptive for the receiving society.

In addition, law enforcement against illegal immigration contributes to increasing financial costs and various issues of concern. Expenditure grows directly in the following areas: policing, removal and detention, border controls and inspection relating to the employment of illegals.[60] Such enforcement expenses are very substantial and constitute almost 17 billion US dollars for the five industrialised

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[58] The House of Lords Report, supra, n. 35.
[59] Ibid., p. 32.
[60] Ibid., p. 14 (para.33).

countries: Canada, Germany, the Netherlands, UK and US.[61] Irregular migrants may also affect society through unpaid contributions, fraudulent use of welfare and access to essential public services.[62]

Most importantly, the social effects attributed to irregular migration are fraught with an acceleration of negative processes which undermine the attainment of an adequate legal order, as was stated in the American context, thus leading to the emergence of political issues and concerns. In this respect, the Congressional Select Commission on Immigration and Refugee Policy has declared:

> "...illegal immigration [if unchecked] will continue to undermine the most valued ideas of this nation—the integrity of the law and the fundamental dignity of the individual".[63]

A topical problem tied up with considerations of law and order and which deserves attention, is the extent of voluntary or involuntary affiliation, and even direct subordination, of some illegal migrants to the criminal underworld,[64] particularly when falling under the authority of traffickers or gang masters, thus creating a dangerous challenge for the legal order. In Britain, for example, the criminality of illegal immigrants was not viewed by policy-makers as a major problem confronting the society (although the fraudulent use of documents is prevalent among undocumented migrants in the UK). As Lord Filkin states in the Report by the House of Lords:

> "What evidence we do have does not, I think, illustrate that there is a major criminal problem from illegal immigrants themselves, who, in the vast majority of cases, not all, come here to work and therefore, one could well presume, they wish to keep a low profile and continue to work." [65]

Nevertheless, the House of Lords Report also recognises that illegal immigrants could be ready prey for criminals,[66] possibly because loss of control over migratory movements and residence is inherent in irregular migration. This is confirmed in the works of social scientists who point out the criminality inherent in irregular migration:

> "As irregular migration erodes the moral values and economic integrity of the receiving society and it becomes increasingly associated with criminality, illicit activities and violence, it tends to generate an anti-immigrant feeling among the public[67].... The irregular migrants thus continue to work in the underground

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[61] "Bordering on Control: Combating Irregular Migration in North America and Europe", supra, n. 13.
[62] Ibid.
[63] "US Immigration Policy and the National Interest: Final Report", US Government Printing Office, Washington DC, 1981, p. 560; Ghosh, supra, n. 4, p. 90.
[64] Albrecht, supra, n. 9, p. 6.
[65] House of Lords, supra, n. 35, p. 15 (para. 38).
[66] Ibid.
[67] Ghosh, supra, n. 4, p. 92.

> economy, to live in ghettos or in places of hiding and enjoy few human rights; as they are consequently trapped into a situation in which their marginalisation and lack of social protection tends to increase rather than decrease over time."[68]

The links between circumstances of irregularity in immigration and emergence of crime or demoralisation in the host society were demonstrated in criminological research, which revealed that, although not being exclusively responsible for the trend, immigrant communities somehow contributed to a higher crime rate than did the nationals of the receiving states.[69] This assertion was based on the analysis of the number of foreign detainees in prisons throughout Europe,[70] where this included scores of aliens who were being arrested specifically for drug offences. In his article,[71] Dario Melossi refers to the same type of statistics which reveal disproportionate numbers of foreign detainees in European prisons, although he warns against understanding these figures as utterly accurate in representing foreigners' involvement in criminal activities, or in demonstrating precisely the character of immigrants and the processes underpinning immigration.[72]

Overall, it is possible to identify both static and dynamic patterns of irregular aliens' contributions to issues of crime, safety and social order.[73] The static elements include, inter alia, generally constant trends for the issue of illegal immigration, such as:[74]

- Some immigrants reveal a much higher proportion of involvement in criminal activities than others;
- The very challenging, disadvantageous or precarious position of irregular migrants encourages them to participate in the informal economies (as evident from the Russian and South African experiences);
- There are different crime patterns or degrees of crime involvement between different ethnic groups.

Some dynamic elements refer to the changeable nature of the abovementioned trends, i.e. developments occurring over time in the circumstances of illegal immigrants:[75]

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[68] Ibid., p. 93.
[69] Albrecht, supra, n. 9, pp. 14 and 15.
[70] Ibid.
[71] Supra, n. 18, pp. 378-379.
[72] Ibid.
[73] Albrecht, supra, n. 9, pp. 8 and 9.
[74] Tonry, M. "A Comparative perspective on minority groups, crime and criminal justice", 6 (1998) *European Journal of Crime, Criminal Law and Criminal Justice*, pp. 60-73; in Albrecht, supra, n. 9, p. 8.
[75] Albrecht, supra, n. 9, p. 9.

- Structural changes have made the position of immigrants more disadvantageous than it was previously;
- Work place shifts in many economies have resulted in the disappearance of low-skilled employment opportunities in favour of service sectors of the economy;
- The trends of migration reflect either illegality, or merely tolerated immigration and asylum, whereby foreigners are subject to excessive administrative restrictions and regulation leading to further criminality and marginality in case of non-compliance;[76]
- More than ever, immigrants in Europe concentrate in inner-city areas, and multiple problems and issues emerge from this process.

The appearance of these trends in the receiving societies brings about political problems and anxieties, and these are especially aggravated by the growing perception of a loss of control over migration or intolerance towards illegal immigrants.[77] There are various explanations and schools of thought in relation to the criminality of immigrants, whereby, on the one hand, some scientists[78] believe in criminality in 'its own right', while others[79] argue about the 'constructed' nature of these trends by means of both formal and informal controls. In this respect, Melossi reconciles both views, but asserts the following in regard to discriminatory tendencies in the receiving societies:

> "There is an ongoing process of interaction between the criminal involvement of certain foreigners and the structure of social relationships, which carries, inscribed within itself, the risk of a continuous amplification of that involvement, an amplification that is neither a simple matter of fact nor a merely ideological construction."[80]

Calavita also points out the lack of substantive rights underlining the position of this vulnerable group of individuals as a factor which leads to marginality and crime.[81] These arguments relating to the marginality and criminality of migrants produce a

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[76] Albrecht, H.-J. "Foreigners, Migration and the Development of Criminal justice in Europe", in A. Rutherford and P. Green, eds., *Criminal Justice 2000*, London, 2000, pp. 131-150.
[77] The House of Lords Report, supra, n. 35, pp. 16 (para. 41) and 14 (para. 34).
[78] Barbagli, M. "Immigrazione e criminalita in Italia", Il Mulino, Bologna, 1998; in Melossi, supra, n. 18, p. 379.
[79] Dal Lago, A. "Non-persone. L'esclusione dei migranti in una societa globale", Fertrinelli, Milano, 1999; ibid.
[80] Ibid.
[81] Calavita, supra, n. 19, pp. 400-401.

demand for balanced immigration policies, embracing, as far as possible, a humanitarian awareness.

1.2.4 Reconciling the Studies on Economic and Social Effects of Irregular Migration

Although undocumented migration produces certain negative consequences for the host society, regular labour migration, in its temporary forms, would be beneficial for the economy and life in the receiving country, because it increases revenues and incomes. For this reason, the only two feasible alternatives to undocumented migration are either the extension of temporary admission policies to unskilled workers,[82] or the regularisation of the available undocumented migrants who have worked and made contributions to the society. At the same time, there should be a balanced strategy, since temporary migration schemes may provide incentives for the further illegal residence of aliens,[83] while mass regularisation brings forth the promotion of illegal entry or stay.[84] Liberal and careful facilitation of temporary work permit schemes, combined with selective regularisation, probably serve as the best solutions, since, in practice, substantial permanent settlement of migrant workers imposes higher social costs and difficulties of integration upon the host society.[85]

Contracted temporary employment is of primary importance as a measure which actually reduces the scale of irregular migration and the illegal employment of foreigners.[86] Because the illegality of workers is encouraged by offering them economic incentives, there could be policy models which precisely redefine the admission of temporary migrant workers, subsequently introducing financial mechanisms to facilitate their departure.[87] The best policy option in this respect was considered to be a combination of bonds and forced savings imposed on employers and legal migrants respectively.[88] While the bonds are payable by employers and encourage them to ensure the departure of foreign workers,[89] the forced savings reduce incentives for the temporary workers to switch to illegal forms of employment and

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[82] Boeri, T., Hanson, G., McCormick, B. "Immigration Policy and the Welfare State: A Report for the Fondazione Rodolfo Debenedetti", Oxford University Press, 2002, pp. 124 and 126.
[83] *The Economist*, "Irresistible Attraction", *Survey of Migration*, supra, n. 5, p. 6.
[84] The House of Lords Report, supra, n. 35, p. 27 (para. 83).
[85] *The Economist*, "Feeling at Home", *Survey of Migration*, supra, n. 5, p. 10.
[86] Boeri, et al, supra, n. 82, p. 126.
[87] Ibid., p. p. 131-134.
[88] Ibid., p. 134.
[89] Ibid., pp. 131-132.

subsequent overstay.[90] Every measure implemented on its own has certain shortcomings, since it tackles only one side in employment relationships,[91] but their combination may constitute serious incentives for all players to act according to the immigration statutes.

At the same time, even these schemes allowing for greater flexibility have to be applied along with necessary enforcement and control mechanisms and implemented by the government apparatuses. The government agencies involved in immigration control will then have to refocus on a more economic means of curbing irregular migration, including employers' sanctions. In addition to bonds and forced savings, sanctions on employers may potentially serve as another powerful measure of illegal employment deterrence, and a counter to the existence of pull factors for illegal immigration.[92] This is because employers' sanctions can actually increase the time that migrants continue working for legal employers, not least by complicating the process of finding illegal jobs.[93]

The outline of policies produced above probably embraces the most efficient modern solution to the widespread irregularity of workers. However, in order to advance in that direction, governments should still be able be make politically challenging decisions such as opening new legal migration channels and extending certain guarantees to undocumented migrant workers. What fosters undocumented migration in this regard is that while the developed states confronted with the refugee crises are measuring the risks of shifting their immigration policies towards more openness, illegal immigration still remains an unwanted, but feasible, option for meeting the labour demands of employers considering the greater flexibility of aliens as a labour force.[94] The presence of some irregular migrants as an exploited class entitled to no benefits in comparison with the legal migrants is cynically advantageous, but necessary for receiving countries. As *The Economist* magazine's "Survey of Migration" points out regarding the prospects of governments' successful legal enforcement against irregular migrants:

> "But they [governments] would be foolish, in doing so [curbing illegal immigration], to lose flexibility and employability that illegals contribute. Better to find ways to allow more to come legally, but not necessarily to stay."[95]

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[90] Ibid., pp. 133-134.
[91] Ibid.
[92] Ibid., pp. 132-133.
[93] Ibid.
[94] 'Illegal Aliens: A Preliminary Study', supra, n. 3.
[95] *The Economist*, "A Better Way", Survey on Migration, supra, n. 5, p. 8.

The reluctance of the government to act is also strong because the short-term sectional advantages of illegal immigration in some spheres of the economy produce strong lobbying on the part of many employers and ethnic minorities, although in the long-run it is the in-country minorities who suffer greater losses from cheap illegal labour.[96] This pro-immigration lobbying produces effects on enforcement, whereby state apparatuses are becoming reluctant to pursue stringent measures. Generally, in the democratic states, as Professor North in his historic lecture on illegal immigration implied, structural problems of enforcement, rooted in a lack of political or moral will, always exist.[97]

That is why the enforcement of employers' sanctions, although acting in the right direction, has not been very successful in many European countries. The degree of relative implementation failure probably supports Professor North's argument referred to above about the lack of political will, in so far as it relates to the reduction of illegal immigration. In this respect, another feasible measure for effective enforcement of policy on irregular migration would be to provide at least limited juridical capacity to irregular migrants, who could eventually claim certain rights against their employers, at least at the stage of voluntary or even forced returns to their home countries, as was argued in the debate presented by Bosniak.[98] The probability is that, among other factors of enforcement or even internal control, this would also reduce incentives on the part of employers to exploit illegal immigrants.[99]

At the same time, not all states face acute enforcement difficulties. As some other observers point out, there are examples of economic-political models, especially in the Scandinavian states, where illegal immigration has failed to be well entrenched, not least because of the *community role*, and the strong welfare or mutual support systems designed to take care of the interests of local workers.[100] Therefore, the community role in shaping the status of aliens would probably contribute to a more effective political mechanism, as opposed to the largely centralised schemes of enforcement and control in immigration. The improvement of interaction within communities in

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[96] North, D. "Why Democratic Governments Cannot Cope with Illegal Immigration", paper presented to the International Conference on Migration, Rome, 13-15 of March, 1991.
[97] Ibid.
[98] Bosniak, L. "Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention", 25(4) (1991) *International Migration Review*, p. 748.
[99] Peletier, supra, n. 2, p. 182.
[100] Hjarno, J. "Illegal Immigrants and Developments in Employment in the Labour Markets of the EU", Aldershot, Ashgate, 2003, pp. 2-5.

combating irregular migration also coincides with Walzer's arguments on immigration control as focusing on protecting these very communities.[101]

Therefore, the most balanced policy towards irregular migration should take into consideration, or possibly even combine, all workable solutions designed for the following purposes:

- To reduce economic incentives or "pull factors" by facilitating more openness for temporary immigrant workers, together with introducing financial mechanisms ensuring compliance with immigration law on behalf of employers and migrants;
- To improve enforcement machinery by switching to a community-based approach to immigration policy, whereby internal controls and sanctions can be reasonably deployed by communities;
- As was presented in the part of the thesis dealing with qualitative and quantitative dimensions, there is a need to address internal structural issues in the receiving economies.
- To provide more juridical personality to irregular migrants in their claims regarding labour and social welfare rights.

These factors viewed superficially may seem theoretically to be contradicting one another, particularly the suggestion of *enforcement combined with liberalisation.* Although, traditionally, administrative enforcement measures were regarded as acting *versus* liberalism, the time has probably come to challenge the conservative understanding of immigration policy phenomena. These solutions could potentially address the pull factors attracting immigrants and, as argued by Bimal Ghosh, may accompany the whole complex of measures against illegal immigration on a global scale:

> "It [effective strategy] must combine and balance between punitive measures and protection of basic human rights, between stricter border control and removing root causes of irregular movements, and as far as possible, it must also harmonise measures of the sending and the receiving countries, including those taken within each group."[102]

The solutions addressing the pull factors may be powerful, but however elaborate they are, they could be challenged by life itself, and turned instead into approximate sketches, lingering on the picture of the complex reality surrounding irregular

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[101] Walzer, M. "Spheres of Justice: A Defence of Pluralism and Equality", Robertson, Oxford, 1983.
[102] Ghosh, supra, n. 4, p. 147.

migration processes. New challenges have arisen in many states, where irregular migration flows have become too excessive and too fraught with social distortions. In this regard, potential economic or geopolitical dangers become evident, since disparities persist between many states, both regionally and globally—an argument that reflects the global prospective and interrelation of the whole world. For example, the South African Republic has the most effective and developed economy on the continent, while tens of millions of Africans confronted with unprecedented realities of famine, civil unrest or oppressive governments may find sufficient incentives to move to this economically better-off region. Population movements are likewise increasing between overpopulated China and the scarcely inhabited but mineral-rich Russian Siberia. The House of Lords Report best expressed a similar problem arising for the European Continent:

> "It would be naïve to assume that immigration would simply stop once the labour market demands had been fully met or that immigrants would return to their own countries if a down-turn in Western economies led to a reduction in job opportunities in the EU. *Economic wealth and the welfare standards of EU countries are such that they would continue to attract migrants from the poor and deprived regions of the world well beyond the labour market situation* [emphasis added]."[103]

Improvement of liberalisation or enforcement can only alleviate the severity of the problem. There are many more components to the functional policies outlined in *The Economist* magazine's "Study on Migration"[104], where the strategy to govern migration flows, in addition to the abovementioned characteristics, was also supposed to include co-operation between sending and receiving states, with possible arrangements under multilateral instruments governing international labour migration.[105]

As becomes obvious from the socio-economic discourse, immigration policy should be highly realistic, and based on the combination of solutions mostly outlined above. The response to these challenges of immigration should definitely be produced by means of legal regulation. However, quite apart from the socio-economic perspective, legal policy is a by-product of additional political factors and public expectations. In addition, in light of an administrative type of regulation, immigration policy often

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[103] The House of Lords Report, supra, n. 35, p. 14 (para 34).
[104] *The Economist*, " A Better Way", *A Survey of Migration*, supra, n. 5, pp. 15-16.
[105] Ibid., p. 15.

presents an independent phenomenon brought about by the considerable discretion and deficiencies of the legal system handling this complex social issue.

1.3 Current Problems of Defining Illegal Immigrants and Uncovering the Corresponding Spheres of Illegality

1.3.1 Definition of Illegality of Aliens

Immigration law in almost any country consists of various spheres of legislation and legal practice, where the main role, however, belongs to the system of administrative regulation. Immigration statutes enacted by parliaments authorise executive bodies to undertake immigration control, which, in addition to the legislative means, also consists of considerable executive discretion, sometimes unpublicised or random. The main checking power on the executive role in immigration control, particularly in those jurisdictions where it is practicably available, belongs to courts and tribunals, which apply and also shape immigration policy in individual cases, sometimes by interpreting the laws and the legislators' intent.

At the same time, in addition to the 'positive' law of legislative acts, executive decision-making and judicial decisions, there are underlying currents of the so-called 'living law', bringing sociological discourse and meaning into the agenda of immigration law.[106] Indeed, normative positivism although it is indispensable in researching immigration law, and despite the fact that actually lays the cornerstone of the present thesis, is still too narrow for defining all the main trends in immigration policy and its social effects. In this regard, Petrazycki saw one of the origins of the law as lying in the psychological behavioural patterns of human beings, i.e. 'intuitive law', or ethical impulsions in particular, often perceived as duties in respect of another person's corresponding rights.[107] Furthermore, Petrazycki developed an extended classification of the law, which included the following elements:

- Positive official law, used by the courts and adopted by the state;
- Positive unofficial law, involving resolution of conflicts by an unofficial agency, albeit with reference to the positive law;
- Intuitive official law, i.e. decisions of courts on the basis of equity;

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[106] Ehrlich and Petrazycki, supra, n. 1.
[107] Ibid., in Banakar, R. and Travers, M. "Law and Social Theory", Hart Publishing, Oxford and Portland (Oregon), 2002, p. 36.

- Intuitive unofficial law, i.e. people's spontaneous behaviour according to their intuition rather than according to statutes or normative acts.[108]

Ehrlich understood the law similarly, although in social, rather than in psychological, terms[109] and, according to him:

> "The modern science of society, sociology, looks upon law as a function of society. It cannot limit itself to the legal provision as such. It must consider the whole of law in its social relations and must also fit the legal provision into this social setting. For this purpose obviously the greatest possible knowledge of the whole structure of society, of all its institutions, and not only those regulated by statutes, is prerequisite."[110]

It is obvious that for Petrazycki and Ehrlich, sociology is a tool for improving law and further developing the legal science.[111] These views on sociology and law are very topical for immigration regulation since, although it embraces largely administrative regulation methods, [irregular] migration poses huge dilemmas for the implementation of policy, not least because such policy is frequently ineffective. Indeed, the existence of the quasi-legal status of illegal immigrants allows for an argument in favour of a wider understanding of the phenomenon of immigration law. In this regard, the sphere of irregular migrants' legal position involves all of Petrazycki's elements of law, but positive norms (sanctions), intuitive official law (some judicial decisions) and intuitive unofficial law (behaviour of immigrants) are especially relevant and, taken together, bring illegal immigration into the realm of law, rather than that of 'compassionate' sociology.

In light of a broader understanding of immigration law, a complexity of immigration relationships is indicated with the main legal and philosophical problem being related to the subject area of the thesis which concerns the provision of accurate legal definitions and dimensions in relation to irregular migration. On the one hand, illegal immigration does not seem to require an elaborate approach where, for example, the status of illegality of aliens could be derived from generalised notions of non-compliance with 'positive' norms of immigration law, such as:

> "...where they [aliens] do not possess the authorisation of the States in whose territories they are required by law in respect of admission or stay or economic

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[108] Podgorecki, A. "Unrecognised Father of Sociology of Law: Leon Petrazycki", 15 (1980) *Law and Society Review*, p. 183-202; in Banakar and Travers, ibid., p. 40.
[109] Supra, n. 1; ibid., p. 43.
[110] Ehrlich, E. "The Sociology of Law", 2 (1922) *Harvard Law Review*; ibid.
[111] Banakar and Travers, supra, n. 107, p. 34.

activity, or where they cease to fulfil the conditions to which their stay or economic activity are subject".[112]

It may be understood that illegal immigration concerns four main spheres of immigration and administrative control, such as entry, residence, access to the welfare state and economic activity, although the exact characteristics of illegality vary in every state.[113] On the other hand, a more elaborate and complex definition is necessary to establish the precise criteria of irregularity in accordance with the entire structure of immigration law.

Indeed, in the scientific debate and literature on the topic of irregular migration, its definition has been one of the issues where policy makers and scientists faced the necessity of developing a much clearer classification, particularly in view of all the aspects concerning appropriate policy instruments.[114] This may be seen in the same light as the hypothesis and purpose of this thesis, inasmuch as it relates to specific policies that contribute excessively to the illegality of the position of aliens in individual states. In this regard, three conceptual problems arise in connection with the nature of immigration policy in general.

First of all, intentions of the legislators are not necessarily identical to the word of subsequent regulations or actual practices that may at least vary slightly from the legislators' intent. This either originates due to unpredictability as to the effect of any legal regulations on legal practice and social life, or because administrative regulation develops its own momentum, even identity, quite different from the more supreme legal acts. Where the result is different from what was intended, which is often the case in the vibrant sphere of immigration, the deflection of the original legislator's ideas is crucial for shaping immigration policy.

What contributes significantly to the unpredictability of the result of legal regulation is the fact that immigration law deals with the basic and most "recalcitrant" phenomenon in life—individuals fulfilling or changing their destinies—especially since improvement of personal circumstances serves as a powerful attraction for immigrants. Handling human flows requires courage and a perpetual process of facilitating up-to-date measures, since the social reality of the migratory movements constantly outstrips legal regulation.

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[112] Ghosh, supra, n. 4, p. 17.

[113] Ghosh, ibid., p. 18, names three classical elements of irregularity, such as illegal entry, residence and employment, despite the fact that, recently, features of the welfare state have been invoked by various governments in order to reduce incentives for immigrants.

Secondly, immigration law covers such a wide scope of areas concerning public or social life that its structure becomes too bulky and saturated with executive regulations. Executive regulation in immigration law is probably unavoidable, but if not properly restrained, it may cause both structural havoc and distortions, with serious implications for basic human rights, even in the well-functioning legal systems.

These interconnected characteristics lead to the assertion that definitions of illegality should be sought, first of all, in the vastly over-regulated sphere of administrative decision making and, secondly, in the corresponding social reality, thus presenting a task much more complicated than may be initially thought. In this regard, illegality in the immigration and administrative branches of law follows patterns of all the constraints imposed on aliens. These constraints represent both primary and secondary "levers" of regulation, where an extensive variety of the latter inevitably provokes an extensive notion of illegality. Often enough, it is these secondary patterns that are being violated by immigrants, thus making their position irregular in light of the main provisions of immigration law. It is inherent in administrative regulation that the more patterns like this that exist, the more chances for infringement upon the law they imply. This is probably the inevitable role and impact of an immigration control system. These trends also crucially shape the possible *legal* capacity of illegal aliens.

Both primary and secondary patterns of regulation are responsible for a great deal of human situations, in turn creating notions of illegality. The process of formation of irregular status from the legal point of view (the connection between norms of law and their reflection in social reality) could also be compared with the interrelation of two sides of one coin, which are interdependent and possess the same value, but reflect different identities at the same time. However, as was mentioned above, there exists a tendency that the de facto structure of immigrants' circumstances and behaviour goes far beyond the structure of immigration law itself, thus causing substantial gaps and loopholes in regulations often used by potential immigrants of all types. The internal juridical capacity of irregular migrants in this system of classification reflects the certain quasi-legal status of illegal immigrants, since the offending persons still operate fruitfully in the receiving societies. This quasi-legal status of irregular migrants is predominantly shaped by the entire structure of immigration law.

In this regard, admission policies for aliens have become the central issue in the entire discourse concerning illegal immigration. These policies may be divided into

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[114] Ibid., p. 9.

two categories: the ones that attempt to stop illegal entry, and the much vaster ones that comprise the main immigration regulations concerning access of aliens into the country, and which affect all other mechanisms of administrative or immigration control. In this respect, it is not only entry that entails admission policy, but also subsequent treatment in the country, be it for employment, study or other purposes. Illegal immigration within the broader understanding of aliens' admission serves as a reverse, a shadow, and an undesirable aspect of the main norms of immigration law.

A separate sphere where irregular status would be likely to occur is where residence is predicated upon specific rules relating to the presence of foreigners in the country and to the facilitation of control over their presence in that country. The residence situation of aliens may be unlawful if they fail to comply with specialised regulations concerning the legality of their stay. In this thesis, especially in the case of Russia, it will be demonstrated that the residence sphere may be full of tricky mechanisms which restrict the freedoms of aliens too heavily, sometimes through semi-official or semi-publicised means. In this respect, it is only the non-compliance with formalities that matters, where aliens fail to act, rather than where they deliberately act in breach of the law.[115]

The third type of circumstance involves the situation where initial entry and residence status may be regarded as lawful, but where individuals could be involved in activities explicitly prohibited by the status of a given immigrant. This refers to unauthorised employment, or unlawful claims of social welfare, or restricted public services. Here, the states guard most sensitive areas of social life, i.e. the ones responsible for social stability and support of the needy. In these cases, irregularity has a two- or even three-fold status, where possible illegal entry and/or illegal residential status is complemented by unlawful practices in relation to unauthorised employment, or to claims concerning public services or benefits.

Bimal Ghosh, for example, places undocumented employment into a different realm, not quite identical to irregular migration, since the nationals may be involved in illegal employment on the same scale as undocumented migrant workers.[116] However, as opposed to this distinction drawn by Ghosh, employment in contradiction to immigration regimes imposed on particular groups of foreigners, may lead to automatic removal, as for a serious immigration offence. Thus, although of derivative

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[115] Here it is an objectively imposed sense of violation, rather than deliberate non-compliance.
[116] Ghosh, supra, n. 4, pp. 17-19.

character, i.e. being consequent to, and dependent upon entry and residence conditions imposed, employment of aliens is still an independent entity prohibited both by virtue of sanctions against immigrants, and those against employers.

Despite the existence of the main forms of illegality based on multiple administrative factors of entry, residence or employment, there may be migrants who supposedly fall outside the scope of the conventional regulation associated with legal immigration, since different norms and cases of irregularity are involved. These individuals form a distinct, but not always homogeneous, entity, although these differential cases could be brought about by the unified humanitarian international regulations. Such is the case of refugee protection, where regulations concerning asylum seekers take a distinctive route in terms of legal status irregularities based on different criteria.

A special interest for this thesis is definitely concerned with asylum issues which have emerged as a modern-day challenge, standing apart from all the classical definitions, since they involve a great number of people claiming entry and protection on humanitarian grounds in the developed countries. The link with irregularity is not direct, but compelling,[117] because situations exist where government policies may either treat asylum seekers as bogus and, similarly, the detected illegal immigrants or, as a result of provisions governing residence, welfare or employment, asylum seekers can commit breaches of immigration law.

Entry of many asylum claimants is almost certainly illegal inasmuch as a fair number of them enter without authorisation, but the presence of asylum claims temporarily regularises their situation,[118] although with multiple difficulties arising from the determination process. The more specific cases involve a situation where asylum claimants destroy documents on entering the country, as was stated in some UNHCR sources which reveal that this occurred in 90% of cases in the Netherlands or Switzerland, in 80% of cases in Norway, and in 70% of cases in Sweden.[119]

However, it is equally true that conceptual problems persist with determination of refugee status. On the one hand, many states face the challenge of presence of so called de facto refugees, i.e. those who did not submit asylum applications for various reasons. On the other hand, the determination problem concerns a fair proportion of registered asylum claimants from politically and economically devastated states, where

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[117] The House of Lords Report established that there is an "overlap" between issues of illegal immigration and refugee protection, supra, n. 35, p. 9 (para. 13).
[118] The 1951 Convention Relating to the Status of Refugees, Article 31(1).

for many nationals oppression still exists today. As was stated in the specialised study on the migration phenomenon undertaken by *The Economist* magazine:

> "Many asylum-seekers are fleeing poverty and disorder rather than persecution. It is usually impossible to establish whether or not they have really suffered the traumas they claim".[120]

The question implied by the study is whether or not these are the people who are in genuine need of protection, rather than the millions of internally displaced people or refugees in the Third World who can be much better served with the same money.[121] At the same time, given a range of these instability factors and the presence of oppressive governments, it is actually extremely difficult to distinguish bogus asylum claims from genuine ones.

Nevertheless, whether bogus or bona fide, the contribution of asylum seekers to the reality of illegal immigration is significant, not least because of the enforcement problems in relation to removal mechanisms unable to deal effectively with all the failed asylum seekers. Still, a large proportion of asylum seekers in Western Europe prefer to remain illegal on encountering failures in the status determination process. At least 75% of these individuals eventually stay in the receiving countries, with half of them becoming overstayers.[122] Rejected asylum cases generate an acute problem, because residence during asylum appeal periods may be illegal in some states or, if the presence is classified as legal, social support schemes are terminated, thus driving desperate asylum claimants to commit breaches of immigration law.

In this regard, the links between asylum issues and illegality concern not only circumstances of entry and legalisation, but also the stay of aliens in the receiving societies. In this regard, the relevance of welfare provisions for the issue of illegality cannot be underestimated. Here, government policies tightening welfare entitlements for asylum seekers are probably designed to decrease the attractiveness of claiming asylum, and therefore to reduce the so-called "pull" factors for immigrants.[123] This is despite the fact that those asylum claimants who are often denied considerable support by regulations are virtually encouraged to commit immigration offences. Currently, it is possible to argue that the success of conventional governmental policies in dealing

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[119] Widgren, J. "Movements of Refugees and Asylum Seekers: Recent Trends in a Comparative Prospective", OECD Conference in Paris, March 1991; in Ghosh, supra, n. 4, p. 7.
[120] *The Economist*, "The Best of Reasons", *Survey of Migration*, supra, n. 5, p. 7.
[121] *The Economist*, "A Better Way", *Survey of Migration*, supra, 5, p. 15.
[122] Ibid.

with asylum issues has been very limited, and thus one could make the assertion that asylum has become one of the biggest issues of controversy in terms of immigration policy.

All the abovementioned characteristics of legal regulation concerning irregular migration are true for most jurisdictions. Indeed, national legislations, including those of the three states subject to scrutiny in the current thesis, accommodate immigration regimes corresponding to all the abovementioned types of illegality. At the same time, elements of control and practices are not fully identical, especially considering the varying emphasis on different mechanisms of control. Therefore, each country, as will be demonstrated in the forthcoming country-specific analysis, develops not only its own identity of immigration control, but also distinct definitions.

1.3.2 Legal, Practical and Enforcement Complications of Immigration Control

All the abovementioned conceptual challenges relating to the formulation of a definition of aliens' illegality are reflected in practical trends in the administrative machinery which handles immigration or residence control. On this very practical level, the trends in the administrative system may have complications which fully reflect deficiencies within administrative machinery. The deficiencies may provoke irregular positions through lack of proper clarity of the norms, and also cumbersome, costly or extremely bureaucratised procedures.[124] These negative features generate additional sources of irregularity, followed by disruptive effects on all the bona fide immigration control measures, or by involuntary breaches of regulations on the part of immigrants.[125]

The nature of institutional problems has been summarised by Bimal Ghosh who proposes various constitutive elements:[126]

- Imposition of excessive constraints on all aliens and abuse of such constraints by the states involved;
- Lack of necessary agencies for handling work with immigrants;
- Insufficiency of material and plausible information for immigrants in the spheres relating to provision of housing, social welfare and travel;[127]

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[123] At the same time, it is not welfare provision, but an opportunity to work that is responsible for attracting immigrants, as was established by the House of Lords Report, supra n. 35, paras. 15-16.
[124] Ghosh, supra, n. 4, p. 173.
[125] Ibid.
[126] Ibid., pp. 64-67.

- Unrealistic procedural and substantive requirements;
- Frequent changes in the immigration law;
- Structural border control problems brought about by colonial or imperial legacies, as becomes obvious from the South African experience.

In light of the present thesis, it will be indispensable to look at the country-specific problems in the following chapters from the point of view of these criteria of policy shortcomings, thus laying the ground for the illegality of aliens, in addition to the possible abuse committed by immigrants themselves. This corresponds entirely with the main hypothesis of the thesis which may help to shed light upon both the quality of existing immigration regulations and their impact on the position of immigrants, as well as compliance with basic standards imposed by international law and practice.

The practical issue in this regard also refers to the structure of enforcement mechanisms in immigration law. The governments have to face the challenge of irregular migration and conduct policy measures for preventing entry and illegal activities. In very general terms, there are only two main methods of imposing restrictions over aliens: preventing them from entry in the first place, and excluding them after entry has been facilitated.[128] Along with the former matter of aliens' admission, the sphere of controls over the residence or activities of migrants gains a crucial importance in the debate on enforcement and control issues. In this regard, internal controls may be defined as a system of monitoring and enforcing the rules governing the residence or movement of aliens, whereby various mechanisms are designed to create a network of limitations for illegal aliens, in addition to constraints in the spheres of public services, social welfare and employment.

Generally, internal control mechanisms are said to respond to three main policy goals relevant for the agenda, and finally for the improvement, of certain enforcement elements within immigration policy:[129]

- Reduction of the attractiveness of immigration in general;
- Improvement of deportation or removal mechanisms and, more generally, deterrence of illegal immigrants;

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[127] Ghosh, B. "Migratory Movements from Central and Eastern European Countries to Western Europe, in People on the Move: New Migration Flows in Europe", Council of Europe, Strasbourg, 1992, pp. 148-150.
[128] Albrecht, supra, n. 9, p. 20.
[129] Ibid., p. 14.

- Creation and enforcement of criminal punishments primarily for those who support or facilitate the process of irregular migration.

At the same time, with the introduction of new measures, the costs of immigration control increase, and this is followed by the subsequent structural adjustment of organised traffickers and the criminal world to these changes.[130] This is a continuous and structural tendency inherent in the black 'immigrant market', inasmuch as it responds to the changes of immigration law and policy. The sphere of immigration control in its entirety is an integral part of the substantive internal legal capacity of illegal immigrants, i.e. their quasi-legal status.

Deployment and development of internal control measures designed to deter irregularity alters the identity and function of immigration regulation, and possibly also the principles on which the system of sanctions towards irregular migrants should operate. Because of the growth in the sphere of immigration control, immigration statutes should probably produce precise and systematic approaches and, if necessary, be codified by domestic statutes. Indeed, the desirable logic of policy-making should entail better organisation and lead to a more elaborate structure of immigration law. Here, the most topical feature concerns the fact that all illegal immigrants, regardless of illegality factors or personal circumstances, form a single category under immigration regulations when one refers to legal sanctions, common, unified and potentially deployable to the hilt for every irregular migrant category in most jurisdictions.[131] This happens despite the fact that the structure of this group is composite to the same extent as, firstly, their personal circumstances and, secondly, the structure of administrative and immigration law imposing constraints, which includes the extending sphere of internal controls. Asylum seekers, students, visitors and employees may fall into this same category of illegal immigrants upon failing to meet the demands of immigration regulations of all types. The gravity of these violations varies, too.

The foregoing outline also implies a further problem that when very few channels for legal immigration exist, and where the freedom of aliens under some immigration

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[130] Ibid.

[131] Fines, removals and expulsions, or even imprisonment are common measures for regulation in every state and act as punitive measures against irregular migration. There is also a plausible tendency well demonstrated further on in relation to the three specific countries analysed in the thesis, that sanctions for every type of violations in immigration law on the part of illegal immigrants are unified and enforced with about the same vigour.

regimes may be heavily restricted or ambiguously construed, irregular migrants could be left with almost no choice apart from non-compliance.

1.4 The System of International and Supranational Legal Regulations Shaping the Position of Illegal Immigrants

1.4.1 International Law Related to the Status of Irregular Migrants

The status of irregular migrants in the countries of living or residence poses one of the greatest dilemmas in contemporary international legal regulation. It is obvious that this topic is very sensitive and poses too much concern for compromise on the issue. The position of illegal aliens becomes somewhat controversial, and contextually contradicts the common logic of stringent immigration law enforcement, as these individuals are prevented from enjoying any legal personality whatsoever, although there still remains an unresolved issue concerning the de facto quasi-legal personality of irregular migrants.

Generally, the movement of aliens forms a substantive part of international law, and some principles may be derived in relation to applying to the migration issues. First of all, the admission of aliens is *essentially* within the matters of state sovereignty, which means that although there is a prerogative power on the part of the state to regulate matters of entry, some aspects fall into the realm of international law.[132] At the same time, under customary international law, the state possesses supreme authority in defining or limiting the access of foreigners into its territory, and the inalienable character of this rule is undisputed.[133] Therefore, there is no right to enter the territory of another state and no corresponding obligation of the state to accept an alien.

Secondly, there are quite uncertain criteria for treatment of irregular migrants in the areas of residence and admission. Certain international human rights documents confer rights upon irregular migrants, since they refer to *everyone*, including undocumented migrants. In this respect, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Universal Declaration on Human Rights (UDHR), play an important role. Although ICESCR, by virtue of its Article 2(3), provides discretion to the developing states to afford as much socio-economic protection to aliens as possible

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[132] Fourlanos, G. "Sovereignty and the Ingress of Aliens". Stockholm: Almquist & Wiksell International, 1986, pp. 57-58.

[133] Chen, L. "An Introduction to Contemporary International Law", Yale University Press, New Haven, 2000, p. 183.

in regard to their economic circumstances, nothing in the wording of the Covenant excludes the possibility of protecting irregular migrants. UDHR is even more generous in this regard, since it applies to *everyone* within the jurisdiction of the state.

At the same time, the International Covenant on Civil and Political Rights bestows freedom of movement and procedural safeguards against expulsion only to legal immigrants. What is particular in general international law, however, is that there is a lack of any specific references to the illegality of aliens' status; neither is there any specialised legally binding international instrument regulating the position of illegal aliens, especially in relation to entry or residence in the receiving states. It is possible to assert that the international law accords de facto discretion and authority to the state in its defining approaches to the position of illegal aliens in its immigration system, including issues of residence, employment or other forms of existing substantive entitlements.

On the universal level, the instrument that could be taken into consideration is the Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in Which They Live, adopted by the United Nations General Assembly.[134] The Declaration endows certain rights to all aliens in the countries of residence, but economic and social entitlements are restricted only to foreigners in a regular situation in accordance with Article 5(1). Therefore, many rights representing social standards, such as health care, education, public services and appropriate conditions of work cannot be enjoyed by illegal aliens. The Declaration lacks legal force, and fails to guarantee any distinct status in relation to the protection of illegal immigrants in international law.

In view of the abovementioned conceptual problems in international legal regulation, there remains the compelling task of classifying and defining irregular migration. For the sake of developing a plausible classification of irregular migrants within the available international legal instruments, it is essential to identify the main dimensions of these issues. In this respect, among other causes of undocumented migratory flows, economic factors constitute the main dimension of the problem. To a quite lesser extent, undocumented migrants are motivated by a whole range of issues, whether of a political or social character, still posing a range of incentives to immigrate to the developed states. Be this as it may, however, employment is still the primary sphere in the socio-economic life of a foreign country and should therefore be treated as the

main factor of empowerment in the receiving states. In addition, employment has been vitally linked to other spheres of immigrants' lives, such as residence, access to public services and social welfare, as well as expulsion or internal controls on the immigrant population.

A number of Conventions concerning economic migration have been developed under the auspices of the International Labour Organisation and the United Nations. The ILO has introduced Conventions and Recommendations that are, to varying degrees, relevant to the issue of illegal immigrants' employment or residence. The main ILO instrument closely referring to the issue of irregular migration is Convention No. 143, which introduces a somewhat combinatory approach to the issue, where it affords fundamental human rights protection to all migrant workers, established by virtue of the Convention's Article 1. However, the right to equality of treatment for nationals envisaged in Part II of the Convention falls out of the scope of protection for undocumented migrant workers, with the only exception to that principle established in Art. 9(1) which extends entitlements to aliens in terms of remuneration, social security and other benefits, based on the past employment of such workers who have been in a position of equality with legal migrants.[135] This norm extends guarantees to illegal immigrants in order to prevent and outlaw the possible abuse by employers who might withhold the necessary payments or financial contributions by virtue of the workers' illegality.[136]

Preventive measures concerning irregular migration are included as a substantial factor in Article 2 of the instrument, which obliges the states to determine the numbers of irregular migrant workers in their territories, and subsequently to monitor their legal position or the conditions to which they are subjected. This is to be done for the purpose of identifying where these conditions contradict the corresponding bilateral or multilateral agreements of the state, where the scope of these conditions includes not only employment or social welfare situation, but also housing standards.[137]

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[134] UN GA Res. 40/144, adopted on 13 Dec. 1985.
[135] International Labour Conference, 66th Session, 1980, Report of the Committee of Experts on the Application of Conventions and Recommendations, General Survey of the Reports Relating to the Conventions Nos. 97 and 143 and Recommendations Nos. 86 and 151 concerning Migrant Workers (Geneva: International Labour Office, 1980), para. 260; in Cholewinski, R. "Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment". Clarendon Press, Oxford, 1997, p. 134.
[136] Kellerson, H. "International Labour Conventions and Recommendations on Migrant Workers", in Dummett (ed.), *Towards a Just Immigration Policy*, Cobden Trust, London, 1986; in Cholewinski, ibid.
[137] Ibid., para. 234; in Cholewinski, ibid., p. 133.

In accordance with Article 6(1) of the Convention, states have an obligation to introduce policy measures designed to penalise the illegal employment and trafficking of migrant workers. This norm directly authorises placing responsibility on the employers' actions, rather than on the illegal workers' presence in the country.[138] Correspondingly, Article 6(2) of the Convention provides for the employer's defence if he or she is detected employing immigrants illegally. The ILO Convention No. 143 establishes general guidelines for states' deployment of employers' sanctions, although this is viewed rather as a humanitarian measure which shifts responsibility away from illegal immigrants.

The Convention lays the ground for the legalisation of undocumented migrant workers by virtue of Article 9(4), which declares that nothing in the Convention may preclude the state parties from legalising the presence of these individuals in their territories, although the norm is obviously declaratory rather than obligatory in this respect. The Convention provisions provide some substantive guarantees to the irregular migrant workers, and this probably explains its very limited recognition, with the number of ratified states comprising only eighteen by the year 2004.[139]

The ILO instruments provide an overall mechanism of protection to undocumented migrant workers, with a combined approach that endorses both the efforts to reduce push factors through the introduction of employers' sanctions, and ensures the realisation of a few basic employment and social welfare entitlements to this most underprivileged category of aliens. Probably because of the as yet incomplete coverage of fundamental rights, there was a call for a new international instrument on migrant workers' fundamental rights.

Given the scope of problems concerning the protection of migrant workers in the countries of employment, the adoption of another universal instrument was initiated by a number of states, which led to the General Assembly Resolution of December 1978, where the Secretary General was asked to consider possibilities for drawing up a comprehensive UN mechanism.[140] As a result, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families was adopted in 1991 and, for the time being, this is the most comprehensive and all-

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[138] Niessen, J. "Immigrants and Migrant Workers", in A. Eide, C. Krause, and A. Rosas, (eds.), *Economic, Social and Cultural Rights: A Textbook*, 1995, pp. 323, 327; in Cholewinski, ibid.

[139] ILO website: www.ilo.org/ilolex/cgi-lex/ratifce.pl?C143

[140] Hasenau, M. "Setting Norms in the United Nations System: The Draft Convention on the Protection of the Rights of All Migrant Workers and Their Standards in Relation to ILO in Standards on Migrant Workers", 28 (1990) *International Migration Review*, p. 138; also in Bosniak, supra, n. 98, p. 738.

embracing international convention developed by the UN.[141] This document is of direct relevance to migrant workers in irregular situations.

Beginning with its Preamble, it becomes increasingly evident that the Convention establishes a direct link to the position of irregular migrants by stating that, along with the recognition of possible efforts made by the states in respect of prevention of clandestine entry in the Member States, they should protect the basic human rights of illegal immigrants. Recital 15 of the Preamble speaks in favour of conferring basic rights on irregular migrants, together with penalisation of employers who exploit such migrants. The latter is designed to reduce incentives for hiring and assisting aliens in the receiving country.[142]

The wording of the Preamble introduced one of the key concepts underpinning the International Convention, in accordance with which, migrant workers, being divided into two categories of regular and irregular types, may have different levels of rights and entitlements. The Convention affords one level of protection to all migrant workers, and a substantially higher level of protection to those in a regular situation. As far as irregular migrant workers are concerned, they are protected by virtue of Part III which grants basic entitlements to all migrant workers, in both a regular and an irregular situation.[143] In this regard, the Convention enshrined differential treatment for documented and undocumented migrant workers, since it provides more substantial guarantees to the legal migrants in its Part IV, but at the same time the level of protection of irregular migrant workers is serious enough to narrow down the discriminatory gap.[144] This principle probably does not contradict the Convention terms relating to the non-discrimination guarantees, envisaged as part of the basic human rights in Article 7 of the Convention. By virtue of this norm, discrimination against illegal migrant workers is outlawed in the countries of employment or residence, a provision that is particularly relevant for the socio-economic spheres.

Differential treatment is rather an attempt to find a compromise between protective and restrictive tendencies revealed in the policy debates. The entire instrument is grounded on compromises of this kind, thus reflecting the more general and conflicting agendas. As one of the observers points out:

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[141] G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990).
[142] Cholewinski, supra, n. 135, pp. 187-188.
[143] Wording of the Convention; Cholewinski, ibid., p. 154.
[144] Bosniak, supra, n. 98, pp. 740-742; Cholewinski, ibid.

> "The Convention accommodates competing concerns about sovereignty and human rights by substantially incorporating both of them".[145]

Some provisions of the Convention resulted from this very compromise.[146] In this range, Article 35 should be included, which established that no provision of the instrument could be invoked to regularise the position of irregular migrants. In addition, Article 79 incorporates two distinctive trends, one of which permits exclusive regulation of admission by the state, the other outlining the possibility for limiting this very principle in the light of the Convention rights.

First of all, Article 5 of the Convention establishes the definition of documented migration. Thus, paragraph (a) of the Article regards workers as being in a regular situation if they are 'authorised to enter, stay or engage in a remunerated activity' in accordance with the law of the state or relevant international agreements. Furthermore, by virtue of Article 5 (b), once they are in non-compliance with the provisions of paragraph (a), workers are considered to be in an irregular situation.

Generally, the Convention guarantees a range of fundamental rights concerning the position of all migrant workers, but just a few of them refer to the substantive socio-economic status relevant to the internal legal capacity of undocumented migrants. In this regard, Part III of the Convention envisages a range of guarantees concerning the political and civil status of undocumented workers, particularly the rights concerning liberty and security of the person, freedom of religion and thought, equality in courts or other tribunals, and other essential guarantees. However, the number of rights underlined for the purpose of this thesis is not extensive.

Protection of irregular migrant workers extends to many situations and, in particular, to unauthorised confiscation or destruction of migrants' documents, prohibited by virtue of Article 21, or the possibility of collective expulsion outlawed by Article 22 of the Convention. Article 22 deals *inter alia* with safeguards in the expulsion process, and outlines that this process should be conducted only on an individual basis in respect of every immigrant, and only through procedures conducted by particular judicial tribunals with the basic guarantees of due process.

The most relevant socio-economic Convention guarantee is enshrined in Article 25, which concerns the protection of migrant workers in the sphere of employment, and which states:

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[145] Ibid.
[146] Ibid.

"1. Migrant workers shall enjoy treatment not less favourable than which applies to nationals of the State of employment in respect of remuneration and:
(a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and other conditions of work which, according to national law and practice, are covered by these terms..."

Other than this, paragraph 1(b) of the Article specifically mentions some other essential spheres of employment relationships, such as the minimum age of employment and restrictions on the work at home. Furthermore, paragraph 3 outlines the policy that the irregularity of migrant workers should not undermine effective enjoyment of these employment conditions. In these terms, undocumented migrant workers are placed in the same position in employment relationships as the national work force or legal aliens.

In addition to employment, social security mechanisms, traditionally unavailable for irregular migrant workers, have been envisaged in Part III of the Convention, which affords protection to all migrant workers, including undocumented ones. The Convention's stance on the social security rights of illegal migrant workers, however, is declaratory, and does not outline details of the desirable protection. By virtue of Article 27, all migrant workers, including those in an irregular situation, have the same right to social security as nationals, as long as they fulfil the requirements envisaged by the country's legislation and bilateral or multilateral agreements. Paragraph 2 of Article 27 provides further protection by specifying that, where migrant workers and their family members do not enjoy social security protection, the state may seek to reimburse the contributions paid by migrants on the basis of contributions made by nationals.

The intent of the drafters appears to be the provision of minimum standards in social security, although the wording of the Article, according to some observers, allows for a cautious interpretation, because the state parties may envisage very high demands and requirements for the migrant workers to fulfil in order to be able to claim social security benefits. This may impede the definite application of this Convention norm to illegal migrant workers.[147] Among other conceptual weaknesses of this provision, Cholewinski, for example, cites the very indefinite wording relating to the

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[147] The best introduction to a discussion of the topic exists in Cholewinski's work, supra, n. 135, pp. 166-167.

reimbursement of paid social security contributions[148], and the lack of definition regarding social security.[149]

The next important provision offers guidance in regard to issues of health care supply to all migrant workers, as 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 this respect, Article 28 of the Convention outlines that medical assistance cannot be denied to migrants on the basis of the irregularity of their status. Additionally, irregular migrants are entitled to a range of rights in connection with Part III of the Convention, such as trade union participation, the education of migrant's children, cultural rights, transfer of earnings and adequate information concerning legal status. Furthermore, from the point of view of social policy, the Convention also takes a protective stance, where Article 69 urges the Member States not to prolong the irregular status of migrant workers should this persist.

If fully complied with, this Convention establishes a firm legal status for all migrant workers, including the ones of irregular type. From the point of view of socio-economic factors, this status may be sufficient for anyone finding himself or herself in an irregular situation and from this point of view, this Convention is the strongest instrument available. However, in addition to the protective function of the Convention, it sets a goal for elimination of illegal immigration. In this respect, an alternative arrangement, in comparison with the protectionist provisions, is found in Article 68. This outlines the collaboration of states in the sphere of eliminating irregularity of clandestine movement or information campaigns in relation to immigration matters, detection and eradication of such movements, as well as the protection of these individuals against violence. Paragraph 2 of the Article envisages a provision that permits employers' sanctions in the territory of the Member States. This last measure is believed to have the effect of discouraging employers, rather than penalising migrant workers, and thus serves humanitarian purposes in this respect.

The scope of the Convention is wide enough to expand protection to any migrant workers in the territory of the ratifying states, without the need for reciprocity[150] while, at the same time, the Convention does not extend to include the situations of

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[148] Hasenau, supra, n. 140, p. 143; in Cholewinski, ibid, pp. 166-167.

[149] "Report of the Open-ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families", UN Doc. A/C.3/42/I, 22, June 1987, para. 258; in Cholewinski, ibid.

unemployed overstayers, or those who do not meet the requirements set to qualify for family member status.[151] The Convention does not tackle other challenging issues concerning unlawful practices, such as the possibility of dismissal by employers of those illegal employees who try to participate in trade unions on the pretext of complying with prohibitive laws,[152] or the enforcement of penalties against those immigrants who try to raise their claims against employers.[153] Provisions granting employment and social welfare rights are not substantiated, due to possibilities of denunciations by employers or public service providers. They remain vulnerable to some forms of abuse when attempting to realise these very entitlements, despite some procedural safeguards established in Article 22 dealing with expulsion.

The significance of this legal instrument for international law in terms of the protection of migrant workers, and irregular migrants in particular, cannot be underestimated. The Convention came into force on 1st of July 2003 by virtue of its ratification by first twenty states. By the end of 2004 the Convention received 27 ratifications and sixteen other states have by now already signed the Convention. At the same time, there can only be a careful optimism about the possible influence that the Convention could have on the situation worldwide, and this is for two reasons. First of all, only labour-sending and smaller countries have so far ratified the Convention.[154] Secondly, enforcement of the Convention's rights could be impaired, even in the states that have consented to this international instrument, as a result of poor implementation of ILO instruments by state parties.[155]

None of the countries in the present study, i.e. Britain, Russia or South Africa, have signed or ratified this instrument, and therefore arguments in favour of increasing protection of undocumented migrant workers are undermined by a lack of ratifications. However, the Convention can be used as a standard-setting mechanism for these and many other states, regardless of its recognition or otherwise.

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[150] Cholewinski, supra, n. 135, p. 167.
[151] Bosniak, supra, n. 98; also in Cholewinski, ibid., p. 187.
[152] Bosniak, ibid., pp. 761-762; also in Cholewinski, ibid., p. 190.
[153] Kitamura, Y. "Recent Developments in Japanese Immigration Policy and the United Nations Convention on Migrant Workers", 27 (1993) *UBC Law Review*, pp. 113, 126-128 and 130; in Cholewinski, ibid.
[154] The most up-to-date information on the Convention ratifications is available on the web site: www.december18.net/web/general/page.php?pageID=79&menuID=36&lang=EN .
[155] Macan-Markar, M. "Experts Dubious on New Migrant Worker Rules", Inter Press Service, 13th February 2003.

1.4.2 European Regulation of Issues on Illegal Immigration

The European response to illegal immigration has been diverse, by virtue of different strategies and varying priorities in policy-making. On the one hand, many European states have been promoting measures of regularisation of undocumented migrants, in order to eliminate the illegality of their presence, particularly in France, Italy and Spain at different periods of time.[156] On the other hand, trends in common European policy have been evolving so as to exclude illegal immigrants from enjoyment of any substantive rights in the host countries. As was outlined above, the presence of irregular migrants in Europe was substantial and, moreover, at the level of social reality, the position of illegal migrant workers in Europe has been problematic.[157]

This socially and politically sensitive area of policy has been primarily targeted both by individual governments and collective efforts on the European level. Recently, the most important supranational legal mechanism in Europe dealing with irregular migration was created under European Union (EU) auspices. The European discourse in the sphere of migration carries a significant future impact for Britain, which, despite retaining sovereignty in its current immigration affairs, may develop close involvement in common policies over the years. The European Union currently presents institutional arrangements for the formulation of common measures against illegal immigration.[158] The Union is grounded on three distinct pillars, as established by the Treaty of the European Union (Maastricht Treaty); that is, the European Community (based on the European Economic Community Treaty), common foreign and security policy (based on Title V) and common justice and home affairs (based on Title VI). Institutionally, the Council, the Commission and the Court of Justice have sufficient competence to formulate common policies within the realm of the first pillar.

Originally, immigration policy was the subject of harmonisation and co-operation among European countries. In this regard, the major role in shaping these policies belonged to the specialised ad hoc group on immigration, consisting of the interior ministers of the EU states *created under the third pillar.*[159] This group has been producing recommendations for the national governments in order to harmonise

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[156] Cholewinski, supra, n. 135, pp. 255-256.

[157] Power, J. "Western Europe's Migrant Workers", Minority Rights Report, No. 28, Minority Rights Groups, London, 1978.; Cholewinski, ibid., p. 250.

[158] For the recent developments, please see the special issue on European migration policies at the 18(1) (2004) *Immigration Asylum and Nationality Law*.

[159] Den Boer, M. "Moving Between Bogus and Bona Fide", in Miles, R. and Thranhardt, D. (eds.) *Migration and European Integration: The Dynamics of Inclusion and Exclusion*, Pinter Publishers, London, 1994, pp. 94-96.

immigration policies. In 1993, the Ad Hoc group was reorganised into the Coordinating Committee on Immigration Policies.[160]

During all the years of its existence, the body consisting of the EC Immigration Ministers of Home Affairs and Justice has adopted a number of resolutions that have proved indispensable for the formulation of a common policy agenda for all EU states. The documents adopted by the Council include: Recommendation regarding practices followed by Member States on expulsion,[161] Recommendation concerning checks on, and expulsion of, third country nationals residing or working without authorisation,[162] Recommendation on harmonising means of combating illegal immigration and illegal employment and improving the relevant means of control,[163]and some other policy statements. The general essence of these policy initiatives meant a tightening of control and restrictions on illegal aliens residing in the EU states.

The Amsterdam Treaty, which came into force in 1999, is important for the further development of common policies in this regard, since it has shifted the subject matter from the harmonisation sphere towards the realm of the first pillar of European regulation, i.e. regulation under the European Community pillars. The provision which is directly connected with measures on irregular migration and residence is enshrined in Article 63(3) of the Treaty of the European Community, which envisages the authority of the Council of Ministers in adopting measures in relation to illegal immigration, residence and repatriation of illegal immigrants. Additionally, the measures requiring police and judicial co-operation in criminal matters concerning immigration as well, have been envisaged in European Union Treaty Articles 29, 30 and 31.

Currently, there are a few specialised legally binding instruments at the European level concerning the issues surrounding the position of irregular migrants in the EU states, developed within the European supranational regulation. First of all, the Community structures went all the way to create regimes for expulsion of third-country nationals from the European Union, as was underlined by the adoption of the Directive 2001/40/EC[164] envisaging mutual recognition of decisions on the expulsion

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[160] Messina, A. "West European Immigration and Asylum Policy in the New Century", Praeger, Westport, Connecticut, London, 2000, p. 99.
[161] Doc. SN 4678/92, WGI 1266, adopted on 30 November, 1992; Cholewinski, supra, n. 135, p. 264.
[162] Doc. SN 3017/93, WGI 1516, adopted on 1 June, 1993; ibid.
[163] OJ 1996, C 5/1, adopted on 22 December, 1995.
[164] OJ L 149 of 2 June 2001.

of aliens.[165] One of the principal norms is Article 3(1)(a) and (b) envisaging the criteria necessary to qualify individuals for expulsion from the EU territory.[166] Other legally binding instruments cover the area of migrant smuggling,[167] foreseeing an increase in penalties of up to about eight years of imprisonment,[168] and the area of trafficking in human beings,[169] outlining a maximum penalty of eight years applicable to coercive acts in relation to persons for the purpose of subjecting them to labour or to sexual exploitation.[170]

However, so far, there are no legally binding instruments specifically regulating the residence of irregular migrants, and therefore defining more precisely the internal legal capacity of undocumented migrants. Currently, multiple policy statements or legislation in preparation exist which reveal views and a policy agenda for the forthcoming unified European regulations. A range of communications and statements produced by the bodies of the European Union emphasise precise policy goals in this respect. First of all, on numerous occasions, the European Council meetings called for the development of a common response towards irregular migration. In this vein, the Council Conclusions, after meetings in Laeken, Tampere and Seville, have had a considerable impact on the formulation of common policies related to illegal immigration. Secondly, in light of these Conclusions and the Treaty of the European Union, the Commission adopted a Communication on the Common Policy on Illegal Immigration.[171]

This Communication is one of the most eloquent and explicit documents in its specification as to common immigration affairs. The main statement concerning the possible status and legal capacity of irregular migrants deals with the prospects of peaceful residence for irregular migrants in the EU. The Communication explicitly states that '*illegal entry or residence should not lead to the desired stable form of*

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[165] The analysis of certain provisions is given in the article by Cholewinski, R. "EU Measures Preventing Irregular Migration and UK Participation", 18(1) (2004) *Immigration, Asylum and Nationality Law*, pp. 20 and 21.

[166] There are two qualifying criteria for expulsion, i.e. a threat to national security or public order, and when an individual is subject to expulsion for reasons of having violated the provisions of national laws on residence or entry; in Cholewinski, ibid., p. 21.

[167] Council Framework Decision 2002/946/JHA of 28th November 2002 on strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328/1) and Council Directive 2002/90/EC of 28th November 2002 (OJ 2002 L 328/17); in ibid., p. 20.

[168] Article 1(4) of the Framework Decision, in Cholewinski, ibid.

[169] Council Framework Decision 2002/629/JHA of 19th July 2002 on combating trafficking in human beings; in Cholewinski, ibid., p. 27.

[170] Article 1 of the Framework Decision, ibid.

[171] COM (2001) 672 final of 15 November 2001.

residence'.[172] This statement obviously removes possibilities for any regularisation of undocumented migrants in the spheres of residence or employment. The Select Committee on the European Union of the House of Lords in the UK finds the same conclusion as probably being 'incontrovertible' enough to achieve the better enforcement of immigration policies.[173]

Additionally, the Commission contends that the widening of the legal labour migration channels may not be a panacea for reducing unwanted migratory flows, while possible legalisation would possibly provide incentives for illegal movements into the EU.[174] The cautious attitude of the European Commission affects all possible spheres of life in the host countries, since undocumented migration has been viewed by the Commission's policy-makers as a very 'multifaceted phenomenon', including, among other factors, illegal entry, residence and employment, whereby initial legality may subsequently alternate with irregular status in the sphere of immigration.[175] As for plans to establish the policy on the basis of balanced and sensible principles,[176] the Commission proposes further restrictions and stringent enforcement in order to reduce the pressures on European states. Among the measures are an increase in criminal penalties and expenditure for combating trafficking and smuggling, as well as the imposition of financial liabilities on unscrupulous employers.[177]

Employers' sanctions are singled out by policy-makers as a means of reducing pull factors for illegal residence or employment, since, according to the Commission, it is employers who set up demands for the undocumented employment, and therefore[178] they should be held responsible for the costs of enforcing return to the home countries. Illegal residence and employment should lead to the detention and subsequent removal from the EU, as was proposed in another Communication produced by the Commission,[179] although safeguards and human rights should also be enshrined in the proposed policy measures.

To this end, in order to implement these enforcement policies, the Council adopted a Comprehensive Plan to combat illegal immigration and the trafficking of human

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[172] Ibid., p. 6.
[173] The House of Lords Report, supra, n. 35, p. 18 (para. 49).
[174] The Commission Communication, supra, n. 171.
[175] Ibid., p. 7.
[176] Ibid., p. 8
[177] Ibid., p. 11.
[178] Ibid., p. 23.
[179] Communication from the Commission to the Council and the European Parliament on a Community Return Policy of Illegal Immigrants; COM (2002) 564 final, 14.10.2002, paras. 2.3.4. and 2.3.5.

beings,[180] providing for the same policy attitude and measures directed against irregular migration. Additionally, the European Commission, in the adopted Green Paper on a Community Return Policy on Illegal Residents,[181] views the effective enforcement of irregular migrants' return as an important condition for the success of all the immigration affairs of the European Union. This policy line has also been endorsed by the Council Return Action Programme.[182] The Green Paper states in this regard:

> "Efficient return policies may encourage potential migrants to prefer to explore the possibilities of obtaining legal residence in the EU and discourage those who do not fulfil the necessary requirements for legal immigration."[183]

The document also views detention as an effective coercive measure to facilitate removal,[184] but, notably, subsequent removal should take place only within the framework of safeguards, such as the humanitarian situation in the countries of return or international non-refoulement obligations of the state, the mental or physical state of the returnee and standards of removal themselves.[185] Co-operation of the European states concerned not only the common policy on residence, but, additionally, a common border, visa and immigration information management system, including the creation and gradual extension of the Schengen agreements into all EU states and co-operation with the migration generating states.[186]

The European Union extends its initiatives to multiple aspects of residence and expulsion of irregular migrants, which generally shape regimes affecting the internal legal capacity of such migrants. These initiatives do not propose relaxation as to the degree of illegality of irregular migrants, but are instead based on collective measures relating to the common restrictive policy on admission: they are preparing Europe for the unified regimes of closed borders and stringent internal controls. Taking into account these policy initiatives, little scope may be left for liberal or compassionate policies towards the status of hundreds of thousands of illegal immigrants in the countries of residence. Even more so, such an understanding of the irregular migration phenomenon influences policy responses in other European countries and Britain, by

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[180] OJ C 142 of 14.06.2002, adopted 28 February 2002.
[181] COM (2002) 175 final of 10 April 2002.
[182] C 14673/ 02 dated 25 November 2002.
[183] Supra, n. 181, at p. 8 and paragraph 2.2 .
[184] Ibid., p. 14 and paragraph 3.1.2.2 .
[185] ibid., p. 15 and paragraph 3.1.4 .
[186] Cholewinski, supra, n. 135, pp. 254-266.

providing excuses for the government in its possible attempts to aggravate immigration regimes.

At the same time, the common European agenda in relation to undocumented migration should reach a different level of specification and details in order to provide a practical response to the illegality of a huge number of people within the Continent. Enforceability of the proposed measures and attitudes could still be regarded as quite unpredictable in the light of previous failures in certain countries.

1.4.3 Summary

As discussed in the section dealing with the international legal regulation of the internal legal capacity of illegal immigrants, some recognition of their legal status exists at a global level, which is directly applicable to the agenda concerning the treatment of undocumented migrants in the specific states. At the same time, many states are reluctant to accept what was proposed in the international instruments, and have adopted either a pragmatic or simply restrictive approach to the issue.

The method of regulation endorsed by the European Union in this regard responds largely to prejudicial attitudes and fears of the governments and public in the receiving countries. Therefore, on a more practical level, little, if any, recognition of the status of irregular migrants will be realised within Europe in the near future. This tendency may effectively explain the reluctance of many governments to ratify the ILO and UN instruments referring to the rights of illegal migrants. As a result, domestic laws excessively govern issues and principles relating to the illegality of aliens and, for the time being, they only impose restrictions on the position of undocumented aliens by virtue of many distinct legal regimes.

1.5 Conclusion

Illegal immigration is a complex sphere, enshrining multiple substantive factors, such as economic, social, political and legal issues. These factors are closely interrelated, and may be said to represent one whole agenda shaping legal and social policy mechanisms. Law, as an instrument of social regulation, is closely linked with social science, because it interferes with relations in society, particularly between individuals and the state. Legal regulation and the policies resulting from it have to consider social effects, as well as the pros and cons in relation to this composite social

phenomenon. Despite the complexity of these notions, drawing an overall picture may assist in shaping the most adequate response to this phenomenon.

This chapter has presented multiple problem areas related to the hypothesis of the thesis and concerning the internal legal capacity of irregular migrants. The current analysis may assist in illustrating specific social issues and providing standards in order to test closely all available materials related to British, Russian and South African immigration laws. The starting point of discourse, as well as the scale and tendencies in illegal immigration, have produced general warning signs for policy-makers, and are particularly topical in all three states under scrutiny. Numbers of irregular migrants are growing universally and domestically, but immigration policies seem to lag behind current trends.

From the theoretical outline, it can be seen that immigration policies have to differentiate between priorities of enforcement of immigration laws, and the possible recognition of the juridical capacity of illegal immigrants. More workable solutions may still be found within attempts to relieve the destitution of undocumented migrants, and simultaneously to provide channels for temporary migration. A better practical enforcement against the most undesirable forms of illegality could also create an improvement of immigration control, as becomes relevant from the analysis in this chapter. This and other agendas will be dealt with in the forthcoming analysis on domestic laws and the comparative perspective regarding all three states. What needs to be defined, however, is *the possible extent of liberalisation* proposed by the very formulation of the hypothesis. This final task will be dealt with in the final comparative overview of the country-specific legislation.

On the legal plane, conceptual problems of all substantive chapters should include the creation of precise definitions of irregularity, the identification of administrative deficiencies of immigration and administrative law in every domestic legal system, a review of effects or consequences of immigration and administrative policies in relation to the lives of aliens and, finally, an evaluation of the success of immigration control mechanisms, measured on the basis of the social outcomes of proposed policies. An additional area of research in the following chapters would focus on the existing links and interconnections between all the main mechanisms of immigration control, such as admission, residence, employment, internal controls and refugee policy.

The analysis presented above not only represents the advocacy of rights of irregular migrants, but, rather, argues in favour of attempts by states to regulate and even to restrict immigration. At the same time, it proposes all-embracing policy mechanisms related to this phenomenon. As was suggested by Peletier, one of the earlier advocates of the juridical capacity of illegal immigrants, a workable solution may also include better surveillance on the borders, and information on the circumstances surrounding illegality in the receiving states.[187] As was revealed from other sources, employer sanctions, special taxes on temporary workers, and internal control measures constitute a substantive part of these preventive actions.

An effective strategy in combating the undesirable aspects of illegal immigration should be grounded in social science, which may assist in deriving criteria for testing the immigration policies of all three states. Therefore, the main issues in the discourse surrounding the juridical capacity of illegal aliens are attached to the means and methods of legal regulation in the immigration sphere. The most topical of these are best represented by the following criteria:

- Realism of immigration policy, especially in the labour migration sphere;
- Existence of elaborate internal control mechanisms in the legal and administrative system;
- Availability of legal entitlements to irregular migrants, either on a de facto or de jure level;
- Degree of severity of constraints on all aliens;
- Degree of penalisation of illegal aliens;
- Diversification of punishments for irregularity in relation to different circumstances, or the extent of illegality involved.

One of the main outcomes to be produced from these criteria concerns the coercion of aliens generally into the ranks of irregular migrants. First of all, this concerns the random attitude in creating legal regulation, occurring as a result of political pressures. The thesis also needs to prove that the randomness of control cannot possibly pose the best strategy for the policy in general.

As far as international and supranational legal regulation is concerned, it is mostly the UN Convention on Migrant Workers that provides guarantees and, in fact, responds to the ideas of extending basic rights coverage to irregular migrants. The Convention serves as a standard-setting legal mechanism in relation to the entire

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[187] Peletier, supra, n. 2, p. 181.

agenda of illegal immigration. Contrary to the UN Convention, European policy-making places a strong emphasis on stringent enforcement, rather than on a liberalisation of immigration policy in this regard.

Generally, the thesis has to introduce the country-specific analysis of immigration laws in the cases of Britain, Russia and South Africa. This is designed to provide a better understanding of the nature of immigration law inasmuch as it concerns the internal legal capacity of all aliens. All the knowledge concerning these specific three states will serve as the ground for a further comparative analysis, also scrutinised in relation to the main principles of international legal regulation. The combination of comparative and analytical legal methods can contribute to the systematisation of existing legal knowledge, and the discovery of new facts and trends emerging in connection with irregular migration.

2 Legal Position of Irregular Migrants in the United Kingdom

Illegal immigration has become one of the key issues of concern in contemporary immigration policy-making in the United Kingdom. The scale of illegal migration to the UK has been substantial, as economic migrants are attracted into the country by relatively high wages and expectations of eventually improving their personal circumstances. Control over irregular migration has been a priority ever since the 1970s, when the UK government started addressing issues of undocumented employment and overstaying. Simultaneously, efforts continued to tighten controls of the admission and residence of foreigners. Currently, there are no official estimates as to the number of illegal immigrants in the UK, but, as one official stated:

> "For the UK, while there are no accurate means of estimating the numbers [of foreign workers living and working illegally], the most reliable indicators suggest that they could run into hundreds of thousands."[1]

In the course of parliamentary debates it was suggested that approximately forty thousand illegal immigrants enter the country every year,[2] while one million is the number, which have been proposed in the mass media and in public debates.[3] Illegal immigration into Britain consists primarily of individuals from a number of states, especially Eastern Europe, Africa and Asia.

Britain is believed to be attracting large numbers of irregular migrants for a variety of reasons, as summed up by the House of Lords report, which reveals that the trend originates from the unregulated labour market and a low level of unemployment.[4] There are no other studies about the effects of irregular migration on British society and the economy, apart from those presented in the theoretical chapter of the thesis. However, the characteristics of illegal immigration are better demonstrated in various sociological studies, such as the one by Jordan and Duvell,[5] which have been closely incorporated within the present analysis. It is widely acknowledged that, qualitatively, illegal immigrants as a group are composed largely of overstayers and individuals in

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[1] A Written Answer to the House of Lords by Baroness Symons of Vernham on 17th July 2002, Official Report, Vol. 637 No. 172, WA 159; in "A Common Policy on Illegal Immigration", House of Lords, Select Committee on the European Union, Session 2001-02, 37th Report (with evidence), p. 12 (para. 25).

[2] HC Hansard Debates on Employment of Illegal Immigrants, 16 May 1995, Column 175.

[3] "Bloody Foreigners", a documentary series on illegal immigrants in Britain, Channel 4, 2000.

[4] House of Lords, supra, n. 1, p. 13 (para. 31).

breach of existing immigration regimes.[6] Additionally, irregular migration is closely associated with the asylum process in the UK, either through failures in the removal or asylum claimants' residence processes, intertwined with breaches of the conditions of stay and welfare support rules.

The chapter is related to a logical construction, largely determined by the theoretical outline of the thesis. Initially, it has to present a systematic construction of statutory definitions concerning the irregularity of illegal immigrants. Secondly, the chapter should reveal the role of immigration statutes and policies in determining labour migration. Thirdly, it has to provide an insight into the position of illegal immigrants in the areas of residence, internal control and labour relations, as well as social support and access to public services. Fourthly, the last substantive part will refer to the status of asylum seekers in the UK and corresponding areas of illegality, often brought about by tight restraints on this group of individuals.

2.1 Immigration policy overview

The British immigration policy presents a multifaceted phenomenon, as it has to deal with the whole range of challenges, including asylum and family issues. At the same time, the central question underpinning all other spheres of immigration law and closely related to the agenda of irregular migration in the UK, concerns temporary labour migration policies and the way the government handles the intake of a foreign labour force. It is perhaps the cornerstone of any migration debates in the country, since employment and general welfare incentives play a major role in shaping motivation of migrants to enter the United Kingdom.

The entire labour migration policy probably demonstrates large constraints and exclusions; but legal admission for employment has had a history which includes political swings of both restrictive and liberal types coming into the agenda of immigration control, thus explaining, at least historiographically, the restrictive labour position of the British government. After the Second World War, British society realised a great need for workers in the national economy,[7] and successive governments throughout the 1950s designed policies in order to meet labour demands

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[5] Jordan, B., Duvell, F. "Irregular Migration: The Dilemmas of Transnational Mobility", Edward Elgar Publishing, Cheltenham (UK) and Northampton (MA, USA), 2002.
[6] House of Lords, supra, n. 1, at p. 10 (para. 19).
[7] Juss, S. "Immigration, Nationality and Citizenship", Mansell, London, 1993, p. 72; also in Layton-Henry, Z. "Britain: The Would-be Zero-Immigration Country", in Cornelius, W.A., Martin P.L. and Hollifield J.F. (ed.), *Controlling Immigration: A Global Perspective*, Stanford University Press, Stanford, 1994, pp. 283-284.

by inviting workers from the Commonwealth, the Caribbean region, Ireland and Continental Europe with favourable treatment being given to this type of migration.[8] As a result, hundreds of thousands of workers entered Britain during that period, thus fostering reconstruction and development of the economy after the war and balancing the emigration of British nationals that the country experienced during the same years.[9]

Consequently, however, issues of labour migration started receiving a negative connotation, with emerging arguments of social problems and threats of excessive immigration thought to be brought about by immigrants from the Caribbean and Commonwealth, as well as a developing belief that constraining immigration could be good for race relations.[10] The outcomes of the political debates of those years extended to new restrictive nationality laws, as well as a tightening of labour migration channels. For example, with the 1971 Immigration Act coming into force, functioning employment vouchers were replaced by a more elaborate work permit system providing no settlement rights to the holders, a move originally designed to constrain Commonwealth migration and settlement.[11] At a later period, Thatcher's government pledged and achieved restriction on the issuance of work permits.[12] These factors possibly explain why work permit criteria have become exclusive, and why labour migration policy has been running on the lines of constraints for the majority of potential migrants, especially of the unskilled type.

Needless to say, in the 1990s, the policy of restrictions freezing the supply of foreign workers became largely outdated, and endorsed illegality itself rather than control over immigration. At the same time, it is impossible to claim that the British government never acknowledged the need for attracting foreign workers. In fact, EU enlargements and conferral of full employment rights to nationals of accession states, at different periods, filled gaps in certain industries. The present enlargement is perhaps advancing the same tactics of meeting the economic needs, but, this time, the process is simultaneous with reducing other essential migration channels.

Lately, the government has begun expanding work permit schemes, even announcing plans for revising the principles for attracting unskilled labour for some sectors of the

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[8] Juss, ibid., pp. 75-76; for the numbers of New Commonwealth immigrants entering at that period, see Layton-Henry, ibid.
[9] Ibid., p. 73; also Layton-Henry, ibid., p. 275.
[10] Ibid., pp. 77-80; also Layton-Henry, ibid., p. 275.
[11] Layton-Henry, ibid., pp. 284-285.
[12] Ibid., p. 286.

economy, including hospitality (hotels and catering) and food processing.[13] The EU enlargement will evidently make a powerful negative impact on this trend. For instance, the government plans to reduce quotas for the Seasonal Agricultural Workers (SAWS) and Sectors Based Schemes (SBS) responsible for the intake of unskilled workers precisely because of the increase in numbers of workers from the accession states.[14] Simultaneously, the government proposes measures for a closer regulation of the educational institutions currently responsible for the wave of bogus students thousands of whom actually enter the country only for the sake of employment concessions.[15]

Undoubtedly, both policy trends target nationals of all other states outside the EU. But however substantial the wave of documented workers from the accession states would be, it is largely unclear whether this might drastically reduce numbers of irregular migrants and indeed eliminate completely the gaps in the employment market. In fact, on the previous enlargement, when Greece, Spain and Portugal joined the European Union, fears of a mass influx of people did not materialise[16] and the gap between labour demands and supply continued to exist in many states including the UK. Perhaps it could be useful to retain at least temporary migration programmes in their extensive forms, considering that there are some other factors emerging in the migration agenda.

One such issue is the regional diversity within the country and the demographic problems of Scotland.[17] There are repetitive calls for distinct immigration policies in Scotland to compensate for the looming demographic crisis resulting from the population ageing and emigration.[18] Undoubtedly, in the following years there will be more localised immigration policy to meet the local demands for a work force. In the light of this, it is questionable whether the EU enlargement will be sufficient to meet

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[13] Home Office Press Release 326/2002; in "Legal Action", March 2003, p. 26; also in "Overworked, Underpaid and Over Here", Trade Union Congress, European Union and International Relations Department, July 2003, pp. 14-15.

[14] Home Office Press Release No. 191/2004, "New Restrictions Imposed on Low-Skilled Migrant Schemes", 19 of May 1004. The quotas for SAWS will decrease by 35 percent from 25,000 to 16,250 workers and for SBS will decrease by 25 percent from 20,000 to 15,000 workers.

[15] Home Office Press release No. 157/2004, "New Measures to Tackle Student and Marriage Immigration Abuse", 22 of April 2004. The measures will include accreditation and monitoring of the educational institutions dealing with international students.

[16] Dustmann, C., Casanova, M., Fertig, M., Preston, I. and Schmidt, C. "The Impact of EU Enlargement on Migration Flows", Home Office (RDSD) Online Report 25/03, p. 46.

[17] "Calling Immigration", *Scotland on Sunday*, 22nd of February 2004, available on the site: http://scotlandonsunday.scotsman.com/leaders.cfm?id=209342004 .

[18] "Scotland to Promote Immigration", *Regeneration and Renewal*, 6th of March 2003, available on the site: http://www.regenerationmagazine.com/news_story.cfm?ID=2367 .

the needs of local communities in the United Kingdom and whether the flow of East European workers will fill all the economic gaps existing in various regions of the UK.

Therefore, the government could renege, to some extent, on the restrictions it is imposing on the sector-based (or other unskilled workers) schemes and relax the policies in relation to the working students, however bogus or precarious their status could be. Indeed, continued liberalisation may effectively increase competitiveness among the foreign workers (particularly between the EU and non-EU nationals) and have a powerful impact on other important immigration spheres such as asylum.

2.2 Irregular Migration Issues in Light of the Main Positions of Immigration Law and Policy

In considering the depth and scope of irregular migration, it has become obvious that the problem affects not just a few industries or small fractions of the society; it is rather a matter which exists on a national scale, since it contributes to the vast underground labour market and encourages extensive illegality in respect of the available immigration law. Irregular migration originates in a number of global structural and economic factors, as well as in the pressures of illegality emerging from internal administrative regimes governing foreigners' admission or residence in the country. It is the major task of this thesis to demonstrate causal links between illegality and restrictive administrative regimes.

Initially, "pull" factors in the receiving economy and society of the UK undeniably exist. In this regard, the House of Lords study revealed the following "pull" patterns in the United Kingdom:[19]

- Widespread use of English as a means of communication;
- Existence of established resident communities from all over the world;
- Insufficiency of internal controls in the society;
- Lenient treatment of asylum seekers in Britain [although this last motive is challenged in the present thesis].

All the aforementioned characteristics depicting the attractiveness of Britain for illegal immigrants are quite benign and, moreover, it is possible to argue that irregularity could be regarded as a by-product of conservative and restrictive immigration policies. However, there is a weakness of internal control mechanisms, whereby there are reasons to believe that the development in Britain of such

mechanisms may have a considerable impact on the prevalence of illegal residence in the country. This assertion can be verified against both the social experience in Britain and in other countries.

As a response to this complicated social issue, statutory mechanisms have been developed which deal with the whole range of immigration policy elements concerning all aspects of foreigners' illegality. Explicitly or implicitly, issues of irregular migration are regulated by the immigration law statutes of the United Kingdom which govern all of the most essential spheres of foreigners' existence in the UK. The main, but not the only, legal instrument in this respect is the Immigration Act of 1971. The 1971 Act, supported by other legislative acts and regulations, such as the Asylum and Immigration Act of 1996, the Immigration and Asylum Act of 1999, the Nationality, Immigration and Asylum Act of 2002, Immigration Rules and Asylum and Immigration (Treatment of Claimants, etc.) Bill offers a detailed pattern which allows for an identification of the main legal definition, policy line and priorities in regard to this social phenomenon.

The initial aim of legal regulation in this respect would be to produce a framework for appropriate regimes outlining basic juridical criteria surrounding the term "illegal immigrant". In general terms, an illegal immigrant is anyone who enters, stays or acts in breach of UK immigration legislation. The only official classification of illegal immigrants according to the existing immigration law is found in the aforementioned Report of the House of Lords, which provides for the following types:

- Illegal entrants;
- Overstayers, i.e. individuals entering the UK legally as visitors, work permit holders, students and fiancé(e)s, who eventually either lose this status or fail to extend permission for them to stay;
- Immigrants in breach of conditions of stay;
- Asylum seekers whose applications were refused and whose appeals were rejected.[20]

In this regard, the fundamental role of defining the current categories and a framework in the immigration law belongs to relevant sections of the Immigration Act of 1971

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[19] House of Lords, supra, n. 1, at p. 9 (para. 10).
[20] Ibid., para. 22.

and the Immigration Rules, whereby[21] the notion of irregularity rests on the most common types outlined.[22]

2.2.1 Illegal Entry

The first substantive regime dealing with illegal forms of immigration is represented by a composite category of 'illegal entry', consisting of four kinds of immigration offences:[23] entry without leave (mostly involves clandestine entry cases), entry in breach of a deportation order, entry through the common travel area and, finally, entry by deception and the use of false documents or through corruption.[24] Illegal entry is dealt with in section 33 (1) of the 1971 Immigration Act, enshrining the essence of all four types. By virtue of the immigration law, regulations and judicial practice, illegal entry may be divided into three periods of time: the moment of entering in itself, the time of seeking to enter, and the time after entry.[25] By distinguishing the first period, one reflects a difference between 'arrival' and official 'entry', where the entry means the moment when people pass the immigration control.[26] By virtue of section 11(1) of the 1971 Immigration Act, the person may be deemed to have entered only after embarking from the ship or aircraft and passing through immigration control. However, the notion of illegal entry extends to a period even prior to that point, i.e. to the circumstances when individuals obtain entry clearance by deception, or simply arrive clandestinely.

There is a range of situations and judicial decisions concerning a very common type of illegality in the UK, i.e. entry without leave, which may also be identified as clandestine entry. For the purpose of this thesis, it is important to limit scrutiny only to cases, where people are entering intentionally on an illegal basis. Clandestine entry is grounded on the relevant norms of the 1971 Immigration Act, where section 3 (1)(a)

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[21] Immigration Rules, HC 395.

[22] A similar classification may be found in the book by Ardill, N and Cross N. "Undocumented Lives: Britain's Unauthorised Migrant Workers", the Runneymede Trust, London, 1987. At the same time, there was reference only to three most common types of illegal immigrants, probably because asylum seeking was not so common in the UK during 1980s as it became subsequently.

[23] Article 33(1) of the 1971 Immigration Act. The category of illegal entry has been well described by Macdonald, I.A. and Blake, N. "Immigration Law and Practice in the United Kingdom", Butterworths, London, pp. 519-520 (paras. 16.8-16.9) of the 1995 edition and pp. 739-740 (paras. 16.3-16.5) of the 2001 edition.

[24] The first three types of offences represent the phenomenon of a so-called clandestine entry, whereas the last type can be classified as an independent, derivative concept embracing all other types of illegality.

[25] Macdonald et al, supra, n. 23.

[26] Macdonald et al, ibid.

requires that nationals belonging to the designated countries need entry clearance[27] in order to enter the United Kingdom, in accordance with conditions attached to facilitation of entry and section 11(1) referred to above, which defines the moment of legal entry. Its most comprehensive definition, however, may be derived from section 32(1) of the 1999 Asylum and Immigration Act which provides for the following cumulative features of the clandestine entrant:

- Arrival in the UK of the person hidden in a vehicle, ship or an aircraft; or
- Attempts to pass through immigration control while concealed in a vehicle; or
- Arrival in a ship or an aircraft, having reached UK territory concealed in transport, or having embarked while the carrier is outside the UK;
- Intentions or actual actions either to claim asylum or to avoid immigration control.

Breaches of the immigration regime of entry into the UK serve as a basis for the criminal offence envisaged by section 24 (1)(a) of the Act, which declares that an immigrant should be punished if, contrary to this Act, he or she knowingly enters the United Kingdom 'in breach of a deportation order or without leave'.

Clandestine entry is becoming increasingly common among immigrants, since it is infrequently perpetrated by asylum seekers and very desperate individuals. As was noted in the Memorandum by the Kent County Constabulary,[28] the number of clandestine entrants has increased dramatically from 803 in 1995 to 8878 in 1999.[29] The Channel Tunnel has also been a concern for the authorities in connection with hundreds of clandestine migrants trying to come through and claim asylum on detection.[30] The average cost of carriage to and arrival in the UK undertaken by clandestine entrants with the assistance of traffickers is estimated at £2200 for a single person.[31]

This type of breach of immigration law may be correlated with assisting illegal entry and harbouring of persons into the UK territory, prohibited and penalised by section 25 of the 1971 Immigration Act.[32] The carrier's liability established by the Immigration

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[27] The list of countries in need of entry clearance is presented in the Appendix to the Immigration Rules (HC 395).
[28] House of Commons, Select Committee on Home Affairs, Appendices to the Minutes of Evidence, Appendix 7. January 2001.
[29] Ibid, p.1.
[30] Ibid., pp. 1-3.
[31] Ibid., p.2.
[32] The norm was amended and penalties for this crime were increased by the Nationality Immigration and Asylum Act of 2002; **www.legislation.hmso.gov.uk.acts/acts2002/20020041.htm** .

(Carriers' Liability) Act of 1987[33] was also introduced in order to prevent the arrival of individuals who held no leave to enter the United Kingdom. This form of deterrence of immigrants also concerns asylum seekers who attempt to arrive without leave.

2.2.2 Overstaying

In addition to the aforementioned offences dealing with entry, overstaying directly concerns breaches of the residence regimes in the country, and comprises a certain type of individual circumstance in connection with the immigration law. As a ground for the legal stay, section 3(1)(b) of the 1971 Immigration Act states that a foreigner may be provided with limited leave to enter or to remain, which means that the duration of the leave is normally constrained. Section 24 (b) of the Act creates a corresponding criminal offence in case a person, having only limited leave to enter or to remain in the United Kingdom, knowingly stays beyond the period designated by the leave. At present, one of the features of the British system of immigration control purports that most of foreign nationals are granted a specific duration of stay.

The offence is committed primarily by those who either lack grounds for extending their permission to stay through applying to the Home Office, or simply because of a neglect of procedures. Despite committing the continuing offence of overstaying, a foreign offender cannot be prosecuted more than once for this and the burden of proof in declaring individuals as offenders belongs to the Home Office.

Until recently, a lack of stringent internal control mechanisms has made it possible for these persons to remain undetectable in Britain, but the general situation is fraught with every sense of illegality. After expiry of the leave, presence and activities of immigrants would amount to punishable illegal practice, since it would automatically be in breach of immigration regimes.

2.2.3 Illegal employment or recourse to public funds

Employment or recourse to public funds in breach of the conditions attached to entry into the country is another very common type of illegal position relating to migrants in the United Kingdom. This behaviour violates specific conditions of entry or residence attached to some immigrants by virtue of section 3(1)(c). A condition restricting employment or occupation in the United Kingdom is attached to temporary visitors, students and some other categories, unless employment serves as an initial purpose of legal entry into the UK, or otherwise allowed by international agreements concluded

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[33] 1987, Chapter 24; 15th of May 1987.

on behalf of the state.[34] The condition requiring immigrants to maintain and accommodate themselves or any dependants, without recourse to public finds, is attached to the entry of almost all categories of foreigners into the country by virtue of Immigration Rules (para. 322(4)), unless otherwise provided by the international obligations of the UK.[35]

Corresponding statutory definitions exist in respect of terms concerning employment or public funds, and a breach of conditions attached to entry is punishable in terms of the provisions of section 24 (1)(e) of the 1971 Immigration Act. The sanctions apply if, 'without a reasonable excuse, an entrant fails to observe any restrictions imposed on him under Schedules 2 or 3 of this Act as to residence, as to his employment or occupation, or as to reporting to the police or to an immigration officer'. However, the prohibition against accepting employment arises not only in cases when a violation of the condition of stay occurs, but also in those where no valid leave exists, such as overstaying and clandestine entry. Recourse to public funds may mean a breach of the law if immigration regulations stress that these funds are expressly excluded from being accessed by immigrants.

2.2.4 Deception

Deception corresponds to all main types of immigration offences, involving a great number of circumstances:[36] making a false representation, where it is the effective means of entry (contrary to section 26 (1)(c) of the 1971 Immigration Act), actual entry and, thirdly, entry by means of deception by another person.[37] Most frequently, it is provision of the wrong information to immigration officers in the country or entry clearance officers in the British consulates that counts as deception.[38] Information required in these cases concerns the entrant's genuine purpose of visit to the UK, where deceit or fraud, also included in the meaning of deception, are the effective means of obtaining leave to enter. Giving false answers to the immigration officer in

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[34] The right to enter and take employment without authorisation by the Work Permit UK scheme belongs to all EU nationals who have job offers or look for employment.
[35] 'No recourse to public funds' rule is best analysed by Macdonald et al, supra, n. 23, pp. 586-587 (2001 ed.) and p. 93 (1995 ed.).
[36] Macdonald, ibid., p. 746 (para. 16.16) of 2001 ed. and pp. 525-526 (paras. 16.22-16.25) of 1995 ed.
[37] Envisaged by legal provisions of section 24 (1A); also in Macdonald et al, ibid., p. 677 (para. 14.19) of 2001 ed.
[38] *R v. Secretary of State for the Home Department, ex p. Saffu Mensah* [1991] Imm. A.R. 43, QBD; in Macdonald, ibid., p. 746 (para. 16.17) of 2001 ed.

the process of extending leave, when information was material in that case, has likewise been declared to be deception in case law.[39]

All types of illegal immigration are closely interconnected, probably because the notion of deception allows immigration authorities to act with a wide margin of discretion in respect of classifying illegal immigrants. In this regard, either overstayers, or persons in breach of conditions of stay, may be said to commit deception on entry to the UK.

2.2.5 Immigration Law Regimes Governing Asylum and Refugee Policies

A distinct category of immigrants comprising asylum seekers, and reflecting the notorious matter of asylum in the UK, has likewise shaped the debate concerning illegal immigration. Generally, several areas of concern exist that may contribute to the illegality of asylum seekers: the illegal entry of asylum claimants, whose presence, although not being terminated immediately by removal, can be penalised; the welfare situation of asylum seekers and, finally, regimes of removal of the failed asylum claimants.

The issue of illegal immigration is closely associated with asylum, both on the sociological and legal levels. Illegality in these cases is dealt with separately in this chapter as a by-product of administrative constraints imposed on asylum seekers.

2.2.6 General Outcomes of Illegal Entry and Residence

As was stated above, section 24 lays a basis for the legislative definition of irregularity established in the Immigration Act of 1971, but in the context of a criminal offence. Additionally, section 25 of the 1971 Act introduced offences, penalising the harbouring and smuggling of illegal immigrants, which were extended by the 2004 Asylum and Immigration (Treatment of Claimants, etc.) Act to the cases of EU states nationals. This perhaps implies suspicion and caution towards many East Europeans from the new EU states, who might assist or harbour irregular migrants from other regions.

All offences under section 24 of the 1971 Immigration Act are punishable by the maximum six-month imprisonment or by fines and could result in deportation or removal from the country. A common feature is that many illegal immigrants commit more than one offence to place themselves in an illegal position. For instance, illegal

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[39] *Durojaiye v. Secretary of State for the Home Department*, [1991] Imm. A.R. 307, CA; in Macdonald et al, ibid., p. 749 of 2001 ed. and pp 526-527 (paras. 16.24 and 16.26) of 1995 ed.

entrants or overstayers may enter employment relationships in Britain or claim public funds, but committing more than one offence in the legal system does not imply a double penalty, meaning rather that these people are eventually more likely to attract the attention of the British immigration authorities.

An important omission of immigration law in relation to irregular migration is the lack of any reference to illegal residence. In fact, there are no serious residence control measures concerning foreigners, although shifts in policy-making are being reflected in the UK, as was made clear in recent proposals to introduce special ID cards,[40] or to tighten up efforts in facilitating enforcement and removal. Residence control features in the UK are closely connected with internal controls which, although these exist currently as a mere threat to the irregular migrants' community, still contain a sufficient potential for implementation.

Emphasis on the construction of immigration regulation has traditionally been assigned to the sphere of admission practices, rather than to statutes specifically designed for the purpose of regulating residence. This is a distinct feature of the current immigration law of the UK.

2.2.6.1 Removal of Illegal Foreigners from the United Kingdom

All illegal immigrants, regardless of the nature of their breach of immigration law, are subject to administrative removal by virtue of the specific provisions of this law. Overall, illegal entrants are subject to removal according to Schedule 2 (paragraphs 8-15) of the 1971 Immigration Act, while overstayers and people in breach of conditions of leave are removed in accordance with section 10 of the 1999 Immigration and Asylum Act, and the Immigration (Removal Directions) Regulations of 2000.[41] The administrative procedure is currently deployed in relation to all categories of immigrants who breach immigration regimes, since both illegal entrants and people violating conditions of stay, are inevitably subject to summary removal,[42] where only compassionate circumstances or an asylum application[43] prevent immediate removal. Originally, however, overstayers, immigrants in breach of conditions of leave, or individuals entering the country by means of deception, were subject to deportation facilitated through judicial mechanisms and safeguards, but the current removal

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[40] Home Office Press Release, Ref. No. 307/2003, dated 11.11.2003. For discussion, see: Joint Council for the Welfare of Immigrants, Bulletin, Winter 2003.
[41] SI 2000/2243.
[42] Immigration Act 1971, Schedule 2, para. 9; in Macdonald et al, supra, n. 23, p. 739 (para 16.2) of 2001 ed.

mechanisms are strictly administrative,[44] with opportunities for disputing these decisions emerging only after the removal has been carried out by the Home Office.[45] Indeed, the main differences between administrative and judicial mechanisms lie first of all in the length of procedures, whereby administrative practices are much shorter and, additionally, the availability of appeal more limited. Introduction of the 1999 Act signalled the peak of appeal restrictions, gradually accumulated by the 1988 and 1996 Acts, by excluding the same categories from the full right of appeal inside the country.

Enforcement actions against illegal immigrants either by administrative removal or deportation have gained a specific political meaning in the British history of immigration control. Indeed, at least on the surface, the numbers of people removed from the UK reflected the effectiveness of successive governments' immigration policies, and have therefore constituted an important political issue. The growth in enforcement actions against violators of immigration laws has repeated swings, representing various political changes. For example, at the beginning of the 1980s, Thatcher's Conservative government achieved considerable increases in removal, thereby fulfilling its electoral pledges, and this was regarded as an improvement in the enforcement of immigration policies.[46] In the 1990s, the issue of administrative removals temporarily lost its priority to the matter of asylum generally. In those years, the effectiveness of immigration policy was rather viewed through the criteria of handling asylum decisions. During the last five years, however, the agenda of illegal immigration has been highlighted and, as a result, facilitation of removals has been prioritised. So, within the years between 1998 and 2002, the total number of people removed as a result of an enforcement action increased from 7,315 to 14,205, while the number of initiated enforcement actions[47] increased drastically from 21,080 to 57,735.[48] Whether this indicates more effective policy conduct by the British government remains a debatable issue, especially considering that the legitimate presumption could be made that numbers of irregular migrants are growing in Britain too.

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[43] Section 69 (5) of the 1999 Immigration and Asylum Act.
[44] Immigration (Removal Directions) Regulations 2000 (SI 2000/2243).
[45] Appeal procedures in the case of administrative removals may be invoked after removal, and take place in accordance with section 66 of the Immigration and Asylum Act 1999.
[46] Layton-Henry, supra, n. 7, p. 286.
[47] The category against whom enforcement action is initiated includes illegal entrants, people issued with a notice of intention to deport and those who are proceeded against under section 10—therefore this concerns all illegal immigrants.

Administrative removals are often preceded by detention which could be ordered by immigration officers. In authorising removal from the United Kingdom, they may likewise order detention or restriction on the movement of individuals subject to this procedure, in accordance with the powers given to them under the immigration legislation.[49] In the year of 2003 roughly about 1000 non-asylum persons were detained in accordance with these powers,[50] which may not be regarded as a great figure in this respect.

At the same time, if robustly enforced, detention and removal may constitute a fast-track procedure with limited appeal rights. These practices may also undermine humanitarian standards, since on the de facto level, detected illegal immigrants cannot claim remuneration owed to them by their employers, or they are often removed too swiftly, and cannot possibly secure their belongings or money prior to the forced departure.[51] However, despite creating strict removal mechanisms, the enforcement machinery is incapable of removing a substantial proportion of illegal immigrants, with estimates downgrading a successful image of immigration policy in this respect.

2.2.7 Summary

The British system of immigration control enshrined in the main legislative acts proposes sufficiently elaborate administrative mechanisms for regulating the admission, residence and everyday living of irregular migrants. Indeed, the framework of irregularity and corresponding offences are well defined, and supported by stringent sanctions and existing enforcement machinery. The agenda concerning the legal regulation of the position of irregular migrants would be incomplete without reviewing details relating to the operation of the secondary administrative regimes, which have an even more important meaning for the immigration policy in question. In this respect, the issues of foreigners' admission for temporary employment, the undocumented workers' employment process itself, residence and access to public funds, may present a more detailed view on the position of the irregular migrant in the UK.

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[48] Dudley, J., Turner, G. and Woollacot, S. "Control of Immigration: Statistics United Kingdom, 2002", Home Office RDSD, p. 33, table 5.1; available on the Home Office Website: www.homeoffice.gov.uk .
[49] Paragraph 16 of Schedule 2 of the 1971 Immigration Act applies to all situations of administrative removals.
[50] The figure was estimated from the "Asylum Statistics: 1st Quarter 2003 United Kingdom", "Asylum Statistics: 2nd Quarter 2003 United Kingdom", "Asylum Statistics: 3rd Quarter 2003 United Kingdom" and "Asylum Statistics: 4th Quarter 2003 United Kingdom", Home Office RDSD, tables from 10 to 12.
[51] "Bloody Foreigners", supra, n. 3.

2.3 *Legislation and Policy Regulating Employment of Foreigners in the United Kingdom*

The sphere of migrant workers' employment has become one of the most controversial issues in British immigration law and policy. Illegal immigration into the country was traditionally brought about by economic incentives on the part of many immigrants, and the most obvious violations of the immigration law in this respect are comprised, on the one hand, by employment-breaching restrictions imposed on certain foreigners in connection with section 3(c)(i) of the 1971 Immigration Act and, on the other hand, by employment which violates the permitted channels.

The method of regulation chosen by the government in the area of the employment of migrants reflects both a prohibitory character (by means of employment restrictions on individual status) and a decretal one (by prescribing the routes for legal employment). In between these extremes, there are certain legal possibilities for manoeuvring by immigrants, including the status of the student who is allowed limited employment. Currently, it is possible to provide the following extended typology of illegal employment by foreigners in the United Kingdom:

- Employment in breach of conditions applied to certain immigrants, such as visitors or asylum seekers;
- Employment while overstaying the period allowed by the immigration authorities, i.e. after expiry of leave to remain;
- Employment of students working for more hours than allowed to them by immigration authorities;
- Employment of illegal entrants;
- Employment of legal migrant workers in breach of work permits or other specific conditions.

To sum up this classification, it is possible to argue that all illegal employment takes place outside the schemes permitted and regulated by immigration authorities specifically for the purpose of attracting the foreign work force, and designed to play a leading role in the agenda of foreigners' work. However, on the basis of the present classification, one can distinguish two substantive groups of violators of the employment regime: those who breach restrictive conditions imposed on them by immigration law, and those for whom employment is a secondary or derivative violation of immigration regulations. The first category includes the prohibited employment activities of visitors, students (working for more than twenty hours),

persons in breach of their work permit conditions and asylum seekers,[52] while the second category of offenders involves individuals who fail in the first instance to be legally present in the country, such as overstayers or illegal entrants. This distinction between the two groups conceptually identifies another issue. Here, only the first category of immigrants, i.e. those breaching specific employment limitations attached to their status in the country, is directly linked with policies of admission for employment, while the existence of the other category, who have violated their entry or residence status, demonstrates a closer correlation with a more general admission and internal control system involved in the legal policy. At the same time, despite certain distinctions as to the degree of connection with employment policy in immigration law, both categories converge upon an important social issue, inasmuch as all irregular migrants subsequently join the illegal employment environment. From this point of view, the relevance for the national economy of immigration policy in relation to an intake of legal foreign workers cannot be underestimated.

Legal entry for employment purposes is possible, but distinct mechanisms should be deployed which correspond either to categories with statutory access to the employment market, or to the application for, and obtaining of, work permits in order subsequently to acquire entry clearance and admission into the UK. It is quite possible to argue that violations of conditions imposed on immigrants occurring as a result of illicit employment may be indicated as a reverse side of this regulation. The main operational framework of foreigners' admission for employment has been placed under the control of the Home Office and its affiliate bodies, such as Work Permit UK, which is specifically in charge of the work permit process. The most essential regulation of this issue in the United Kingdom is defined by very selective processes and criteria envisaging no possibilities for switching from any distinct immigration category to employment, while residing in the country.[53]

2.3.1 Legal Means of Access to Employment in the UK

The British immigration system provides for several types of administrative regimes and corresponding substantive opportunities for foreigners in their pursuit of employment, such as:[54]

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[52] These conditions are likely to be imposed by the immigration officer on the basis of section 3 of the 1971 Immigration Act in the first two cases.

[53] Currently, some concessions are given to foreign students graduating from UK universities, since, unlike other categories, they are entitled to acquire work permits while living in the UK.

[54] Macdonald et al, supra, n. 23, p. 354 of 2001 ed. and p. 277 of 1995 ed.

1. Seasonal workers;
2. Exchange teachers;
3. Commonwealth citizens with grandparental connections;
4. Working holiday-makers;
5. Trainees, who can be divided into two main types: work experience and training itself;
6. Categories of employees with permit-free employment opportunities;
7. Employees taking part in the approved employment under a work permit, which comprises probably the most extensive category of foreign labour force in the United Kingdom;
8. Nationals from the states constituting the European Economic Area, enjoying visa-free entry into the country and permit-free access to the work force.[55]

Each of the aforementioned categories enjoys a distinct status in immigration law, particularly in respect of entrance and employment admissions, but not every type of employment deserves special attention for the subject matter of this research, as the issues of illegality do not concern all the abovementioned areas to the same extent. At the same time, these issues could be invoked in regard to one main feature: considerable restrictions are imposed on all main groups of migrants, with a view to impairing their capacity to gain or to switch employment.

The first category-- seasonal workers-- mainly comprised by full-time foreign students admitted to the United Kingdom in order to take seasonal employment in a variety of unskilled jobs, could probably pose challenges for the immigration authorities. This scheme was initially created for seasonal work in the agricultural sector but, subsequently, paragraphs 104-109 of the Immigration Rules were altered to enable students to take employment in a variety of industries. Substantial restricting mechanisms that used to be deployed before the recent changes rendered continuous legality problematic in this respect, since employment was limited to only one sector of the economy. Yet, currently, no possibility is envisaged for switching to a different job, apart from staying as a regular visitor. Leave may be granted to students for a

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[55] By virtue of Article 39 of the Treaty of Rome, European Union nationals are allowed to travel without any restrictions for the sake of taking employment or some other economic activity. This notion has been incorporated into British Law by the European Communities Act, particularly its Subsection 2(1), with the following projection of the same entitlements onto the 1971 Immigration Act. Pursuant to incorporation of the legal entitlements possessed by EU nationals, the Immigration (European Economic Area) Order 1994 was introduced with further replacement of the same provisions by virtue of the 2000 Order. 'Qualified persons' under the 2000 Order do not need clearance, but should produce a valid passport or a national identity card (Article 12.1) on contacting the immigration officer.

period of up to half a year and, on arrival, foreigners should produce the Home Office card issued by the operator of the government-approved scheme. Justifiable concerns may still be related to a fair percentage of these individuals who could try under the prescribed limitations, to prolong their employment by overstaying for the sake of making extra money.

In the Home Office estimates, from 4 to 10 per cent of seasonal workers overstay the period prescribed in the initial entry clearance[56] and, as far as the case law suggests, other infringements upon the system of their employment are possible. However, the Government is prepared to increase the annual quota for the seasonal workers' scheme, so as to make it more realistic for the needs of several industries. Currently, seasonal workers constitute a classical group within the temporary workforce, albeit with certain shortcomings in their status or operation of the scheme. On the one hand, the scheme places restrictions on the position of migrant workers as to the time period and the activities allowed, but on the other hand there are no bonds or enforced savings which would encourage the departure of the worker.

Other specialised professional and ancestral schemes, such as trainees, exchange teachers and Commonwealth citizens with ancestral links with the UK, enjoy a slightly different treatment and selection which initially limits the scope and number of people concerned in their application. Although under these categories immigration authorities often deal with individuals from the states with 'pressures to emigrate', these categories are not responsible for a great number of irregular migrants. A quite similar trait also exists for permit-free employment, since it is reserved for particular groups and is limited only to certain professions and circumstances of social standing, such as: overseas journalists, sole representatives of foreign companies, doctors and dentists, overseas government employees, domestic servants of affluent persons and private servants in diplomatic households, ministers of religion, missionaries and members of religious orders and, finally, members of airline or ship crews.

The right to employment of these individuals is supposedly undisputed at the entry clearance stage, so long as individuals personally qualify and subsequently satisfy immigration officers on entry. Although these procedures do not pass without dispute, immigration law provides for permit-free employment only to a narrow group of individuals, where the British Home Office adopts utilitarian reasoning, and enables

certain organisations to function without excessive administrative constraints. However, permit-free employment categories, as with those requiring work permits, may, hypothetically, fall short of law compliance with the regulations, when people change employment or take on additional duties. The most problematic group of individuals dealt with in the permit-free category comprises domestic servants of affluent persons. There have been numerous comments on their conditions of work or treatment in employment which identified them as particularly vulnerable people, sometimes treated like slaves.[57] They were probably more likely to become illegal immigrants after experiencing difficulties at their place of work.[58] At the same time, the British Government introduced regularisation schemes (with the deadline of 23rd of October 1998) for those who have abandoned their employers and overstayed.[59] However, the relevance of these issues decreased since the opportunity of switching to another employer was introduced for these individuals.

As a rule, the system imposes constraints on many immigrant categories in their possible attempts of changing the employment place and immigration regime respectively. There cannot be a possibility for legal migrants under many categories to take up other employment, even in the same sphere, with the exception of students or working holiday makers, since the Immigration Rules require the person in question to be 'engaged in such employment for which entry clearance was granted'.[60]

The same rule also applies to the most prolific group of foreigners, representing those individuals who need to apply for a work permit. The existing work permit scheme is responsible for attracting almost 180,000 foreigners a year,[61] thus shaping the supply of foreign workers for most industries in the United Kingdom. At the same time, the current governmental policy enables only highly skilled professionals, talented individuals or people with rare skills to be entitled to receive work permits. It is widely acknowledged that these are not issued for manual, craft-related, clerical,

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[56] Home Office, "Review of the Seasonal Agricultural Workers' Scheme 2002", at p. 8. Available at the IND home page under the section 'Consultation Papers' of the Home Office website: www.homeoffice.gov.uk .

[57] Most dramatic and complete accounts of this treatment may be found in the book by Anderson, B. "Doing the Dirty Work", Zed Books, London, 2000; also Macdonald et al, supra, n 23, paragraph 10.29 of the 1995 edition.

[58] Ibid.

[59] Macdonald et al, ibid., p. 361 (para. 10.15) of 1995 ed.

[60] Immigration Rules (HC 395), paragraph 128 (iv).

[61] "Control of Immigration Statistics 2002", supra, n. 48. This number of work permit holders comprises those newly admitted into the UK for employment (120,112 persons — reference at p. 5), and those whose permits have been extended (61,190 persons — reference at p. 23).

secretarial, or for resident domestic work,[62] while even the application criteria for the designated highly skilled professionals have also been high.

The application process is designed in such a way as to protect the employment market in the country, and to promote British nationals' priority in gaining employment.[63] Employers willing to attract foreign workers have to submit applications consisting of two tiers. The two-tier process distinguishes between different professional categories, with a division into those professions where appointment requires nation-wide advertisements, with the purpose of filling both parts (tiers) of the application respectively, and those where the work permit may be granted without stringent requirement of a national bid for vacancies, and where the requirement stands to fill in only one part (tier) of the application form. The professionals applying under Tier I are often either already high-ranking officials, or persons promoted for career development.[64]

The other type of employment which needs initial advertising relates to positions of not such significant importance, where suitable candidates have not been available in the European Economic Area. The Tier II application is submitted in cases of: a trainee who, for the two preceding years has held the appropriate traineeship permit, someone who has taken a career development post and has been an employee for six months prior to application, foreigners already in the country, and an application aimed at filling positions of key workers.

Certain work permit subcategories can have separate scrutiny procedures and requirements for individuals wanting to qualify for employment entitlements in the UK operating under the Tier II application process, such as applications for employment in the hospitality sector.[65] This industry has been experiencing serious shortages of staff, and the work permit system was instituted in order to create a supply of foreign workers in this area, but work permit applications should be submitted only by high class establishments, where applicants are supposed to meet a stringent set of

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[62] Web site: www.workingintheuk.gov.uk .

[63] Ibid., the same website; also the work permit application process is described by Macdonald et al, supra, n. 23, pp. 373-382 (paras. 10.40-10.59) of 2001 ed. and pp. 288-298 (paras. 10.46-10.66) of 1995 ed.. A relevant description was also given in the book by Divine, L. "Immigration and Employment: Fast Tracking for Business", 2nd ed., Palladin Law Publishing Ltd., London, 2000.

[64] This includes senior professional posts in an international company, with a need to make a transfer from abroad, board level or similar positions for which the employer cannot find a suitable candidate within the country, investment professional positions creating inward investment in the economy, professions in short supply in the UK and EEA.

[65] Macdonald et al, supra, n. 23, p. 291 (para. 10.59) of 1995 ed.

requirements.[66] Because this industry has been responsible for employing substantial numbers of irregular migrants, the government introduced the aforementioned Sector Based Scheme for the hospitality industry designed to employ foreign students on a short term basis. But, as indicated in the policy analysis above, the quota for the migrant workers was eventually reduced after the EU enlargement.

There is some evidence that restrictions have served as incentives for potential workers to exploit any other immigration means, such as entering the UK as students, i.e. in order to be able to work. Employment admission policies have become an integral part of regulation efforts designed to restrict access of the foreign labour force to the domestic labour market, but their largely adverse effects cannot be considered apart from the role of internal control measures and the corresponding social reality which emerges as a result.

2.3.2 Legal Principles Governing Irregular Migrants' Engagement in Employment and Sanctions in Respect of Unscrupulous Employers

The initial issue associated with the employment of illegal immigrants could be connected to the existence of compelling incentives on the part of employers to hire illegal immigrants. Some British industries find themselves in a very competitive environment, facing local and global challenges.[67] This leads to the emergence of specific labour demands, encouraging employers to decrease the cost of the labour force on the one hand, and to find a sufficient supply of workers on the other.[68] In this situation, very few indigenous workers agree to be employed with reduced conditions of employment, while illegal immigrants find these conditions suitable and desirable, to the extent that they have been filling these gaps successfully for many years.[69]

There are various economic and psychological features which explain the leading role of undocumented migrants in some industries, such as the opportunity of earning

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[66] This includes people with at least 5 years experience in hotel or restaurant administration, head or second/ specialist chefs with a 5-year period of training and 2 years in a supervisory capacity, highly skilled waiting staff capable of working at a sophisticated level-- controlling and training staff, advising clients about the menu, etc., and finally senior hotel receptionists with formal training, fluency in English and another EEA language.

[67] Ram, M., Edwards, P., Jones, T. "Employers and Illegal Migrant Workers in the Restaurant and Clothing Sectors", the Final Report for the Department of Trade and Industry, 2001, pp. 14 and 23— hereinafter the DTI Report.

[68] Ibid., p. 14.

[69] The industries where illegal immigrants are predominantly employed include the catering, hospitality and construction sectors of the economy (in Jordan and Duvell, supra, n. 5, p. 161); the same trend has been confirmed specifically for the catering industry by the DTI report, p. 15.

more than is ever possible in their countries of origin, or a lack of extensive family and social connections in the country,[70] although quite a few undocumented workers are also settling because of the links in the UK. Despite the economic advantages of undocumented labour, very few employers have deliberately undertaken to hire irregular migrants;[71] rather they claim that there is no other alternative to employing undocumented workers considering the restrictive character of existing schemes for the employment of migrants.[72] Engagement of illegal immigrants brings multiple advantages and benefits, such as increased output in production, higher reliability, harder work and, finally, better motivation to earn as much money as possible.[73]

In this regard, on the one hand, functioning of temporary employment schemes for foreigners in the UK, designed to create opportunities only for professional and well-qualified categories, serves as an administrative shortcoming of the overall policy. On the other hand, however, with specific demands existing in some industries to achieve a great reduction in production costs, the extension of unskilled migrants' employment presence cannot automatically result in eliminating undocumented work. This is due to the substantial rights conferred upon legal immigrant workers, including the right to minimum wages, and the total inability on the part of some industries to meet the threshold of minimum guarantees in employment relationships. Therefore, because of the dearth of available workers within the country, a factor which is also encouraged by restrictive migration schemes, undocumented workers have become a structural necessity in certain sectors, thus contributing to a wider and already pre-existing phenomenon of 'clandestine employment',[74] understood within the framework of the informal economy. It is often this environment of the informal economy, comprising both foreign and domestic workers, that serves as a 'pull factor' for undocumented migrants.

It is possible to argue that the system of economic migration that is in place, albeit one which is at variance with economic demands, is only partly and indirectly related to the problem of an informal economy. This ambiguous connection between such an economy and economic migration policies demonstrates an element of unpredictability

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[70] The DTI Report, ibid., pp. 12-13.
[71] Ibid., p. 16.
[72] Ibid., p. 15.
[73] Ibid., p. 20.
[74] The phenomenon of clandestine employment is defined and dealt with in the book: De Grazia, R. "Clandestine Employment: The Situation in the Industrialised Market Economy Countries", International Labour Office, Geneva, 1984.

for both restrictive and liberal solutions to the problem of temporary migration. In order to uncover the position of irregular migrants, it is essential to address the whole range of administrative constraints existing inside the country, i.e. mechanisms more closely related to internal legal capacity, such as the validity of employment contracts concluded outside the legally functioning schemes, and sanctions on unscrupulous employers. Despite their connection with immigration issues, both features of legal policy nevertheless have an even closer affiliation with administrative regulation of clandestine employment and informal economy, something which is outside the scope of the present thesis.

As early as 1978, the illegal employment of foreigners was addressed by debates in the Parliamentary Select Committee on Race Relations and Immigration. The guidelines produced by the Committee were later pursued by successive Conservative governments throughout the 1980s, where the precise agenda could be summarised by the following comments:[75]

> "Equally important would be a check on the employment of overstayers. A Department of Employment witness told us that 'the TUC has expressed concern about illegal working by immigrants... and the Government has made it clear it shares that concern and 'is keen to take some action'... we recommend that... the Government, after consultation with both sides of industry should introduce measures, if necessary by legislation, to provide effective sanctions against employers who knowingly employ overstayers and illegal immigrants. (para. 88)."[76]

At the same time, these parliamentary recommendations resulted in an increase of resources being dedicated to the system of internal control, particularly the identification of illegal immigrants in such problematic areas as employment, social welfare and health care.[77]

However, it was only in 1996 that the Government adopted the Asylum and Immigration Act, setting as its initial goals the discouragement of employers from hiring illegal immigrants[78] and, more generally, the protection of the domestic employment market from lower standards brought about by an inflow of undocumented foreign workers.[79] Section 8 of the Act made it illegal for employers to hire workers who were subject to immigration control in accordance with the 1971

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[75] Cohen, S. "Employer Sanctions, Immigration Control and 1992", (August 1989) *Legal Action*.
[76] Ibid.
[77] Ibid.
[78] Comments by Michael Howard, HC Debates, vol. 267, col. 337, on the 20 November 1995.

Immigration Act, and who held no entitlements to legal employment.[80] The prohibition introduced by section 8(1) concerns all types of irregular migrants in the country, such as illegal entrants, overstayers and individuals with specific conditions of entry precluding them from taking up employment. Additionally, however, employment relationships with all the abovementioned groups have been precluded by corresponding and pre-existing sanctions imposed by section 24 of the 1971 Immigration Act.[81] The novelty of the 1996 Act lays in its imposition of penalties on employers, while the sanctions of section 24 of the 1971 Act originally penalised only those foreigners who were themselves employed in breach of immigration law. At the same time, as Ryan points out, sanctions imposed upon undocumented workers and their employers are not at the same level, since irregular migrants are liable to a six-month imprisonment.[82]

The provision targets all types of employers, who represent both individuals and corporate bodies, where, in the latter case responsibility is transferred to any person holding a managerial position and capable of decision-making in this respect.[83] Any employer is liable to the imposition of a 5000 pound administrative fine for every illegal worker hired.[84] The employer may be exempt from responsibility, only if hired workers are illegal entrants under 16 years of age;[85] neither does section 8 (8) extend the employer's offences to the situation of service or apprenticeship contracts.

The Act introduced likewise a concept of employer defence, meaning, inter alia, that when employers have been shown a specific identity document providing the necessary immigration status and retained a copy, they are not responsible for a violation in terms of section 8 of the Act. In this situation, liability automatically shifts to the employee, who becomes responsible for having committed likely fraud or forgery. The employer's defence is limited, however, in certain aspects, such as the requirement to acknowledge documents before employment commences and, secondly, lack of knowledge of the document fraud or other inadequacy. In addition to

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[79] However, it is important to note that in light of the statement above, lower standards are not so much a result of undocumented workers' employment, but rather a structural problem of the informal economy.
[80] A sound analysis of the section 8 provision is produced in the article by Ryan, B. "Recent Legislation: Employer Enforcement of Immigration Law after section Eight of the Asylum and Immigration Act 1996", 26 (June 1997) *Industrial Law Journal*, pp. 136-141.
[81] The notion of a correlation between s8 of the 1996 Act and s24 of the 1971 Act may also be found in the article by Bernard Ryan, ibid., p. 137.
[82] Ibid.
[83] Managerial responsibility is the subject of section 8(5) of the 1996 Act.
[84] Subsection 8 (4) of the 1996 Act.
[85] Section 8 (1).

the establishment of categories subject to immigration control and liability for document checks, regulation of employment restrictions expands to fixing of the list of documents necessary to prove the right to work. The list was initially provided by Part II of the Schedule of the 1996 Immigration (Restrictions on Employment) Order,[86] and is subject to amendments by virtue of the 2003 Immigration (Restrictions on Employment) Order. Under the discretionary powers of the Secretary of State in accordance with section 8(1) of the 1996 Act, some categories of workers may be excluded from the offence of taking up employment.

It is obvious from the regime of sanctions, that the employment of irregular migrants may be regarded as unlawful in light of immigration law. However, the next relevant issue refers to a precise meaning within common law as to the employment contract concluded between an undocumented foreign worker and his/her employer. The notion of contractual legality in relation to the employment of illegal immigrants is controversial concerning the interpretation of the ideas behind the enforceability of such a contract. The British common and civil law doctrines of illegality deem any civil law contract to be automatically unenforceable if its performance is facilitated by means of committing a legal wrong or that which would be contrary to public policy.[87] In this regard, it is appropriate to expand the interpretation of illegality existing in the civil law transactions to those dealing with the employment of illegal immigrants. In the case of *Newcastle Catering v. Ahmed*,[88] the criteria for the illegality of the employment contract included illegal purpose, illegal performance, or the character of the contract being contrary to public policy.[89]

In this regard, employment contracts in breach of the immigration law involve the commission of both the legal wrong, and the acts contrary to public policy, since the sphere of irregular migrants' employment concerns not only issues of private law, but also the purely public aspects of immigration policy. Commission of the legal wrong occurs if conclusion of the contract is accompanied, for instance, by criminal acts, which, in the present system of immigration control, means that the employment of irregular migrants for which both parties are punishable. On the other hand, consideration of public policy could also be invoked to justify the unenforceability of terms following these employment relations, since the government imposes sanctions

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[86] SI 1996 No. 3225.
[87] Law Commission Consultation Paper No. 154, "Illegal Transactions: the Effect of Illegality on Contracts and Trusts".
[88] 1992 ICR 471, CA.

on both illegal immigrants and unscrupulous employers for the sake of protecting the interests of the domestic labour force. Illegality of an employment contract deems any employment guarantees based on such a contract to be unenforceable, as was established in the case of *Tomlinson v. Dick Evens U Drive*.[90] Offences punishable by the provisions of s24 of the 1971 Act, and s8 of the 1996 Act, correspond both to acts of legal wrong and those which are contrary to public policy.

The effect of immigration law on the validity of employment relationships has also been dealt with in the case before the EAT, *Sharma v Hindu Temple*[91], where the judiciary provided for a general line of reasoning in matters concerning illegal employment. The Employment Appeal Tribunal has confirmed the approach that commission of a specific immigration offence invariably leads to the illegality of the contract of employment, and that even if the legal wrong has not been committed, the contract will not be enforceable for public policy reasons.[92] This formulation of judicial reasoning conforms to the idea of contract illegality adopted by the Law Commission Consultation Paper referred to above. In this case, the applicant was admitted into the country and permitted to take up employment as a priest in a Hindu temple, but later switched to another employer by whom he was subsequently dismissed. Although the court actually allowed for an appeal in the case, it stated that, in the situation when breaches of conditions of stay occur, any terms of the employment contract will be rendered unenforceable.[93] However, as Bernard Ryan points out in this respect, it is likely that the unenforceability of the contract also concerns situations where persons illegally enter or reside in the country,[94] as well as the categories of violators of conditions imposed by immigration authorities.

In addition to the effect of the employer's sanctions and immigration restrictions relating to the unenforceability of the employment contract, concerns arise about civil liberties being undermined by the measures in question. Adoption of this Act leaves possibilities open for the state to penetrate sensitive spheres, in the same way as the employers have been assigned a special role in the process of law enforcement dealing with employment sanctions.[95]

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[89] Also these principles were presented by Ryan, supra, n. 80, p. 144.
[90] 1978, IRLR 77, EAT; also in Ryan, ibid., p. 145.
[91] Decision of 28 November 1991, noted in IDS Brief 464 and in the article by S. Juss. "Public Policy and the Enforcement of Contracts of Employment", 21(1992) *Industrial Law Journal*, p. 301.
[92] Ibid.
[93] Ibid.
[94] Ryan, supra, n. 80, pp. 144-145.
[95] Ibid.

The Asylum and Immigration Act of 1996 threatened to produce discrimination towards the most vulnerable individuals in British communities: i.e. racial and ethnic minorities have probably been victimised by the new legislation, since identity checks are likely to humiliate these people, in addition to many legal foreigners. There emerges a substantive conflict with the Race Relations Act of 1976, which prescribes equality in all areas of employment. A situation where some individuals undergo identity checks more frequently than others ordinarily amounts to discrimination in the light of the legal provisions of the Act. In a number of cases, however, the judiciary justified the document checking, as being necessary by means of statutory requirements, as not being discriminatory or contrary to section 3(4) of the Race Relations Act,[96] and therefore as falling within the realm of exemptions to the discrimination criteria outlined in section 41 of the same Act.[97]

As far as enforcement is concerned, despite the government's expectations, the Act has not achieved the desired goals of eliminating the problem but, instead, has created additional issues when looked at in conjunction with legal practice and the immigration law of the country. The employer's sanctions seem to have a limitation in their implementation, especially since the employer actually seeking to maximise profits by deploying undocumented migrants is also obliged to check their immigration status, thus creating a conflict of interests within the employers' realm.[98] This dichotomous role of employers will inevitably provoke incentives to avoid the correct administration of employment control in fulfilment of section 8 requirements.[99]

Ever since their introduction in 1996, the success of employers' sanctions has not been significant. According to the data publicised by the Home Office, up until 2001, only one twenty prosecutions and seven convictions in relation to employers had been documented.[100] The workplace raids conducted by the Immigration Service Enforcement Department, based on section 8 of the Asylum and Immigration Act of 1996, were not regarded as having been fully productive,[101] not least because detection of employment without authorisation was given a low priority by the Home Office, in

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[96] *Dhatt v McDonalds*, [1991] IRLR 130.
[97] *Hampson v Department of Education and Science*, [1990] ICR 511.
[98] Drew S. "Human Trafficking: A Modern Form of Slavery". 4 (2002) *European Human Rights Law Review*, pp. 488-489.
[99] Ibid.
[100] Home Office, "Full Regulatory Impact Assessment: The Immigration (Restrictions on Employment) Order 2004, website: www.ind.homeoffice.gov.uk .
[101] Jordan and Duvell, supra, n. 5, p. 187.

comparison with asylum issues, for instance. The real policy aspects were described by Jordan and Duvell in the following way:

> "...the best they [Immigration Service] could do was 'let people know they were about', and hope that a certain amount of mythology about their effectiveness, together with denunciations and betrayal, would keep irregular migrants on their toes."[102]

A further practical issue reported in the study concerned the problem of the precise identification of the actual employer concluding the contracts, rather than simply identifying a liaison contractor. This is currently an especially relevant issue for the agricultural sector. Farmers, in particular, tend to employ workers contracted by the "gangmasters", i.e. unscrupulous subcontractors using informal links in supplying labour.[103] In this regard, deployment of the whole chain of subcontractors supplying labour brings confusion to law enforcement.[104] As Immigration Minister O'Brien commented concerning the scope of this problem:

> "...'gangmasters' operate in East Anglia and the West country, bringing in illegal immigrants from Eastern Europe, employing what used to be called a lump labour system, using gangs of illegal immigrants to work on the land during the picking season, again at a very cheap rate.... The problem has been getting worse since 1996."[105]

According to recent media estimates, there are over 2,000 gangmasters in the country, who supply over 75,000 undocumented workers to farms and agricultural companies.[106] As for the social effects, new types of crimes connected with illegal economic migration, such as document forgeries and even violent crimes, are blossoming in this environment.[107] Additionally, gangmasters are linked to the underworld of trafficking and abusive exploitation, being by far the most dangerous feature associated with undocumented employment in the United Kingdom. The recent Gangmasters Licensing Act of 2004 has focused precisely on this phenomenon by means of licensing regulations of these activities

Illegal employment has likewise been facilitated by employment agencies, many of which neglect the immigration status of applicants but, within these practices, there are a number of borderline cases involving students, for instance, many of whom have the right to be employed for twenty hours a week, but who actually work considerably

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[102] Ibid., p. 196.
[103] Elliott, V. "Gangmasters Who Reap the Human Harvest", in *The Times* daily, 8th of July, 2003, p. 3.
[104] Jordan and Duvell, supra, n. 5, p. 187.
[105] House of Commons, supra, n. 100.
[106] Elliott, V., supra, n. 103.

longer than this because of the agencies' or employers' demands.[108] The shadowy world of unscrupulous subcontractors and employers has become a "pull factor" for thousands of irregular migrants, and has thus presented a more compelling problem. This assertion generally coincides with the findings of the House of Lords report on the issue of irregular migration which, among other negative factors, mentions enhancement of additional irregular migrant flows, reductions of social standards, and an increase in organised crime.[109]

2.3.3 Basic Employment Conditions of Illegal Economic Migrants

Although the hiring of undocumented workers becomes purely a matter of economic necessity, unscrupulous employers and subcontractors are well aware of the vulnerability of the position of many undocumented migrants and a justifiable assumption can be formed that practices exist which jeopardise basic minimum standards and conditions of employment. These employment relationships have also been characterised in the Parliamentary debates by Minister O'Brien, who stated the following:

> "A conspiracy had been created between the employer and the low-paid illegal immigrants. The employer was not going to say anything, because he was getting a cheap labour. The illegal immigrant was not going to say anything, because he would be removed from the UK. Therefore, both parties engaged in the conspiracy continue to work and to undermine the job opportunities for people in the area...".[110]

Employment of illegal migrants created peculiar circumstances in terms of work standards for the labour market. On the one hand, illegal immigrants have not been protected at all by legislation so as to have a sense of security in employment relations,[111] since employment contracts provide for unenforceable terms. On the other hand, illegal employees regard it as a great opportunity to come and work in Britain, because even reduced standards of life or work in the country could be an improvement in comparison with conditions existing in their home countries. Be this as it may, undocumented migrant workers have contributed to the formation of aberrant conditions in the sphere of employment.

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[107] Ibid.

[108] Most illicit employment practices remain unchecked in a situation of poor control, reflecting, for instance, that there are only 12 inspectors responsible for control over employment agencies. This information was presented at the Trade Union Congress seminar *Migrant Worker's Rights—Could We do More in Britain?*, 14th July, 2003.

[109] The House of Lords Report, supra, n. 1, p. 13, para. 32.

[110] House of Commons, supra, n. 100.

[111] Ardill and Cross, n. 22, pp 51 and 56.

The initial issue related to stay and subsequent employment of this category of persons was tied up with their adaptation to social circumstances in the receiving society. The pre-existence of social ties usually suffices for people rapidly managing to gain an active participation in employment opportunities. For South Asian workers, this tendency has proven to be relevant, and little concern can be raised regarding the integration of South Asian workers, since they live within their established ethnic community in the United Kingdom.[112] In this respect, most of the respondents in the aforementioned Department of Trade and Industry specialised study managed to find links with their prospective employers through the presence of, and their affiliation to, their ethnic community members. Relatives also played a crucial part in finding jobs for some of the illegal workers surveyed, although none of the questioned illegal immigrants made efforts to seek any work while preparing to leave their native countries.[113]

However, other groups of illegal immigrants, especially East Europeans, cannot possibly claim to be so adaptable to circumstances in Britain, since they are more individually and randomly employed. Polish workers (before the EU enlargement), for example, although they established some ethnic networks in British society, frequently sold (rather than simply exchanged) information on available jobs.[114] Other than that, possible mutual collaboration in their case is undermined by a degree of disloyalty, competition and mistrust which characterises their life and work circumstances.[115]

The job which most typifies the employment of illegal immigrants is frequently casual, and almost certainly manual, with payment taking the form of cash-in-hand for one particular day, evening or week.[116] The casual character of employment is likely to be higher in some sectors of the economy, such as the construction or agricultural industries. In many cases, usually those involving desperate asylum seekers or immigrants, admission to work is based solely on a brief verbal agreement made for a single day, and some streets in London serve literally as market places, 'trading' the foreign workers, where prospective employers occasionally cruise to find labourers.[117] Such employment is crucial for many foreigners as a last resort in illegal circumstances

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[112] The DTI report, supra, n. 67, pp. 12 and 16.
[113] Ibid., p. 12.
[114] Jordan and Duvell, supra, n. 5, p. 125.
[115] Ibid., p. 124.
[116] Ardill and Cross, supra, n. 22, pp. 49 and 51; this is also obvious from the DTI report and the Jordan and Duvell study.
[117] *Daily Mail*, Wednesday, May 21, 2003; also in *Evening Standard*, 7th of February, 2002.

in the host society, but hardly any guarantees or standards may be invoked in such a situation. As was mentioned above, in the agricultural sector of the economy, subcontracting of the work force with the involvement of gangmasters is crucial in shaping employment circumstances where exploitation could be regarded as acute, and conditions as very severe. The negative employment factors include health dangers, excessively long working hours, and often illicit and degrading means of control by gangmasters.[118]

In other industries, on the contrary, there could be a possibility for a permanent and steady situation in employment, such as in the ethnic catering sector. The duration of the contract with illegal immigrants obviously varies, but almost all employers questioned in the Department of Trade and Industry study admitted that they had been looking for permanent or long-term staff in order to avoid the anxiety and uncertainty associated with an instability of employment relations.[119] According to the report there is a great possibility for the development of such relationships that allow employers to avoid more effective legislative and regulatory requirements.[120] In these circumstances, employers make no distinction in training between legal and illegal workers, but the matter of language proficiency arises as an obstacle for many immigrants to be adequately trained.[121] However, the possibility of long-term commitments can rather be viewed, either as a cultural feature in the ethnic South Asian catering places, or possibly as an indication of a stable and constant demand for cheap labour within this sector of the economy.

In the clothing industry, the main feature in employment of illegal immigrants has been a sufficient degree of flexibility in attracting workers for any particular employment period.[122] Therefore, activities of illegal immigrants in this sector bear a higher degree of irregularity and casualisation, because workers wait for weeks in order to be given a chance to earn money.[123] Many immigrant workers are provided with jobs through specialised agencies, which also contribute to the casualisation of undocumented work.

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[118] Felicity Lawrence. "Migrants Working in Britain: Milk and Honey—or Blood, Sweat and Tears?", in the Trade Union Congress seminar *Migrant Worker's Rights—Could We do More in Britain?,* 14th July, 2003.
[119] The DTI report, supra, n. 67, p. 21.
[120] Ibid.
[121] Ibid., pp. 21-22.
[122] Ibid., p. 23.
[123] Ibid., p. 28.

The general feeling is that most desperate immigrants who need occasional work should be prepared to be exploited. In this regard, casual employment facilitated on the basis of cash-in-hand for a single day, or that provided by gangmasters, could be least advantageous, since it results in extremely low payment. Gangmasters, for example, tend to commit severe discrimination by paying illegal immigrants two times less than British workers, sometimes even £2 an hour,[124] despite the fact that these labourers work for at least 16 hours a day.[125] Undoubtedly, this is the plight of asylum seekers or illegal entrants without a knowledge of English, who are probably not mobile in the shadowy employment market.[126] A particularly serious problem of abuse arises when employees do not get paid for their work, a situation which leads to complete helplessness in the face of the legal system.[127]

More permanent employment may have better, but still somewhat backward, standards. Previously, in the 1980s, the number of hours of work in weekly terms may have been higher than with national employees, and comprised about 55 hours a week (ranging from 40 to 76 hours).[128] Serious competition having increased over the last years in some industries has led to a situation where working time may be getting longer, and could comprise the maximum of sixteen hours a day,[129] while wages corresponding to such a period of work may still remain very basic. In the ethnic catering sector, for example, it is quite normal to work from 50 to 70 hours a week for a rate of payment amounting to either £3.00 or £3.70 per hour.[130]

Payment for such predominantly long hours of work is below the minimum standards accepted in the country. In the ethnic catering industry, for example, payment is normally made in the form of a weekly flat rate with a few bonuses available to employees. Under the current system, good chefs receive about £250 per week, and ordinary workers are able to earn about £150.[131] East European workers are normally hired by the subcontractors or agencies, who mostly neglect restrictions and sanctions imposed by immigration law and pay wage rates between about £4 per hour in the provincial parts of the country to £5 per hour in London. The initial flat rate of

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[124] Elliot, supra, n. 103.
[125] Lawrence, supra, n. 118.
[126] De Bruxelles, S., Rumbelow, H. "Three Migrant Farmworkers were Killed Yesterday, Victims of A Train—and the Demand for Cheap Labour", in *The Times* daily newspaper, 8th of July, 2003, p. 3.
[127] During my interviews with Polish and Ukrainian migrants in London, I learned of such situations.
[128] Ardill, supra, n. 22, p. 49.
[129] Jordan and Duvell, supra, n. 5, p. 133.
[130] The DTI Report, supra, n. 67, p. 17.
[131] Ibid.

payment for the beginner normally constitutes from £90 to £120 a week, or even higher in the construction or cleaning sectors. Over time, salaries may slowly grow and other employment conditions may gradually improve.[132] Illegal immigrants are at first likely to attach themselves to the lowest paid occupations and, only with a growth in experience, do they feel more confident in undertaking a change of employers or a switch to other occupations.[133]

It is obvious, that the minimum wage guarantees, or standards in working hours, are difficult to enforce, and this leads to some unrealistic figures being shown in the account books, thus establishing shadow practices in accountancy and taxation.[134] Other essential guarantees, such as paid leave for reasons of sickness or for a holiday,[135] or compliance with health and safety standards, are likewise missing in the employment of irregular migrants, because of the atmosphere of increasing uncertainty for both parties within the employment relationship.

Currently, in light of many discrepant circumstances, the employment market which exists for irregular migrants is fractured, and does not represent an absolutely uniform reality, considering that the length of the hiring period produces a substantial impact on salaries and on the degree of exploitation. However, certain tendencies and even logic operate in relation to employment standards. The abovementioned trend reflects causal links between mobility, knowledge of the language (better adaptation) and better work conditions. This could explain the tapestry of circumstances when some categories are better-off than others. Illegal immigrants are possibly capable of improving their employment conditions in British society, but only over a considerable period of time.

This gradual improvement, however, has its limits, especially in connection with the generally low mobility of undocumented migrants and the unenforceable nature of contractual obligations. This 'ceiling' for the employment standards of immigrants is particularly notable in the areas of health and safety and protection from being fired. For instance, in the current situation, nothing precludes tragedies from occurring similar to the one in Morecambe Bay[136] and, in the same vein, the on-site injuries will

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[132] Jordan and Duvell, supra, n. 5, p. 135.
[133] The DTI Report, supra, n. 67.
[134] In the earlier studies on irregular migration, it was noted that there was a trend of concealing financial information for avoiding payment of taxes and social welfare deduction, in Ardill, supra, n. 22, p. 49.
[135] Ardill, ibid., pp. 50-59.
[136] Norfolk, A., Jenkins, R. and McGrory, D. "19 Dead, the Cost of Cockles: Chinese Immigrants in Grip of Gangs Running Lucrative Trade", *The Times*, Saturday, 7th February 2004, p. 1; Kennedy, D.,

never be compensated for by the employer. In this light, the major challenge to labour relations in the United Kingdom is posed, not by the very nature of migrant labour, but by the casual types of undocumented workers' employment, where this environment amounts to exploitation, and where even employers with genuine intentions learn quickly how to benefit from the undocumented labour force. Therefore, a realistic policy should probably aim at reducing 'casualisation' of employment, rather than eliminating the presence of migrant workers themselves. An additional limitation on possibilities for an improvement of the position of undocumented workers is posed by a lack of regularisation opportunities within the country referred to below.

The question of whether there can be any recourse to judicial protection in such conditions of employment can hardly receive a positive answer, for two reasons: first of all, it is clear from the overall policy that the legality of such an employment contract is impossible. Secondly, as a result of this, the employment tribunals can refuse to consider law suits against employers, although the trade unions may undertake representation of irregular migrants in courts.[137] It is highly likely that when undocumented migrant workers complain about violations of basic employment rights, administrative mechanisms punishing irregular workers could be invoked as a reprisal. The question of whether or not illegal immigrants could exercise judicial protection *post facto* while being outside the country, probably receives a negative answer as well. There are no precedents for such judicial enforcement of contractual terms, and the vulnerable position of undocumented workers in the UK seriously contradicts the UN Migrant Workers Convention conferring certain rights upon irregular migrants in most essential areas of life, including that of labour relations, considering the UK has not signed or ratified the instrument. At the same time, the system of judicial recourse while people are either inside the county, or even after departure, could both improve the position of migrant workers, and eliminate illicit employment practices.

2.3.4 Summary

The system of economic migration available in the UK has been in a significant crisis, since the available immigration and internal control mechanisms neither responded properly to economic demands nor managed to create administrative obstacles for the in-country existence of irregular migrants. Even despite the prospects

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Norfolk, A. and August, O. "Migrants at the Mercy of Gangs and the Tide", *The Times*, the same issue, p. 11.

[137] Trade Union Congress paper, supra, n. 13, p. 19.

of an extension of economic migration opportunities for the unskilled labour force, these are not likely to result in a great reduction of illegal employment, because of the powerful stratum of the underground economy present in the UK.

Therefore, the circumstances of undocumented workers' employment, characterised by a high degree of 'casualisation' which undermines their position and encourages the operation of a black market, need to be improved. The vulnerability of irregular migrants demonstrated and referred to above, i.e. created by the absolute unenforceability of their employment contracts, should be addressed by the legal system. The extension of at least a few employment guarantees to irregular migrants could respond to the needs of public policy, including the improvement of enforcement. In fact, along with the more active deployment of employer's sanctions, a humanitarian view of the problem could lead to the greater effectiveness of the policy in question.

Currently, when British law enforcement lacks the necessary robustness in dealing with various features of undocumented work, including unscrupulous subcontracting, this leads to a demoralisation in employment relations in the country. Nevertheless, the problem which arises in relation to aspects of the treatment of the available irregular labour force, is that all the necessary solutions probably require titanic public efforts in rethinking all aspects of current policy in the United Kingdom.

2.4 Issues on Immigrants' Residence, and Internal Control Relating to Their Irregularity

2.4.1 Residential Rules and Policy in Relation to Illegal Immigrants

Residence regimes for foreigners in the United Kingdom have not been so rigorously spelt out or stringently enforced as in other countries. Britain has been a relatively liberal state from the point of view of internal control or residence mechanisms deployed to manage the movement and life of immigrants within the state. Traditionally, personal demands for social welfare or public services were met by individuals without conducting a strict identity scrutiny, which meant that residence procedures were running on quite a discretionary basis from the point of view of the welfare agencies. As Jordan and Duvell point out in relation to irregular migrants' position:

> "...they [the interviewed illegal immigrants] were not required to carry identity documents, or to register where they were living; in practice, they were

> not asked to produce work permits or permissions to get work...there were very few internal controls, since the officials who were supposed to enforce the few rules that did apply to this system were so thin on the ground, and the police were so willing to turn a blind eye to their presence and their activities."[138]

Irregular migrants tend to survive without insurmountable problems within British society, possibly because a low priority is given to curbing illegal immigration, considering that the primary goal of the Home Office has recently been the improvement of the asylum system.[139] At the same time, during the last few years, there have been shifts in policy-making, with an accumulation of efforts by the Home Office in tracking illegal immigrants, and the development of a new agenda for the functioning of internal control regimes, as will be discussed further in this section.

The main immigration control mechanism deployed in relation to the residence status of foreigners has been a limited leave to enter and remain within the territory of the UK, as envisaged by section 3 of the 1971 Immigration Act. As argued above, such a leave is subject to conditions and limitations attached by immigration officers on entry or upon in-country application for residence status. In addition to the entry stage, a relevant mechanism of immigration control is deployed at the stage of reapplications for prolongation of permission to remain in the UK—the procedure envisaged by section 3 (3) of the Act. Leave to enter or remain serves as permission for residence, which may be varied or refused (curtailed), also in accordance with the Immigration Rules (Rules 322-323, HC 395), where a list of grounds exist on which changes in the position of immigrants may take place. Specifically, it is the failure to observe any limitation or condition of stay mentioned in the Act or Rules that serves as possible grounds for refusal (curtailment) of the leave. Another administrative mechanism deployed for residence control over foreign nationals from the designated states concerns the requirements of their registration with the police in accordance with section 3(c)(iii) of the 1971 Immigration Act.[140] This registration tackles personal and residential details concerning a person.

There are probably no other available provisions of residential control, which impose additional obligations on foreigners in the United Kingdom. The meaning of immigration law in this respect is, rather, to manifest obligations or limitations on the

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[138] Jordan and Duvell, supra, n. 5, p. 171.
[139] Ibid.
[140] In addition, the process of registration is regulated by Immigration (Registration with Police) Regulations 1972 (SI 1972/1758).

immigrants' status. However, as a matter of practice, there still seems to be substantial scope for personal intentions to conform with the requirements of the immigration law, since the British system of immigration control requires subjective personal discretion to be voluntarily synchronised with the objective legal rules. This is a barely achievable task in the sphere of immigration, where personal desires of immigrants to improve their circumstances lead them to ignore their obligations. Both the administrative measures involved in establishing the residential status of immigrants, unless such measures are strengthened by residential control, are highly unlikely to tackle preventively the issue of irregular migration and, in themselves, hardly represent measures of internal residence control.

2.4.2 Issues on Internal Control

Currently, elements of internal control in the UK operate on the basis of actual enforcement activities, by means of *post facto* deterrence of irregular migrants from their access to employment and most essential public services. In light of the available immigration and residential status regulations referred to above, there is hardly any possibility for preventive control. There are three governmental bodies that facilitate detection and enforcement activities in relation to residence or other activities of undocumented migrants, those being the Immigration Service Enforcement Directorate (ISED), the Benefit Agency Fraud Investigation Service (BABFIS) and the police. These agencies, despite occasional joint activities, have their own priorities, where the leading role still belongs to the Immigration Service.[141]

The main enforcement agency, ISED, is significantly reliant on assistance from the other aforementioned organisations, and especially on the police in detecting and detaining immigration offenders. Co-operation of the three primary enforcement authorities led at one point to a facilitation of co-ordinated raids upon places of employment or residence, although these were not always well organised and neither did they bring about substantive results.[142] These joint operations were finally abandoned because of the fragility of concerted actions, resulting from a lack of common priorities.[143] This is despite the fact that joint operations conducted in relation to the places of employment of illegal immigrants can be quite productive[144] and result

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[141] Jordan and Duvell, supra, n. 5, p. 171.
[142] Ibid., pp. 185-187.
[143] Ibid., p. 191.
[144] Owers, A. "The Age of Internal Controls?" In Spencer S. (ed.). *Strangers and Citizens/ A Positive Approach to Migrants and Refugees*, Rivers Oram Press, London, 1994, p. 269.

in the detection and removal of offenders.[145] Most raids attempting to identify illegal immigrants appeared as a result of denunciations coming to the ISED from members of the ethnic minority community or the irregular migrants themselves, with the proportion of such denunciations comprising about 70 per cent of the total number.[146] In response to these anonymous tip-offs, the enforcement bodies begin to act only upon receiving information about some particular violators of immigration regimes, although usually after each raid some other offenders are also revealed.[147]

A particularly topical matter in relation to internal control relates to the mechanisms of identification of illegal migrants outside the raids upon work places or houses. Considering that British society has longstanding liberal traditions, random identity checking, status verification and residential registration are non-existent. At the same time, racial and ethnic minorities are infrequently checked and questioned by police and therefore such measures bring about more penalisation in this regard. Indeed, the adverse sides of intensification of internal control policies should be avoided as much as possible.

Meanwhile, however, as Jordan and Duvell point out, the chances of illegal immigrants being stopped and identified are very slim. According to one of the immigration inspectors in the study:

> "...we are not allowed to go and stop people on the streets and say, 'Excuse me, are you an illegal entrant?' or whatever it is; we can only act on research and act on specific information. The government will not let us, eh, stop people in the street and ask for papers, I think in the continental system they can do that, because they have internal controls, people should have identity cards with some numbers..."[148]

Quite illustrative of this is an example again produced by Jordan and Duvell, where an undocumented migrant worker, although detected and identified as such by police, was released, not least because of the reluctance of police to act in such a case.[149] However liberal the regimes governing residence are, though, illegality is nevertheless a precarious form of living, offering little if any substantive guarantees against possible abuses or hardships. In this respect, opportunities for legalisation (regularisation) of irregular migrants are rather scarce considering current policies. Such regularisation is thought to be possible, but the rate of success is extremely low in these cases. For

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[145] Ibid.
[146] Jordan and Duvell, supra, n. 5, p. 178.
[147] Ibid., p. 179.
[148] Ibid., p. 194.
[149] Ibid., p. 185.

example, a few per cent would be the only possible figure when detected irregular migrants apply for asylum. The recent Home Office proposals for a so-called 'earned liberalisation' represent a positive step forward, thus extending possibilities for irregular migrants to become legalised.[150] At the same time, the success of these measures will all depend on the actions of the government and its good will. In this regard, it would be worth announcing a moratorium on the stringent enforcement against irregular migrants during the whole period of legalisation. This time, however, rumours were spread among the immigrant communities about a well organised enforcement operation against illegal workers at the top hotels before the state visit of President Bush, which coincided with the announced liberalisation and resulted in the removal of hundreds of people. Many believe that this is yet another 'devious stratagem to smoke them out'.[151]

Other than that, a difficult, but plausible solution for illegal immigrants for a long time has been to stay in Britain for 14 years in order to claim permanent residence status.[152] Originally, this was fulfilled as a concession by the Home Office, and it is only lately that this has been inserted into the Immigration Rules (paragraph 276 (A-D), thus bestowing permanent residence upon illegal entrants if they stay in the country for fourteen years.[153] The human cost for such a solution, especially considering the limitations on detected overstayers or illegal entrants, may be enormous, as it impairs prospects for a legal and comfortable life with standard guarantees of employment or social welfare.

Meanwhile, communication with state officials or bodies within the administrative system albeit unconnected with the Home Office, contributes to substantial anxieties on the part of immigrants in the UK. Collaboration between various government departments becomes increasingly important for the lives of illegal immigrants. In this regard, the government has recently introduced substantial alterations to the operation of many public or private institutions in attempting to counteract possible irregular

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[150] Travis, A. "Illegal Workers May Be Allowed to Stay in the UK: Blunkett Asks Hundreds of Thousands to Own Up", *The Guardian*, 14th of November 2003, p. 1.

[151] I interviewed some undocumented workers who had a "lucky escape" from the premises of a top hotel after the beginning of the Immigration Service enforcement operation.

[152] This is based on a number of judicial cases and Ministerial Statements from the Home Office. The cases are *R v. Secretary of State, Ex p. Musah,* [1995] Imm. A.R. and *Ofori v. Secretary of State* [1995] Imm. A.R. 32; Statements by the Minister of State, the latest dated March 29, 1993 in Hansard, H.C. Vol. 222, cols. 101-102.

[153] This rule, however, has a limited use, since overstayers or illegal entrants who were detected, and against whom the notice of intention to deport or removal directions were issued, are excluded from enjoyment of this possibility.

migrants. For example, in the taxation sphere, although information in the possession of Inland Revenue used to be treated in confidence in accordance with the Taxes Management Act of 1970,[154] section 130 of the 2002 Nationality, Immigration and Asylum Act has given authority to the Inland Revenue to supply the Home Office with the relevant information if there are presumptions of illegality in relation to the foreigner. The Registrars of Births, Deaths and Marriages are duty-bound to report suspicious marriages to the Home Office by virtue of section 24 of the 1999 Immigration and Asylum Act.

Additionally, in accordance with section 134 of the 2002 Act, there is a duty imposed on employers to disclose information about their employees if the Home Office suspects any of a whole range of immigration offences committed by immigrants, such as deception, overstaying, or illegal entry, as well as fraud in claiming asylum-seeker's support.[155] Information on fraud against the asylum support system must also be provided by financial institutions, in accordance with section 135 of the 1999 Act. These recently introduced draconian powers may shape the system of internal control across the whole spectrum of immigrants' activities in the country.

The National Insurance system poses some obstacles for illegal migrants too, as it is often a preliminary stage for access to the welfare state[156] or to employment. Currently, the Benefit Agency requires identity checks before granting a National Insurance Number, where the valid passport may be a prerequisite for its issuance.[157] However, limited availability of National Insurance numbers does not mean total lack of access to acquiring them on the part of illegal immigrants. First of all, the Benefit Agency itself has recognised that they have lost control over their issuance. Secondly, illegal immigrants borrow, or even buy these, numbers from others for the sake of applying for employment.[158] According to Jordan and Duvell, it costs about £80 to borrow, and £250 to buy, National Insurance Numbers on the black market.[159] Probably because of the loss of control over NI numbers, the Home Office does not refer to them as a

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[154] "Immigrants and the Welfare State", Chapeltown Citizens Bureau/ Harehills and Chapeltown Law Centre, London, 1983.
[155] Criteria for fraud in relation to asylums seekers' support concerns section 105 (1)(a), (b) or (c) of the 1999 Act and section 106 (1)(a), (b) or (c).
[156] Leaflet GL31, Department of Work and Pensions, 31 October 2001.
[157] Ibid.
[158] Jordan and Duvell, supra, n. 5, pp. 125-126.
[159] Ibid.

primary 'indicator of entitlement to work',[160] while the proposed 2003 Immigration Order, referred to above, lists the documents containing the NI number only as secondary sources[161] of proving the entitlement to work, i.e. the document which should be produced only in addition to other primary identification documents.

In light of insufficient and unbalanced regulation of residence and internal control, the government proposes considerable changes to their administration, mainly by undertaking to introduce secure identification documents, which would be designed to endorse checks on the status of individuals when they consider entering employment relationships, or claim access to public funds or services.[162] In this regard, the new IDs are proposed as a measure of deterrence for all irregular migrants in many transactions involving provision of welfare or public services, but this measure could potentially also deprive illegal migrants of basic human standards, for example, in the sphere of medical care. Observance of very basic welfare guarantees in relation to undocumented workers could possibly not only enhance humanitarian standards, but also improve the success of enforcement measures.

In this regard, it is essential to introduce reasonable pressures on irregular migrants, without depriving them of humanitarian basic standards. Of course, deterrence policies should be supported by the enforcement efforts of the British Immigration Service. However, currently, it has also proved to be institutionally flawed, and therefore incapable of detecting a great number of irregular migrants, so long as the agency does not have links to the local community structure of British society.

2.5 Irregular Migrants' Recourse to Public Funds and the Welfare State

As mentioned above, all categories of visitors, students and most workers have a "no recourse to public funds" condition attached to the leave to enter or remain, initially imposed by the immigration officer at the port of entry. Restriction on the access to public funds is authorised by section 3(c)(ii) of the 1971 Immigration Act, whereby breach of this condition is an offence and makes an individual liable to be removed by the Home Office in accordance with section 10 of the 1999 Act. The Immigration

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[160] Home Office, "Prevention of Illegal Working: Consultation Document", para. 31; in Ryan, supra, n. 80, p. 141.
[161] Article 4(2)(b).
[162] Home Office Press Release, "David Blunkett: National ID Card Scheme To Be Introduced", Reference No. 307/2003, 11th of November 2003.

Rules impose requirements on some individuals to reveal at the entry clearance stage that they are capable of maintaining and accommodating themselves without recourse to public funds, where this concerns visitors, students, some categories of employees and family reunion cases.[163] However, these requirements do not refer to refugees or their dependants, transit visitors, returning students and a few other groups.

The provisions of immigration law regulating recourse to public funds concern two of the most common types of situations, when:

- Foreign nationals are legally in the country and access the welfare state despite the prohibition (condition of their entry), thus making themselves illegal in light of immigration law.
- Foreigners are illegally in the country, but make claims for public funds or services.

The British immigration law does not distinguish between these two types, as far as sanctions are concerned, but the problem is significant, and closely concerns illegal entrants, overstayers and people working in breach of conditions. A topical issue concerns the situation where irregular migrants residing for a long time in the UK become most vulnerable, and at some point have to find access to public services or welfare, which is extremely limited, unless they fraudulently obtain a National Insurance Number. However, in view of the public funds definition provided below, the restriction on immigrants' entitlements refers primarily to social welfare benefits and only slightly to public services, while access to the latter is rather left to the administrative discretion of the Government agencies and local authorities which provide them.

Indeed, the Asylum and Immigration Act 1999 (section 115), and later the Statement of Changes in Immigration Rules (HC 395), are the key legal documents establishing a definition for the term 'public funds'. According to these legal regulations, the list of 'public funds' restricted to those foreigners on whom the limitations are imposed, include:

- Housing;
- Certain types of attendance allowance, severe disability allowance, invalid care allowance and disability living allowance, income support, family credit, council tax benefit, disability working allowance, housing and child benefits;
- Income-based jobseeker's allowance.

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[163] In Macdonald et al, supra, n. 23, pp. 586-587 of 1995 ed.

However, the immigration law has been ambiguous in relation to the issue of providing foreigners with welfare support. On the one hand, public funds are *not* available to persons subject to immigration control, where the 1999 Immigration and Asylum Act relates this restriction to the following individuals: non-EEA nationals requiring leave to enter, but not gaining it, non-EEA nationals subject to the conditions of immigration law limiting their entitlements to social welfare, persons holding leave as a result of a maintenance undertaking, and finally those under statutory leave, pending appeal, in accordance with the 1999 Act.[164] On the other hand, section 95 envisages the possibility for provision of welfare support to people subject to immigration control, but excludes many categories of individuals arriving into the country, stipulating that the Secretary of State will have discretion in granting such assistance on an exceptional basis, thus rendering welfare support a privilege.[165]

Thus, it is only a limited group of persons settled in the United Kingdom who are undisputedly eligible for benefits, where they need to qualify on the basis of their previous status during the entire period of their stay in the country, such as: continuous legal residence in the UK or, after being illegal, subsequent re-entry on lawful grounds, or a grant of leave to remain and, finally, ordinary residence.

In addition to restrictions on financial benefits endorsed by the Act, section 116 of the Immigration and Asylum Act provides for constraints on eligibility for public housing support. The section, inter alia, established that groups excluded from access to benefits by section 115 have no entitlements to housing solely for the reason of being destitute, although previous destitution ordinarily serves as a precondition for the provision of public housing. Accordingly, section 116 changed provision 21 of the National Assistance Act 1948, and therefore immigrants, including asylum seekers, are meant to have no recourse to public housing.

Even prior to adoption of the 1999 Act, local authorities were empowered to make enquiries as to the immigration status of applicants for housing, and to deem an immigrant illegal for the purposes of the Housing Act of 1985, as was established in the case of *Regina v. Secretary of State for the Environment, ex parte Tower Hamlets*.[166] Furthermore, in the same judicial decision, the Court of Appeal endorsed the principles drawn in the earlier case of *Regina v. Hillingdon London Borough*

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[164] Section 115 (9), paragraphs from (a) to (d).
[165] Billings, P. "Alienating Asylum Seekers" 9(2002) *Journal of Social Security Law*, p. 126.
[166] *Regina v. Secretary of State for the Environment, ex parte Tower Hamlets London Borough Council*; [1993] Q.B. 632.

Council, ex parte Steering,[167] where Lord Denning expressed an opinion that local housing authorities had the right to turn such applicants down, whenever detecting immigrants' irregularity.[168] In the aftermath of the 1999 Act, however, the issue arose in the cases of *R v. Wandsworth L.B.C.*, ex parte "O" [169] and *Bikha v. Leicester C.C. & Secretary of State for the Home Department* (2000) and the trend of restrictions was partially reversed. In the latter decision, the appellants, being destitute illegal immigrants, fell ill,[170] but the local authorities refused their claims for housing assistance. The Court of Appeal, declaring its decision in this case, confirmed that illegality per se should not bar applicants from support. There, the Court denounced sufficient possibility for local authorities to conduct a balancing exercise of considering irregularity against humanitarian reasons and, as a result, 'to starve immigrants out of the country'.[171]

In *R v. Wandsworth L.B.C., ex parte "O"*, the court drew a distinction between the situation where the need for assistance was purely a result of destitution, and when demand for welfare was a result of other compelling factors. In this respect, Simon Brown L.J. stated:

> "If an immigrant, as well as being destitute, is old, ill or disabled, he is likely to be yet more vulnerable and less well able to survive than if he were merely destitute… If there to be immigrant beggars on our streets, then let them at least not be old, ill or disabled."[172](sic)

What impairs these principles drawn up by the judiciary is that, by virtue of sections 116 through to section 122, the local councils ceased to be responsible for provision of accommodation to all destitute immigrants, including asylum seekers.

Further, the approach endorsed by the liberal judicial decisions was subjected to the recent legislation changes introduced by section 54 of the 2002 Nationality, Immigration and Asylum Act, removing any social support from overstayers and failed asylum claimants. This new principle revoked the provisions of section 21 of the National Assistance Act of 1948 and section 17 of the Children Act of 1989 in relation to these categories. Therefore, the effect of the abovementioned court decisions was nullified by the 2002 Act, and these categories cannot enjoy the right to housing.

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[167] *Regina v. Hillingdon London Borough Council, ex parte Steering*; [1980] 1 W.L.R. 1425.
[168] Ibid., at p.1434.
[169] [2001] 1 W.L.R. 2539.
[170] Digest, (2000) *Journal of Housing Law*, D61-D62.
[171] Ibid.

The list of public funds introduced in the immigration law tackles only a few of the most essential benefits. However, public services in the UK often introduce their own regulations and define entitlements for their own institutional purposes, in addition to the immigration law. These issues become more complicated, as the *de jure* scope of welfare support inaccessible to irregular migrants may thus be extended. But, *de facto*, the system functions without so stringent a control.

For instance, health care, despite the recent tightening of identity checks, may not be interpreted as totally prohibiting any medical assistance to illegal migrants. The NHS Regulations[173] define categories of individuals eligible for free health care, which include those people granted ordinary residence within 12 months, and even those holding the citizenship of particular countries which have concluded reciprocal agreements with the UK.

Nevertheless, irregular migrants who have been in the country long enough may hypothetically be treated for free. Doctors are not precluded from taking such patients, especially considering the commitments of the NHS staff to non-discriminatory practices.[174] Even though occasional document checks may limit this possibility, it does not mean that in the case of the NHS any exchange of information is possible with immigration authorities, due to the requirements associated with professional ethics. Overall, the sociological study on illegal immigration in the UK produced by Jordan and Duvell revealed that very few irregular migrants indeed had trouble receiving emergency medical aid.[175] At the same time, aforementioned section 54 of the 2002 Act was invoked by social services on some occasions to deny palliative care necessary for continuing treatment after discharge from hospitals.[176]

State education is not considered by immigration law to have recourse to public funds, as was established in the case of *R v. Immigration Tribunal, ex parte Ved* (Times, May 14, 1981). However, once again, in the case of grants or financial assistance, overstayers or clandestine entrants are at risk of losing this opportunity, due to their inability to obtain legal grounds for staying in the UK. Likewise, access to state schools may depend on the immigration status of parents, due to de facto document checks by the school authorities. Education, however, still remains the sphere with some discretionary possibilities on behalf of administrators.

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[172] Supra, n. 169, para. 2548.
[173] NHS (Charges to Overseas Visitors) Regulations No. 306, dated 5th of January 1989.
[174] Jordan and Duvell, supra, n. 5, p. 200.
[175] Ibid., p. 200.

As for National Insurance-based benefits, these may be regarded as public funds (most of them are on the list of the abovementioned instruments). However, restrictions depend on the degree of flexibility in attitude of the Home Office to certain types of welfare assistance. The Home Office is primarily concerned with contributory benefits rather than means-tested ones.[177] As for legal aid as an issue of public funds, it mostly arises in respect of asylum claimants and works as an instrument of immigration policy. Indeed, recently the government proposed new limits to the legal aid provision for asylum seekers down to the maximum of 5 hours for the initial determination process and 4 hours for preparation of appeal.[178] It is in no way illegal to have recourse to legal aid, but the policy of restrictions affects the justice[179] and makes asylum determination precarious which leads to different modes of irregularity.

Recourse to public funds, when in most aforementioned circumstances it was illegal, is a criminal offence, leading to removal from the country. Theoretically, it is possible to argue that overstayers, clandestine entrants and undocumented workers commit additional offences by claiming public funds, since no valid clearance initially exists in their cases, but immigration law makes no distinction between various degrees of violating immigration law in this regard. The current tendency of imposing stringent restrictions on the immigrant population means that public funds may be acquired only by committing document fraud, which could be regarded as an offence quite distinct from the notions of immigration law, being rather within the compound of pure criminal law.

Despite being part of a very sensitive area, access to the most essential public funds and public services should be available to the most desperate irregular migrants. Although there is a tendency for denouncing possibilities of any access to public services and support for immigrants, limited access would respond to genuine public policy needs. Presently, when foreigners' irregularity very commonly occurs in employment practices and the state fails to tackle the issue successfully, it is essential not to deprive them, deliberately at least, of a few de facto possibilities on the level of

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[176] JCWI bulletin, supra, n. 40, p. 2.
[177] "Immigrants and the Welfare State", supra, n. 154.
[178] Legal Services Commission, "Asylum Legal Aid: The Way Forward", 19 of December 2003, available at the site: http://legalservices.gov.uk ; in Matsui, H. "Legal Support for Asylum Seekers in the UK: Quality. Quantity and Opportunity Under the Current System", unpublished SOAS dissertation for a postgraduate diploma, 2004, pp. 15-16.
[179] Matsui, ibid.

basic needs, such as emergency medical care, housing for the sick or disabled, and school education to the immigrants' children.

2.6 *Legal Position of Asylum Seekers and Refugees in Relation to Their Possible Illegality in the United Kingdom*

Asylum and refugee policy has been recognised in immigration law and practice as one of the central issues interconnected with irregular migration. As the Home Office once stated:

> "…economic migrants will exploit whatever route offers the best chance of entering or remaining within the UK. That might mean use of fraudulent documentation, entering into a sham marriage or, particularly in recent years, abuse of asylum process…. The government's aim is to create an efficient asylum system that helps genuine asylum seekers and deters abusive claimants." [180]

As far as policy measures are concerned, government officials have been emphasising the need for sifting out bogus asylum seekers who abuse the asylum process. Throughout the 1990s the asylum problem was serious in the context of the UK, with the numbers of asylum seekers drastically increasing over the years[181] and only recently, the immigration system experienced a fall in the number of applications for asylum.[182] Within the structure of asylum flows, there are definite changes as well, due to the fact of EU enlargement[183]and presence of British forces in Iraq,[184] although in the latter case the tendency of decrease in application numbers could be short-term, considering the fragile peace existing in the country.

The UK is a Member State to the 1951 Refugee Convention establishing the refugee definition in its Article 1A (2), and determining qualification criteria for refugee status.[185] The Convention definition plays a central part in the asylum application

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[180] Jordan and Duvell, supra, n. 5, p. 79.

[181] Home Office, "Asylum Statistics: 4th Quarter 2002 United Kingdom", Home Office RDSD, London, table 1; in Stevens, D. "UK Asylum Law and Policy: Historical and Contemporary Perspectives", Sweet & Maxwell, London, 2004, paragraph 7.28 (p. 295). Statistics reveals that in 2001 there were 71,365 applications, and, in 2002, 85,865 applications were received by the Home Office.

[182] Indeed, as the statistics indicate, numbers of asylum applications fell from 84,130 (excluding dependants) in 2002 to 49,370 (excluding dependants) in 2003; in Home Office, "Asylum Statistics: 4th Quarter 2003 United Kingdom", Home Office RDSD, London, table 3b.

[183] Asylum statistics indicated the fall in numbers of asylum applications (comparison are drawn between 2002 and 2003) from Polish (90%) and Czech (95%) nationals and perhaps the same tendency exists for the Baltic states (under the category of 'Europe Other' in the asylum statistics); in Home Office, ibid.

[184] The fall in a number of applications was 72%; in Home Office, ibid.

[185] The refugee status is based on the following criteria: well-founded fear of prosecution on the basis of race, religion, nationality, membership of a particular social group or political opinion; presence outside

process, since its main guidelines on asylum process are enshrined in the UK policy instruments, such as Asylum Policy Instructions and Immigration Rules. [186] However, it is not the entire immigration law regulation of asylum issues that would be relevant for tackling illegal immigration, but only those areas of concern that are especially sensitive to the position of asylum seekers. The area where asylum claimants could be at variance with their immigration status under some circumstances extends to the following situations, which immigration law has been regulating:

- Illegal entry for the purpose of subsequently acquiring asylum status, or an application submitted by persons who have been detected violating immigration law inside the country;
- Any violation of immigration or asylum regimes by individuals whose asylum claims were under scrutiny at that moment, including either bona fide circumstances causing this violation, or a situation where immigrants deliberately avail themselves of their admission into the country by subsequent elusion of Home Office control.
- Rejection of asylum claims.

The whole sketch of possible circumstances leading to the illegal presence or behaviour of asylum seekers in the United Kingdom can only be approximate, but reflects deep structural problems concerning not only bogus asylum claimants, but also contributing to the illegality of genuine cases in Britain.[187] Most of these issues are related to the treatment of asylum seekers during the application process for refugee status, and to the spirit of government actions and decisions in each case. Because asylum seeking has become a very widespread entry type over the last ten years, government has modified procedures, quintessentialising them to a fast track process demanding fewer resources or efforts, and adopting both the application review and the appeal process for this specific function.

2.6.1 The Asylum Application Process

The first category of asylum claims in Britain represents circumstances when a person arrives at the port of entry and asks for permission to stay in Britain, which is

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the country of nationality; unwillingness or inability to return to the home country or use its protection, due to fear of prosecution; the best summary is given in Stevens, supra, n. 180, at paragraph 7.2 (p. 264).

[186] Home Office, Asylum Policy Instructions, "Deciding Claims: Assessing the Claim, Pt 1", paragraph 3; Statement of Changes in Immigration Rules, HC 395, paragraph 334; in Stevens, ibid.

[187] The best account of asylum seekers problems is given by Stevens, supra, n. 181 and Shah, P. "Refugees, Race and the Legal Concept of Asylum in Britain", Cavendish Publishing, London, 2000, Chapter 8.

often expressed verbally, and therefore may be regarded as an asylum claim. Then the person in question is subjected to screening, including identity checking, fingerprinting and an interview about previous travel arrangements for arrival in Britain, with requirement to fill in formal written application forms.[188] After the initial stages, the immigration officer may authorise one of the following actions in respect of the applicant: (1) either detaining an applicant in accordance with the 1971 Act,[189] especially if there is a presumption that the claimant has arrived from a safe country, or (2) granting to him or her temporary admission[190] into the United Kingdom. Immigration Officers (Chief Immigration Officers) have been given sufficient powers (administrative discretion) to decide on the necessity of detaining the asylum seeker on the grounds of information pertaining to his or her identity.[191] In addition to paragraph 16 of Schedule 2 of the 1971 Act, detention may also be authorised by the Immigration Officer in accordance with section 46 of the 1999 Act, something which is possible on specific grounds of public safety, i.e. when an asylum seeker is mentally disturbed or may commit a criminal offence.[192] The majority of those detained are port applicants, not least because immigration officers have considerable discretion in handling these cases[193]and decisions to detain are not infrequently based on very personal and subjective criteria deployed by immigration officers.[194]

The in-country asylum applications are grounded on slightly different rules, since the applicant may not be detained unless a serious suspicion arises as to illegal entry by means of deception, especially in situations where asylum claims follow the entry on various grounds. As for the asylum seekers who arrive clandestinely in the country, first international law, and then domestic legal practice in the UK, precludes treating them as illegal entrants. Convention Article 31(1) prohibits penalties being imposed on the refugees if they arrive without proper passports or with forged documents, so long as they report to the immigration officer 'promptly' and reveal their intention to claim

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[188] Description of the asylum application process is given in Stevens, ibid., paragraphs 6.8 and 6.9 and Macdonald et al, supra, n. 23, pp. 534-535 (1995 ed.).
[189] Immigration Act 1971, Schedule 2 , paragraph 16; in Macdonald et al, ibid.
[190] In accordance with the temporary admission powers given to an immigration officer by Schedule 2, paragraph 21; ibid.
[191] API Aug/00, Chapter 1, section 1(4); also in Webber L. "Detention of Asylum Seekers on Arrival in the UK/ Part 1: Overview of Decision—Making Process", 15(3) (2001) *Immigration, Asylum and Nationality Law*, p. 151.
[192] Webber, ibid., p. 153.
[193] This is indirectly supported by Stevens, supra, n. 181, at paragraph 6.15 (p. 242).
[194] Webber, supra, n. 191.

asylum in the UK, as was supported in the cases of *R v. Nailie and Kanesarajah*[195] and *Nzamba-Liloneo v. Secretary of State for the Home Department*[196]. However, the fact that illegal entry is a much more composite notion than can be applied to potential asylum seekers has been supported by the judiciary in other cases.

In the case of *R v. An Immigration Officer, ex parte Uluyol*,[197] two asylum applicants, Turkish Kurds, arrived at a place undesignated for entry, and claimed asylum from what appeared to be customs officers. The port had no immigration officers to deal with the asylum seekers, but applicants were served with illegal entry notices, which could disadvantage them at an asylum support stage. The judge confirmed the view that these individuals were illegal entrants, although he quashed the decision to serve the notices due to the fact that the asylum seekers in this case were not interviewed or given an opportunity to explain the purpose of their arrival in the United Kingdom.

Generally, immigration authorities in the UK treat every individual applying for asylum inside the country, i.e. after entry on different grounds, with the presumption and suspicion that the applications are bogus. During the later stages of residence in the United Kingdom, this method of application prescribes a different treatment for these persons on their claims for asylum welfare support.

2.6.2 Residence and employment in the country

In comparison with the entry stage, residence of asylum seekers during the application determination period has become an issue of even greater importance, since it is precisely during this period that asylum seekers are subjected to such treatment and conditions that make their life difficult, or render them illegal before immigration law. In this regard, those asylum seekers granted temporary admission may be referred to the National Asylum Support Service if they turn out to be destitute. They are subject to restriction on their residence[198] and certain social entitlements, all of which have been established by Schedule 2 of the 1971 Immigration Act and the Asylum Support Regulations of 2000. As for employment of asylum claimants during the whole period of residence, the Government no longer grants employment permissions, reflecting the government's tactics to deter

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[195] [1993] A.C. 674.
[196] [1993] Imm. A.R. 225.
[197] 3 of November 2000, CO/1960/00.
[198] Immigration Act 1971, Sch. 2, paragraph 21 (2B)ff.

immigrants and to speed up the asylum determination process.[199] The British government was not alone in introducing employment restrictions on asylum seekers, since this was the practice widespread all over Europe, but there is no indication that this in itself had considerable and direct impact on the influx of asylum seekers.[200]

Earlier on, asylum seekers could be granted permission to be employed after six months of residence, but now asylum seekers' employment is prohibited unless the case is not resolved within a year. The policy patterns restricting employment of asylum claimants is very likely to have an effect on the legality of their stay in Britain, because the administrative constraints are very likely to be infringed by the claimants. Indeed, research suggests that asylum seekers prefer employment during residence and the asylum determination process;[201] in fact, the total ban on asylum claimants' employment makes them rely on the asylum support system, which is not always generous. Overall, there are two situations involving illegality, (1) work by asylum seekers deprived of any support or (2) employment by the applicants for asylum receiving assistance, i.e. in breach of its provision conditions. In light of the employment prohibition imposed on asylum seekers, there are reasons to believe that, considering the existing system, asylum seekers will inevitably perform certain casual work activities, with or without support.[202]

2.6.3 Welfare Support for the Asylum Seekers

The immensely important issue in connection with the illegality of asylum seekers in Britain may be found within the realm of problems concerning welfare assistance for this category of persons. In this regard, a legitimate presumption may be invoked that a causal link continues to exist between inadequate support and illegality. This happens in addition to other factors when asylum seekers who enjoy reasonable welfare support may deliberately gain employment, or commit other violations of restrictions governing their welfare.

Initially, the British approach to asylum was far different from the one existing today, since asylum claimants were not prevented from taking either contributory or non-contributory benefits, due to British obligations under the 1951 Refugee

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[199] Home Office Press Release, "Faster Asylum Decisions—Historical Employment Concession Ended", 23 of July 2002; also in Stevens, supra, n. 180, paragraph 6.26 (pp 259-260).
[200] Zetter, R., Griffiths, D., Ferretti, S. and Pearl, M. "An Assessment of the Impact of Asylum Policies in Europe 1999-2000", Home Office Research Study No. 259, Home Office RDSD, June 2003, p. 49.
[201] Robinson V. and Segrott, J. "Understanding the Decision Making of Asylum Seekers", Home Office Research Study No. 243, Home Office RDSD, London, July 2002, p. 53; in Stevens, supra, n. 181, paragraph 6.26 (pp. 259-260).

Convention. However, with the numbers of asylum claimants growing during the last ten years, the problem arose of accommodating and supporting such claims.[203] The government sought ways to discourage abuse of the asylum process, viewing the continuing generous support as a possible pull factor for refugee flows.[204] Although the reference to social welfare as a pull factor has been well accepted in Europe and asylum deterrence policies included restrictions on the welfare provision across the continent, the effects of such policies have been variable.[205] Schuster in this respect notes a difference between Germany and France, both states pursuing restrictive asylum support policies, where in the former case asylum seekers' numbers have continued to increase and in the latter one decreased.[206]

In the UK legal regulations concerning welfare support provided by the National Asylum Support Scheme (NASS) have peculiar areas of concern that put at risk the position of asylum claimants. It is possible to distinguish between two types of problem areas in this regard, such as: public policy explicitly excluding some categories from welfare provisions and, secondly, the imposition and enforcement of stringent welfare rules operating on the basis of large administrative discretion given to the Home Office.

As regards the public policy issues, the following three categories of asylum seekers were distinguished by the government and the Secretary of State in respect of differential treatment in asylum support: asylum seekers submitting application at the port of entry, asylum seekers who applied for asylum status when already in the country, i.e. not on entry to the immigration officer, and those who were refused refugee status by the Secretary of State, especially where such claimants were very likely to become illegal immigrants. The first category were not excluded from support schemes, and therefore their problems may be reduced only to the issue of non-compliance with the stringent norms conditioning and setting rules for support eligibility. The other two groups, however, were excluded from assistance within the

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[202] Jordan and Duvell, supra, n. 5, p. 212.

[203] Feria-Tinta, M., Doebbler, C.F. "Surviving the Asylum Process in the United Kingdom: Destitute Asylum Seekers and Their Rights Under International Human Rights Law", 13(2) (1999) *Immigration & Nationality Law & Practice*, p. 50.

[204] This assertion remains controversial, however, with different studies claiming different tendencies. The House of Lords Report claims that the main motivation for asylum claims was employment, while the abovementioned Report by the House of Commons found that some connection exists between high welfare expectations and growing numbers of asylum seekers entering the country.

[205] Zetter et al, supra, n. 200, p. 48.

[206] Schuster, L. "A Comparative Analysis of the Asylum Policy of Seven European Governments", 13(3) (2000) *Journal of Refugee Studies*, pp 118-132; in Zetter et al, ibid.

agenda of possible asylum system abuse. The second category were specifically targeted by asylum regulations, being deliberately deprived of possible support initially, in accordance with the Social Security (Persons from Abroad) Amendment Regulations,[207] which denied the rights of in-country asylum applicants in the essential spheres of income support, housing benefit, and a council tax benefit (most recently the same policy was re-introduced by section 55 of the 2002 Nationality Immigration and Asylum Act). It goes without saying that, being deprived of support, individuals were pushed into a state of illegality regarding their presence in the country.

Subsequently, in the case of *R v. Secretary of State for Social Security, ex parte Re B & Joint Council for the Welfare of Immigrants*,[208] the judges stated that the government could not deny benefits to asylum seekers, because this would make their appeal illusory. Therefore, everyone having the right of appeal was to be provided for at the government's expense, especially because very basic human rights were at issue in this respect. Furthermore, the government announced that it 'intended to reverse' the court decision with legislation, and therefore to withdraw benefits at parliamentary level,[209] which resulted in the adoption of the 1996 Asylum and Immigration Act.

The 1996 Act only endorsed denial of asylum seekers' access to certain social welfare benefits. At the same time, the Government refused to recognise the right of asylum seekers to work, and the destitution of asylum seekers reached its peak between the introduction of the 1996 Act and the court decision which returned rights to the most destitute refugee status applicants, who were generally unable to provide shelter and food for themselves.[210] Although there was an indication of the fall of overall asylum applications and particularly in-country claims,[211] the effect was not long-term and application numbers continued to rise. Ever since 1996, there emerged a reversing trend of judicial decisions which altered the restrictive executive policy-making in this respect: all continued until and after introduction of the 1999 Asylum and Immigration Act and subsequently the 2002 Nationality, Immigration and Asylum Act.

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[207] Dated 5 February 1996.
[208] [1997] 1 WLR 275; also in Feria- Tinta and Doebbler, supra, n. 203, at p. 51.
[209] Feria-Tinta and Doebbler, ibid.
[210] Feria-Tinta and Doebbler, ibid.; Medical Foundation, "Past Misery, present Muddle: Council by Council Survey of Assistance to Asylum Seekers One Year On", London, 1997, in Zetter et al, supra, n. 200, p. 94.
[211] Koser, K. and Salazar, M. "United Kingdom", in Angenendt, S. (ed.) *Asylum and Migration Policies in the European Union*, Research Institute of the German Society for Foreign Affairs, Europa Union Verlag, 1999, p. 327; in Zetter et al, ibid.

The recent policy of asylum welfare support should be viewed in the light of a more general framework concerning foreigners' eligibility and access to welfare and basic public services, as outlined by the 1999 Asylum and Immigration Act. Here, the major novelty arose in the circumstances of destitute asylum claimants, primarily the same two categories concerned, many of whom were excluded from the welfare provisions by the 1999 Asylum and Immigration Act.

As was presented in the chapter related to foreigners' access to the welfare state, persons subject to immigration control were excluded from such access on the basis of section 115 of the 1999 Act, which likewise concerned asylum seekers. At the same time, a new support system was initiated in section 95(1) of the Asylum and Immigration Act, granting authority to the Secretary of State to provide support to asylum seekers and their dependants on a strictly discretionary basis. This legal construction of administrative discretion turned out to be distinctly different from guaranteed asylum support, thus meaning that the Secretary of State owed no such obligation to asylum seekers,[212] as was later confirmed by the Asylum Support Adjudicators.[213] Section 95(2) enables the Secretary of State to exclude any destitute immigrant from welfare assistance, while section 96, in its subsections (1)(a) and (1)(b), establishes strictly discretionary possibilities for providing asylum support. The Asylum Support Regulations of 2000,[214] adopted in respect of the provisions of the 1999 Immigration Act, repeat the same notions.

The discretionary character of asylum welfare provisions was questioned as a whole by the judiciary. In the case of *R v. Asylum Support Adjudicator, ex parte Hussain*[215] the judge said the following on the nature of discretion:

> "The Secretary of State is under no obligation under the Act to support destitute asylum seekers, but if he supports any it is difficult if not impossible to see on what basis [he] could lawfully discriminate between asylum seekers who fulfil the conditions for eligibility laid down in the Act and in the Regulations."[216]

According to section 95(3) of the 1999 Immigration Act, discretion also stretches to the inadequacy of existing accommodation, and the unavailability of other living necessities.[217] Perhaps in this regard, destitute asylum seekers may likewise be

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[212] Billings, supra, n. 165, pp. 126-127.
[213] ASA/00/09/0063,9/10/00; also in Billings, ibid.
[214] Asylum Support Regulations 2000 SI No. 704.
[215] Unreported case WL 1171912, commented by Billings.
[216] Ibid.
[217] Regulations 8 and 9 of the Asylum Support Regulation; also in Billings.

excluded from provision of housing by local authorities, but not entirely if other aggravating circumstances emerge in addition to destitution, similarly to cases outlined above in the general presentation on the welfare position of irregular migrants.[218] There is a striking similarity as to how the 1999 Act applies discretion to all immigrants, be they asylum seekers or all other (irregular) migrants, thus equating their statuses in legislative terms.

A separate problem which persists in the context of asylum support, constructed in accordance with principles of the 1999 Immigration Act, arises when asylum seekers have their support terminated in connection with certain violations of regulations. In most cases it is violations of procedures or material requirements that contribute to the termination of assistance. Generally, assistance to asylum seekers may be cancelled in accordance with Asylum Support Regulation 20(1), and this extends to violation of residence rules or asylum support regulations.

One of the most controversial situations concerning asylum seekers involves one of accommodation provision in relation to the registered asylum claims. Generally, the NASS may only provide assistance on certain types of conditions, such as travel to other areas for residence. In circumstances when asylum seekers are absent, or change a place of residence without permission, the approach of the Home Office and Asylum Support Adjudicators has been to demand that asylum seekers be required to produce evidence of a reasonable excuse for moving without permission.[219]

The issues of asylum support discussed so far may be regarded as being of crucial importance for shaping the illegality of desperate asylum seekers, deprived of support by means of administrative discretion. While prohibition of employment is endorsed by policy-makers, along with the deliberate exclusion of many claimants from any form of welfare assistance, the illegal employment of asylum seekers is likely to be widespread.

The Nationality, Immigration and Asylum Act of 2002 has further complicated the circumstances and, in fact, led some asylum seekers to live on the brink of illegality. According to section 55 of the 2002 Act, the Home Secretary may specifically withdraw support from single asylum seekers and couples without children if not

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[218] The case of *R v. Wandsworth L.B.C., ex parte "O".*

[219] Willman, S., Khafler, S., Pierce, S." Support for Asylum Seekers: A Guide to Legal and Welfare Rights", Legal Action Group, London, 2001, p. 129.

satisfied that the asylum claim was placed reasonably upon arrival in the UK.[220] In practice, asylum seekers are encouraged to register their asylum claims within 72 hours upon arrival in order to qualify for support.[221] The Home Office implemented this principle even in the voluntary assistance sector (Refugee Action, Refugee Council and Migrant Helpline organisations), until asylum seekers provide a written letter from the Home Office that their claim for asylum was not late.[222] As a result of this withdrawal, almost 14,000 people were made destitute in the UK, with 10,000 of them residing in London.[223] According to the study undertaken by the Mayor of London,[224] the side effects of such a decision comprised growing destitution, ill health,[225] criminality[226] and, finally, tendencies towards illegality[227] among the asylum seekers' communities.

Subsequent judicial review did not bring clarity to the issues surrounding the interpretation of section 55. On the one hand, a High Court judgement[228] has endorsed support guarantees to asylum seekers; the High Court opined that denial of support would create a risk of inhuman and degrading treatment.[229] There followed other cases, where the High Court has adopted the same approach to the issue. On the other hand, the Court of Appeal reversed this line of judicial reasoning, and actually held that denial of support to such individuals could not effectively invoke considerations of inhuman and degrading treatment.[230]

By and large, the welfare treatment of asylum seekers in the United Kingdom probably encourages destitution, and such persons could possibly resort to illegal means of survival, such as undocumented employment and even criminality.

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[220] The Act actually envisages asylum categories whose support cannot be refused in accordance with the section, such as individuals with special needs, or those likely to suffer inhumane and degrading treatment, asylum seekers with families, and others.
[221] House of Commons, *Hansard* 17 December 2003, col. 1594, debate on Asylum & Immigration (Treatment of Claimants etc.) Bill; in Mayor of London, "Destitution by Design/ Withdrawal of Support from In-Country Asylum Applicants: An Impact Assessment for London", Greater London Authority, London, 2004, p. 19.
[222] JCWI Bulletin, supra, n. 40, p. 1.
[223] Mayor of London, supra, n. 221, pp. 32 and 37.
[224] Ibid.
[225] Ibid., pp. 55-58.
[226] Ibid., p. 62.
[227] Ibid., p. 35.
[228] Reported in *The Independent*, Thursday, 20 February 2003.
[229] Ibid.
[230] Court of Appeal (Civil Division), *Q& Others v. SSHD*, [2003] EWCA Civ 364; and Court of Appeal (Civil Division), *T v. SSHD*, EWCA Civ 1285.

2.6.4 Consequences and Effects of the Asylum Application Refusals on the Legal Position of Asylum Seekers

Overstaying by failed asylum seekers has become the issue which underpins the asylum agenda in the UK, since only a small percentage of rejected asylum claimants are actually removed, with thousands staying illegally in the country. In this regard, the legal mechanisms involved after completion of the asylum application process provide an insight into the illegality of failed asylum seekers.

The crucial moment for asylum claimants is a 'date of determination', which refers to the moment when they receive either an appeal decision, or a letter refusing refugee status, with a list of full reasons for the unfavourable outcome.[231] The Immigration and Asylum Act of 1999, in its section 94(3), specifies the moment of determination, which is crucial for the withdrawal of asylum support following a 14-day period after refusal, as established by the Asylum Support Regulations.[232] The moment of asylum support termination has in fact become a decisive factor for those asylum claimants who are very likely to become destitute and even illegal afterwards. As one of the immigration advisors stated in the study by Jordan and Duvell:

> "...as soon as your asylum claim is refused, you cannot get any benefit plus you cannot work. And obviously these people were forced to do illegal activities, including taking employment illegally, or in robbing, becoming robber."[233]

These realities may also concern those failed asylum applicants who decide to appeal against the refusal, or who are unable to depart from the UK for other reasons. Following the appeal, the Immigration Officer may either issue temporary leave to remain, or detain the applicant. However, in a case where the applicant avoids detention, this does not mean that there will be an automatic renewal of support to these individuals, even if provided only on a strictly discretionary basis. The notion of support is based on section 4 of the Immigration and Asylum Act of 1999 and establishes the so-called 'hard cases' scheme of assistance to these categories. Eligibility for the scheme is based on several criteria where, among other factors, it is spelt out that one should be destitute and incapable of attracting assistance from any other source, such as family or friends.[234] In order to qualify for the support scheme, former asylum claimants have to demonstrate that they have made sufficient effort to

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[231] Willman, supra, n. 219, p. 26, paragraph 1.80 .
[232] Ibid.
[233] Jordan and Duvell, supra, n. 5, p. 160.
[234] The issue is best presented in the book by Willman, supra, n. 219, p. 138.

leave the country.[235] It is possible to argue that the hard cases support has been very limited, and often results in the destitution of failed asylum seekers, leading to illegal employment or other activity.

The failed asylum seekers may be served with removal directions or deportation orders simultaneously with the refusal of asylum, as provided by Immigration Rule 338 (HC 395). Unless the asylum claimant pursues an appeal, he or she will be apprehended and removed, something which can easily be fulfilled if the asylum seeker is located at one of the dispersal areas. Despite the existence of this mechanism for removing failed asylum claimants, they still constitute a sensitive problem area for immigration authorities. In 1998, for example, almost 14,000 asylum seekers were unaccounted for by the immigration authorities,[236] with the trend over the time reaching even more serious proportions. In 2001 the system rejected 87,990 asylum claims, while only 9,285 failed asylum seekers were removed;[237] by 2002, statistics revealed that 13,905 failed asylum seekers (including dependants and participants of the Assisted Voluntary Return Programme) were removed, while the total number of asylum claimants reached the figure of more than 80,000.[238] Although a number of removed asylum seekers reached 17,040 in 2003 simultaneously with the decrease in asylum applications,[239] it is evident that many individuals making up the difference between numbers of applicants and removals tend to disappear from immigration control and join the armies of irregular migrants. Perhaps the only measure to deal with such consequences of the asylum process, apart from the asylum regimes themselves, is the internal control mechanism.

2.6.5 Summary

The presented study has investigated those areas of law which seriously contribute to the illegality of asylum seekers in the United Kingdom. So far, the contribution of asylum claimants to illegal immigration has been substantial in the United Kingdom, but illegality indicates also indicates the administrative shortcomings of the system in question. There are several main features in the UK's asylum system relevant to this: very limited availability of asylum status, constrained welfare assistance or access to

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[235] Ibid.
[236] Home Office, "Control of Immigration Statistics UK 1998." London: Government Statistical Service, 1999, CM 4431; in Morris, L. "Britain's Asylum and Immigration Regime: The shifting Contours of Rights", 28(3) (July 2002) *Journal of Ethnic and Migration Studies*, p. 419.
[237] Home Office, "Asylum Statistics 4th Quarter 2002 United Kingdom", Home Office RDSD, table 2; in Stevens, supra, n. 181, paragraph 6.17 (p. 247).
[238] Home Office, "Asylum Statistics 1st Quarter 2004 United Kingdom", Home Office RDSD, p. 6.

employment, and lack of control over departure. Initially, there is a possibility that the Government does not grant refugee status to a sufficient number of people and, with the restrictive trends in the asylum policy, there will most likely be a large number of would-be illegal immigrants. Secondly, the asylum policy does not seem to acknowledge the humanitarian element of the problem sufficiently. In light of the Home Office's attempts to deter new asylum seekers by eliminating support, the result will be the further recourse of asylum claimants to illegal practices such as undocumented employment. As for their employment, if permitted to work on a limited scale, asylum seekers could present a valuable source of temporary labour. Thirdly, any efficient immigration or asylum control could become useless in circumstances where no workable removal mechanism is in place.

To sum up, the norms governing the position of asylum seekers creates a quasi-legal status, with completely defined administrative rules, where even a minor deviation could serve as grounds for suspension of any support entitlements. Additionally, as was argued above, some asylum claimants are initially deprived of any assistance and many in-country applicants have to prepare for a long struggle in order to reach the final outcome. The struggle, however, concerns more categories of applicants, and involves moral elements as to responding to the tempting possibilities of employment that British society provides, but the Government mostly prohibits. As was demonstrated above, many asylum seekers find employment without permission, and prefer becoming illegal, thus responding to many factors of both insufficient asylum support and opportunities.

Generally, when asylum seekers are dependant upon all the rules determining their status, while not being engaged in any gainful activities and being despised and occasionally harassed, they become too vulnerable. In this regard, the extended employment schemes for asylum seekers, which would reduce their reliance on support and, correspondingly, on the welfare bill burdening the receiving society, would serve some public policy needs.

The extensive widespread illegality of asylum claimants, coupled with inefficient removal mechanisms, reflects the fact that an asylum crisis is looming in the United Kingdom, largely determined by their desperate circumstances of residence in the country, and by the inability of the enforcement system to tackle the issue of overstaying.

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[239] Home Office, ibid, p. 2.

2.7 Conclusion

The issues of irregular migration present a complicated agenda for contemporary British society. On the one hand, the country possesses elaborate immigration legislation capable of defining and regulating the most complicated immigration issues related to irregular migration. On the other hand, the principles of immigration regulation impose considerable restrictions on access of foreigners to the temporary unskilled workforce in the UK and, understandably, render illegal any deviation from the administrative regimes shaping the immigrants' position. Additionally, as a result of the general public policy, the position of irregular migrants has been strongly impaired in the spheres of labour and social welfare. The position of asylum seekers is especially vulnerable in light of the immigration law, which becomes an obstacle to their legality.

Since the 1960s and 1970s, British immigration law has not provided sufficient possibilities for the employment of unskilled migrants in the country, but with the extension of temporary migration opportunities to the nationals of the new EU states and actual regularisation for some of them who were present illegally in the country, there is some hope that the illegality trends could be reversed in the near future. In this regard, registration of migrant workers could do no harm to the immigration policy. On the contrary, this policy could be supported by the forced savings and departure bonds in order to ensure the temporary character of such migration practices.

In addition to the areas of foreigners' employment policy, residence plays a vital part in shaping successful regimes of immigration control. Despite the existing framework of administrative regimes of residence and internal control, the British system does not include a sufficient number of workable legal instruments capable of taking account of the presence of immigrants in the country. The internal control system is not actually grounded on any residential control and, therefore, there is no solid basis for enforcement against illegality and, particularly, its social impact. In contradiction to issues of residence, the policy in the employment sphere is characterised by restrictions and, as a result, there is an extreme degree of vulnerability on the part of the undocumented migrant worker, because of the lack of any enforceability of employment terms and conditions. The success of policy

measures combating undocumented work is notably impaired by challenges of administering the prohibition of employment and the sanctions themselves.

The position of irregular migrants in the social welfare and public services has likewise been complicated. In this regard, irregular migrants breaching their stay conditions can access essential public services, i.e. since they possess an initially legal status. Overstayers and illegal entrants rather exploit the de facto compassionate concessions in acquiring the required services. The position of all illegal immigrants, and particularly those of the latter group, is precarious, although access to welfare has been even more restricted and, concerns only the most essential housing needs and emergency medical care.

Asylum seekers are blamed by British society for being responsible for irregularity and creating distortions in the immigration system. However, the notion of asylum seekers' treatment ignores the reality of humanitarian protection and is designed to produce, by any means, a great discomfort for this category of immigrant inside the country. Needless to say, with pressures on asylum seekers being enormous, illegality is a tempting possibility for removing the strains of the asylum process.

The generally complicated and restricted position of illegal economic migrants is tied up with the fact that the public and authorities in Britain blame them for additional pressures on society. At the same time, a wide stratum of employers in the UK prefer to hire illegal immigrants, and in this way to contribute to the existence of the pull factors. Therefore, there seem to be two quite irreconcilable trends, almost a dichotomy, in public life in the UK, whereby the matter of illegal immigration may not be eliminated by present legislation. In principle, there are only two possibilities for tackling the problem:

- A liberal trend, which would involve the regularisation of all illegal economic migrants, possibly extending employment opportunities for the unskilled foreign workers and granting employment rights to the illegal immigrants.
- A restrictive solution, which would mean a general increase of police and administrative powers of the state, the introduction of internal controls, and the consolidation of all administrative mechanisms in the social welfare system.

Compromise is probably the only resolution to this situation. This would inevitably include the enforceability of employment contracts (at least the basic terms) relating

to illegal economic migrants, and the issuing of more work permits (even if supported by enforced bonds and savings), and also the introduction of stricter internal controls as a measure necessary in the current situation. A combination of liberal solutions in the employment sphere, and more restrictive administrative regimes, provides the degree of flexibility needed to tackle this complex social phenomenon.

3 Illegal Immigration in the System of Russian Immigration and Administrative Legislation: Effects of Restrictive Legal Regimes on Migrants

3.1 Introduction

Illegal immigration has emerged as a very recent phenomenon in Russian life, social science and law, appearing only very recently in the 1990s when relative liberalisation was achieved, and when foreigners were allowed to enter the country with fewer constraints. Liberalism in immigration policies has been significant as, for the first time, quite porous borders and less strict internal control regimes came into existence. At the same time, though, chaos in legislation and in the ideological identity of the state created by economic and political transition brought about a significant growth of illegal immigration, with a tenfold increase in the number of irregular migrants.[1] One of the features arising in the post-Soviet period was that until recently, there have been no specialised legislative acts regarding the position of aliens and, furthermore, there has not been any system of legislation that could outline the basic treatment of aliens in the country. Neither is there any plausible and officially publicised immigration statistics available to enable to comment in detail on trends in immigration policies.

In this regard, and as far as the position of all aliens under contemporary immigration law and policy is concerned, they have been divided into two main categories—individuals from republics of the former USSR (now the Commonwealth of Independent States or CIS), and all other aliens.[2] Illegal immigration in Russia is predominantly comprised of nationals from the former USSR republics whose status gradually underwent serious transformations. A number of separate newly concluded agreements between Russia and other states of the former Soviet Union established possibilities that some categories could be admitted without visas,[3] but this does not make them exempt from applying for work permits.

Foreigners from outside the CIS were traditionally subject to visa requirements for entry, but these groups have experienced a decrease in their rights, especially with the introduction of legislation on the position of aliens in the country. The most recent

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[1] Krassinets E., Kubishin E, Turukanova E. "Illegal Immigration Into Russia", Academia Publishing, Moscow, 2000, in Russian.

[2] Nationals from the Baltic states of Lithuania, Latvia and Estonia are regarded as foreigners outside the CIS, and do not possess the right to visa-free movement.

[3] Information on the existing bilateral agreements of Russia is available on the site of the Russian Foreign Ministry: www.mid.ru .

changes of migration policy affected these foreigners in terms of the less generous entry entitlements and the deliberate reduction of the number of long-term multi-entry visas issued to aliens.[4]

The distinctions between these groups of aliens still remain true today. The position and internal legal capacity of the two groups of foreigners in Russian society and the legal system are currently determined by issues in admission, general residence, employment and asylum. Therefore, substantive parts of the current chapter will deal with each of the specified spheres of regulation under Russian law.

Russia differs from the other two cases of Britain and South Africa. It is a huge federal country with a persistent regional diversity in ethnicity, welfare and development.[5] In addition, the legacy of the Soviet system is still relevant in two major ways, (1) because of enormous bureaucratic machinery, unseen either in the UK or even in the Apartheid South Africa and (2), correspondingly, due to socio-legal traditions of restricting the freedom of movement and generally dealing with foreigners. The irregular migration issues and, as a result, immigration policies rest on these fundamental elements which determine curious trends.

First of all, to a greater extent than in Britain or South Africa, any progressive and liberal notions acknowledged in legislative acts, nevertheless undergo negative transformations or sometimes even get reversed through penetration by the administrative machinery (procedural bureaucracy), as obvious from the presentation below. Secondly, over the last few years the government has made attempts to abandon the social welfare responsibility for both its nationals and foreigners and to severe links with nationals of other former Soviet republics. Both of these major policy shifts have affected the position of refugees and forced migrants and produced the preconditions for illegality of all aliens in the country.

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[4] Munro, R. "Rules Are Getting Tougher for Visas", *The Moscow Times*, 1st of April 2003; www.moscowtimes.ru/stories/2003/04/01/001.html .

[5] Almost half of Russia's regions are homelands to various ethnic groups.

3.2 Trends, Current Policies and the Socio-Economic Effects of Illegal Immigration

3.2.1 Russian Migration Policy and the Effects of Illegal Immigration on Social and Economic Life

As in every Continental system of law, the Constitution of the Russian Federation defines a framework for regulation on matters of citizenship, immigration and economic migration. Illegal immigration has not been a specific subject of constitutional law, but the norms of the Constitution hypothetically provide for the most essential guarantees to everyone and also for major legal principles, so that both are taken into account in the creation of migration policy.

The Constitutional norm directly related to the legal status of a foreigner in the Russian Federation is enshrined in paragraph 3 of Article 62 of the Constitution. According to this provision, foreign nationals and stateless persons have the same rights and obligations as Russian nationals, apart from circumstances envisaged by federal laws or international agreements of the Russian Federation. The fact that the regime towards aliens was declared to be the same as the one existing for Russian nationals is an important aspect of Article 62, in light of Article 19 of the Constitution prohibiting discrimination.

The Russian legal system is based on a hierarchy of legal acts, whereby the Constitution has supreme legal authority understood in the light of Russia's federal system. All other federal laws or governmental regulations, as well as regional legal acts, should be in conformity with the Constitution, which also underlines the supremacy of the federal laws in relation to regional legislation. Migration policies are, on the whole, considered to be a subject for joint regulation by both federal and regional authorities, the joint sphere of competence instituted in Article 72 of the Constitution. Joint competence may mean that authorities in all Russia's regions adopt legislative or executive acts governing the policy in question, but the measures adopted should be in conformity with the federal laws.[6]

The shaping of immigration control mechanisms that took place through the recently introduced normative legal acts at federal level, and through changes to the immigration legislation, represent a continuous process. Currently, the government proposes the establishment of an immigration inspectorate which would be responsible

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[6] According to the Constitution, the City of Moscow in this regard represents the regional, but not the municipal level of regulation.

for control over illegal immigration[7] and the imposition of tougher regulations regarding the position of aliens. The new administrative constraints, endorsed with the adoption of the legislation concerning the status of aliens (discussed further on), are being introduced jointly with plans to increase the levy as part of the employer's sanctions with which unscrupulous employers will be charged for attracting foreign workers illegally into the sphere of employment.[8]

At the same time, the government has not yet undertaken to address a long-standing structural problem concerning enhancement of judicial protection of individuals, which is especially relevant for aliens in the immigration sphere. Indeed, it is too slow, inefficient and unpredictable for people to dispute official decisions in courts, which is perhaps one of the reasons why foreigners prefer to remain illegal.[9] It is probable that in the UK, for instance, aliens may find much better opportunities to have recourse to the judiciary.

Meanwhile, the prohibition and prevention of illegal immigration have become priorities for the actual policy measures taken by the government. The President of the Russian Federation has issued a Decree[10] shifting control and supervisory powers over immigration, and especially over illegal entry and stay to the realm of the Russian Interior Ministry, and disestablishing the Federal Migration Agency which was previously in charge of these affairs. The climate around the sphere of immigration in Russia has heated up and, as one of the government officials stated:

> "Passport and visa services of the Interior Ministry have actually lost control over the movement of foreigners, as they turned into bodies that deal only with law-abiding aliens.... In the year 2000, only 22,000 aliens were removed from Russia's territory."[11]

This shift has immediately influenced migration policies and actions by the police, since the restructured immigration body defined as its main goal the enforcement of the prohibition of illegal immigration. Figures on undocumented presence in the country vary, but official estimates presented in 2002 reveal that out of 25 million foreigners entering the country annually, between 1.5 and 6 million of them reside or

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[7] Site of the Russian Interior Ministry: www.mvdinform.ru .
[8] www.mvdinform.ru .
[9] This is a conclusion that I can draw from my previous professional experience as a Russian immigration lawyer.
[10] Presidential Decree On Amendment of the State Policy in the Field of Migration Policy dated 23 of February, 2002.
[11] Rucheikov, V. "Legal position of refugees and persons applying for asylum", *Legal and Social Position of Forced Migrants in Russia: Minimal International Guarantees*, Moscow, 2001, p. 28, in Russian.

work illegally in the country.[12] Seasonal workers comprise almost 10 million persons annually, and a fair number of them are illegal immigrants from the former republics of the USSR.[13] Previous evaluation of the scale of illegal immigration given for 1999 in an official economic magazine suggests that over 700,000 illegal immigrants arrived and remained in Russia from Afghanistan, Iran, Somalia, Cuba, Ethiopia, Sri Lanka and Bangladesh.[14] According to the magazine, republics of the former Soviet Union contribute to the presence of about 2 million irregular migrants residing in the country, with a fair proportion of them pouring into the criminal world and the informal economy. A special issue underpinning the irregular migration process also arises in relation to numerous immigrants from China illegally living in Siberia and Far East.[15]

These trends and approximate estimates provide grounds for great concern within the society, although there is no agreed study on the effects of illegal immigration on life in Russia. However, it is possible to derive certain tendencies in relation to this phenomenon. In the Russian reality, it is not the economic side of illegal migration,[16] but its social impact, that may be regarded as being the most adverse. The major problem in this respect is the one relating to their affiliation with the shadowy criminal world, or even their engagement in various criminal activities, something that characterises as many as 25% of irregular migrants.[17] In this regard, Russian social scientists have confirmed the high rate of involvement of illegal immigrants in such criminal activities as trafficking or dealing in drugs, smuggling of humans and weapons, forgery of documents, prostitution, contract killing, trading in antisocial goods and involvement in organised crime.[18] Trafficking of drugs and women for prostitution into Russia and throughout the country are probably the main issues confronting policymakers and society.[19]

However, the problem of criminal involvement may not be eliminated only by means of punitive measures, while legalisation of the available illegal migrant workers may

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[12] www.mvdinform.ru .
[13] ibid.
[14] Vishegorodtsev M. "Labour Migration should be manageable and based on legal grounds", 49 (1999), *Economy and Life*, Moscow, in Russian.
[15] Case study, infra, p. 150.
[16] Russian experts agree that irregular migration benefits the country economically, especially the poor population strata, by reducing production costs and, as a result, consumer prices—Krassinets et al, supra, n. 1, pp. 84-86.
[17] Krassinets et al, supra, n.1, p. 77.
[18] Ibid.
[19] Ibid.

be an option in dealing with the problem.[20] At the same time, the official policy response to issues of illegal immigration is based predominantly on restrictive measures, fulfilment of which is placed on the single enforcement body dealing with home affairs. Generally, the effects of control are reduced by the unwieldy structure of the Interior Ministry, the scope of enforcement that needs to be addressed, and the wide range of official responsibilities extending to all aspects of the aliens' irregularity which characterises the enforcement of Russian immigration and administrative control regulations.

3.2.2 Facilitation of Aliens' Entry into Russia

The initial issue emerging in relation to Russian immigration control is the admission policy concerning foreigners. Regulation of admission through Russian visa policies can be considered as an initial legal issue where criteria for legal entry are determined by procedural and certain substantive constraints. Issues of facilitation of entry or departure from the country constitute the subject matter of the specialised Law on Conditions of Entry and Departure from the Russian Federation[21] (hereinafter— the law on entry and departure) relevant to the notion of immigrants' irregular position, inasmuch as it permits entry only after fulfilment of stringent procedural formalities. As a general rule, all aliens, unless otherwise established by legal acts for certain categories, apply to the Russian Consulate abroad for entry clearance which takes place through the issuing of either a visa or a temporary residence permit. A written invitation for entry and stay in the territory of Russia should be submitted, together with an application form. According to the Governmental Decree No. 167,[22] the invitation should be supported by various financial guarantees from organisations or from individuals who have invited aliens.

Along with requirements of the law on entry, another federal act regulates the internal administrative facilitation process for admission into Russia. The Federal Law on the Legal Position of Foreign Nationals in the Russian Federation[23] (hereinafter-- the law on the position of aliens) in its Articles 16, 17 and 18 envisages that norms governing the invitation process for entry of aliens should be fully facilitated by the

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[20] Semenova, I. Interview with Mr. Igor Unash, an official of the Federal Migration Service, the Rossijskaya Gazeta official newspaper, January, 2003, in Russian; available on the site www.rg.ru .
[21] Federal Law adopted on the 15th of August 1996, No. 114 FZ, Collection of Laws of the Russian Federation, 1996, No. 34, Article 4026.
[22] Governmental Decree Establishing Rules of Provision of Financial, Medical and Housing Guarantees to Foreign Nationals and Persons without Nationality in the Territory of Russia, dated 24th of March 2003.

Interior Ministry territorial departments, upon application from Russian nationals or organisations. The purpose of entry plays a vital part in the process, and the law on entry and departure distinguishes nine types of entry visas.[24] While there are unified requirements for facilitation of entry, Article 6 (3) of the law on entry and departure, outlines an additional requirement when an alien applies for entry in order to take up legal employment: i.e. this norm implies that the work permit acquisition should be facilitated prior to application for entry clearance at the consular offices abroad in order to be able to obtain visas. Admission of aliens into Russia resembles the system in the UK, where entry for the sake of employment is possible only after fulfilment of procedures for acquiring the work permits.

The checking procedures dealing with invitations for private or business visits contribute to large backlogs in processing formalities before the foreigner can apply for the entry clearance, since it often takes almost three months for the completion of the invitation and visa formalities. In fact, the prolonged process may discourage bona fide visitors or tourists, while persons likely to commit immigration offences will devote resources and energy to the facilitation of deception. Abuse of the system is particularly likely, since the Russian immigration law does not envisage provisions for punishing the assistance, harbouring or trafficking of illegal immigrants into the country that should be a necessary background for a properly functioning immigration system.[25]

As far as substantive issues of admission are concerned, there are obvious obstacles to the entry of some categories of individuals. Entry clearance could be denied to an alien if the consular office abroad finds that a person fails to meet the necessary criteria for entry, by not having sufficient funds for stay or living,[26] or by failing to produce all the necessary documents for a Russian visa, including, inter alia, an HIV-status certificate.[27] At the same time, the immigration officers at the ports of entry only verify the validity of passports or visas and hardly question aliens, unlike in other countries.

Generally, the policy on the entry of foreign individuals, including high profile professional categories, is too restrictive and, on a more general scale, provides serious

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[23] Law № 115- ФЗ brought into force on the 25th of July 2002.
[24] Articles 25.6, 25.7 and 25.8 of the law on entry and departure.
[25] In this regard, the most recent novelty was the introduction of carrier sanctions by the 2001 Code of Administrative Violations, in its Article 18.14.
[26] Article 26 (1) of the law on entry.
[27] Article 27, paras 3 and 4 of the law on entry.

incentives for abuse of the immigration system. The Russian visa policy is a legacy of the Soviet past when it had to limit any admission into the country.

3.3 General Theoretical Notions on Illegal Immigration

3.3.1 Definition of Foreigners' Illegality

Illegal immigration forms the subject matter of a number of spheres of legislation, including constitutional, administrative and a few other branches of law, since immigration law as a branch of the law has not been recognised in any official or theoretical legal classifications. Only recently, did the Russian government attempt to regulate the immigration sphere with special statutes concerning the entry and residence of foreigners. Despite this, the term 'immigration law' should probably be transformed into the term 'migration law', as the notion of movement and other activities concerns not only foreigners, but also, to some extent, nationals of Russia itself. The peculiarity in terminology of the Russian laws on immigration also extends to the term 'immigrant' which may be understood only as an asylum seeker in connection with the provision of Article 18.11 of the Russian Code of Administrative Violations and its commentary[28] which relates the term to the context of the asylum determination process. Therefore, the use of the terms "immigration" and "immigration law" in this chapter reflect generic composite notions rather than legal ones. In fact, in strictly legalistic terms, the immigration control system is mostly shaped by the sphere of administrative regulation.

No fixed juridical definition of illegal immigration is provided in any given federal legal act either, and this definition can be derived only from an analysis of multiple legal acts related to foreigners, both at federal and regional levels. Initially, quite an authentic and comprehensive specification of aliens' irregularity was provided by the Russian Governmental Decree,[29] which identifies illegal immigration in the following way:

> "Entry into the Russian Federation, presence and departure from its territory of foreign nationals and stateless persons in breach of the legislation of the Russian Federation regulating entry, presence, transit or departure of

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[28] The Commentary is published in the "Garant" Legal database for the relevant article. This may be obtained in Russian via the website: www.garant.ru .

[29] Decree No. 1414 of the Government of Russia Establishing the Federal Migration Programme for the Period from 1998 to 2000, published in the Rossijskaya Gazeta official newspaper on the 27th of November, 1997; also in Krassinets, supra, n. 1, pp. 32-33.

foreigners, as well as the voluntary change of the legal position during their stay on the territory of the Russian Federation".[30]

Further, the Decree identifies those individuals who can be regarded as illegal immigrants, such as:

- Individuals entering Russia with no valid documents or without any documents;
- Foreign nationals or persons without nationality whose declared purpose of stay does not represent their real intentions or actions;
- Aliens entering Russia illegally, which includes individuals who enter the country through the former Republics of the USSR.

The given classification existing in the Governmental Decree is incomplete, however, because it does not explicitly mention illegal employment and access to public services or social welfare, and thus becomes too general in distinguishing various spheres of illegality.[31]

A substantively similar, but more detailed definition available in the Russian system of administrative law, provided in the law on entry and departure referred to above, concerns mostly illegal entry and only a few features of residence in the Russian Federation. The law states that illegal presence in the country embraces the following situations:

- Entry into Russia's territory in violation of the declared rules;
- Lack of documents confirming the right to reside;
- Loss of such documents with the subsequent failure to renew and reinstate the lost papers at the appropriate interior affairs office;
- Elusion of departure from Russia on the expiry of residence rights;
- Violation of rules during transit travel through Russia.[32]

Once again, the stated definition does not embrace all possible aspects of aliens' presence in Russia. In the practice of immigration and administrative law, illegal immigration represents a much wider range of violations, penalised and prohibited by national laws. To sum up, the situation of illegality exists in the following situations:

- Clandestine and illegal entry, i.e. entry in breach of the specialised acts;

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[30] Krasinets, ibid.
[31] Ibid, p. 33.
[32] Para. 1 of Article 25.10.

- Residence in the country in breach of residence registration rules endorsed both by federal and regional bodies, where the specific requirements could be violated by both Russia's nationals and foreigners;
- Overstaying the period prescribed by visas or residence permits;
- Employment without authorisation by the supervisory federal or regional governmental bodies and access to public funds or services;
- Illegality concerning asylum seekers, refugees and migrants which expands to include all the abovementioned areas.[33]

Among the listed forms of illegal immigration, the ones that are probably most prevalent are overstaying, residence without registration, and the special position of refugees and forced migrants. In this respect, deception is a factor underpinning all the existing regimes concerning the presence of aliens. Clandestine entry is not uncommon either, since the borders with other former Soviet states have been porous.

3.3.1.1 Clandestine Entry

The alien is an illegal entrant in the Russian Federation if he or she enters into the territory of Russia without the authorisation of immigration control bodies where this means, first of all, entry in avoidance of places specially designated for entry and disembarkation, as prescribed by Articles 9 and 11 of the Law On the State Border of the Russian Federation.[34]

An important feature enshrined in the Russian state's response to clandestine entry concerns the fact that, unlike other administrative immigration offences, it is subject to criminal prosecution. Article 322 of the Criminal Code of the Russian Federation envisages a criminal sanction for the unlawful crossing of the border. Paragraph 1 of the Article concerns border crossing by a person without the necessary documents or permission, an offence which is punishable by a considerable fine. Paragraph 2, however, deals with a graver violation, when the crime is committed by an (organised) group, and this is punishable by imprisonment of five years. One important issue in connection with the criminal prosecution of clandestine entry is the fact that, according to the same Article, it cannot be extended to humanitarian situations, i.e. when the violation is committed in order to claim political asylum regulated by the Constitution. However, it is unclear to what extent this exemption from sanctions refers to

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[33] Refugees and migrants, both de facto and de jure form a separate vulnerable category of individuals, whose position is infrequently illegalised by legislative acts.

clandestine entry for the sake of claiming ordinary refugee protection. This criminal violation of immigration law should also not be confused with the administrative breach of the regime envisaged for passing through the Russian state borders in Article 18.1 of the Code of Administrative Violations.

Clandestine entry may be detected through the Russian system of administrative controls. The law on the position of aliens and the law on entry and departure[35] established that every foreigner admitted into Russia should submit the specialised Migration Card in order to be able to enter Russian territory. The alien should retain the departure part of the card until he or she leaves Russia, while all the submitted data is inputted into the centralised computer database.[36] Furthermore, the Migration Card also includes information on registration at the place of temporary residence.[37] In the light of these procedures and the practice of checking aliens' documents upon departure, clandestine entrants and illegal residents lacking the properly administered Migration Card become easily identifiable, at least at the time of departure.

Therefore, clandestine entry finally has punitive consequences for an alien. The failure to produce the Card upon request in these and other circumstances serves as an obstacle for the registration of an alien and, as a result, produces an adverse effect on all substantive socio-economic rights. Needless to say, the emergence of a market for the forged Migration Cards is a highly likely outcome, thereby contravening the government's efforts.[38]

3.3.1.2 Illegal Residence in the Country

Residence in breach of various residential rules in the territory of Russia is probably one of the main forms of the illegal presence of aliens in the country. Although there are a few formal conditions of stay in Russia imposed on aliens by immigration authorities, more often than not, it is a failure to fulfil residential requirements which becomes the major obstacle for possession of any legal status by an alien. First of all, these are procedures of application or prolongation of any of the residence permits that may jeopardise the position of a foreign national. Secondly, these violations may involve specific legal loopholes or prescribed limitations on the movement or status of

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[34] Federal Law No. 4730-1 dated 1st of April 1993, with amendments on the 19th of July 1997; also in Krassinets, supra, n. 1, p. 30.
[35] Article 25.9 of the law.
[36] Paragraph 19 of the Rules on Migration Cards established by the Joint Decision of several ministers; dated 11th of September, No. 1095/16531/143/49/1189/692.
[37] Ibid.
[38] The official newspaper "Rossijskaya Gazeta", supra, n. 19.

foreigners. Thirdly, and most importantly, the residential status of an alien is shaped by a range of registration procedures, where the interior ministry is exclusively involved, such as registration which is recorded upon arrival at the place of residence, with subsequent further re-applications and renewals.

As far as general residence permits are concerned, the law on the position of aliens provides for the division into four main components or groups: short-term temporary stay, temporary residence, permanent residence, and residence based on the work permit-related activities-- all regulated in accordance with the legal provisions of the law on the position of foreigners and corresponding regulations. The notion of illegality is closely linked to these legal regimes, where the substantive meanings of each one is based on the prescribed criteria for a withdrawal or a denial of the residence status, also reflected in the law on the position of aliens.[39]

A short-term temporary stay is limited only to the length of the visa duration or a ninety day period with a visa-free right of entry.[40] A prolongation of the short-term stay should be applied for at the interior ministry department currently responsible for immigration affairs.[41] The regime of temporary residence is envisaged by Article 6 of the law and by the corresponding Governmental Decree,[42] both of which declare that it is granted by immigration bodies[43] for a period of three years, and is limited only by numerical quotas adopted on the basis of another Governmental Decree[44] defining the policy at both federal and regional levels. In this vein, it is quite notable that paragraph 1 of the abovementioned Decree No. 790 established the quota of 439,080 foreigners for the whole country, with this number comprising 90,000 for Moscow and only 1000 for St. Petersburg. The number of temporary residence permits realistically needed should be far greater, due to the growing foreign population and the widely acknowledged calls for regularisation of the population of illegal residents, estimated at several millions.[45] Most violators of immigration law are likely to be short-term

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[39] Infra, in the part dealing with the definition of the breach of the law.
[40] Article 5 (1) provides for the norms in this respect.
[41] Under Article 5(5), prolongation of a stay for the sake of employment requires a prior application at the immigration body.
[42] Governmental Decree No. 789 On Establishing Rules of Issuing Temporary Residence Permits to Foreign Nationals and Persons Without Nationality, the 1st of November, 2002.
[43] In this case, the immigration body means either Russian Consulate in the country of ordinary residence of an applicant or the Interior Ministry specialised departments dealing with immigration affairs; the period of an application review should be no longer than six months.
[44] Governmental Decree No. 790 On Quotas on Issuing Temporary Residence Permits to Foreign Nationals and Persons Without Nationality, dated 30th of October, 2002.
[45] The official newspaper "Rossijskaya Gazeta", supra, n. 19.

visitors and temporary residents, because the more sophisticated immigration regime of permanent residence carries more checks on aliens.

A number of other norms concern the general legal capacity of foreigners in the country which includes, inter alia, regulation of freedom of movement. Article 11 (2) of the law on the position of aliens restricts the stay of temporary residents only at places where the foreigner applied and received temporary residence status, i.e. no change of place of living is possible, apart from short-term travelling for personal or business purposes. This is a serious contradiction to the Constitution of Russia, the fundamental federal law on freedom of movement,[46] according to which restrictions should not undermine this basic constitutional freedom, and Protocol 4 of the European Convention of Human Rights (ratified by Russia on the 5th of May 1998). The provision of Article 11(2) contributes to the illegal position of many foreigners by unnecessarily immobilising aliens within Russia.

Chapter III of the law has been entirely devoted to matters of recording information by immigration authorities. Foreigners have to report to the passport and visa departments within three days upon arrival,[47] or for further mandatory reapplications for an extension or review of their status conducted on an annual basis[48] (this last requirement concerns temporary residents in the country).

Registration regimes in relation to places of residence and which constitute a distinct complex category (dealt with further below), are foundational to setting up the internal control system in other spheres. Requirements regulating the movement of foreigners and the virtual recording of their information can be regarded as crucial, because these are being enacted simultaneously with the fundamental requirement to register at the place of residence, as envisaged by the specialised legislation.[49]

3.3.1.3 Staying longer than the Period Permitted by Immigration Authorities

The law on the position of aliens makes overstaying the subject matter of Article 31 of the law on the position of aliens, which prescribes that any foreign individual should leave the country within three days after his or her period of residence expires, and fifteen days after his or her permission to stay is nullified by immigration authorities. Article 31 envisages deportation for this violation of immigration law. Overstaying is

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[46] Infra, p p. 138-139.
[47] Article 20 of the law.
[48] Article 21 (2).
[49] Infra, pp. 138-139.

often associated with CIS nationals, many of whom do not need an entry visa, but whose stay is limited to ninety days.

3.3.1.4 Employment of Aliens in Breach of Statutory Procedures

Employment has become a fundamental issue in aliens' lives in the Russian Federation. Article 13 (4) of the law on the position of aliens outlines the most essential traits of this regime where, as a general rule, an obligation to apply for a work permit has been established, with exemptions being allowed for some groups of individuals. Temporary and permanent residence status has been made the core issue for a permit-free system of employment, thus exonerating these non-nationals from applying for work permits. Additional exemptions were introduced to the obligation of aliens to apply for a work permit in some other cases, such as recognised refugees. Still, most aliens, including CIS nationals, fall under the existing obligation to be in possession of a work permit, while the Russian Government is authorised to introduce a system of quotas by means of a Decree, which may play a vital role in shaping the climate of aliens' employment. Currently, the specialised Governmental Decrees[50] establish the order of applying and issuing work permits and introduce quotas for work permit invitations which currently comprise 213,000, as opposed to 530,000 permits which were envisaged for the year 2003. According to the law on the position of aliens, once granted, the work permit allows employment only in those areas of the country where it was issued.

The law on the position of aliens provides for essential obligations on employers in dealing with immigrant labour. In addition to other norms of Article 18, paragraph 8 envisages the facilitation of certain administrative functions by employers, who are made responsible for the taxation duties of their employees, work permit acquisition,[51] deportation expenses and even provision of denunciations to the interior and other state security bodies on violations of employment contracts or change in place of residence by an employee. As a matter of fact, paragraphs 9(3), 9(4) and 9(7) of Article 18, in establishing most of the essential corresponding obligations of an alien taking employment, make work permits void if he or she, among other things, has been previously subjected to administrative removal or deportation, or has been

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[50] Governmental Decree No. 941 On The Order of Issuing Work Permits to Foreign Nationals and Stateless Persons, dated 30th of December, 2002; Governmental Decree No. 658 On Establishing Quotas for Issuing Invitations to Foreign Nationals for Entry for the Purpose of Fulfilment of Economic Activities, dated 3rd of November, 2003.

[51] Also the Presidential Decree No. 2146, infra, p. 145.

involved in document fraud for the sake of clandestine entry. In case of a violation of any of the terms or conditions of the employment contract by employees, the employer has the right to apply for nullification of the contract, either to the immigration bodies issuing work permissions, or to those in charge of internal administrative affairs, as envisaged by Article 32(2) of the law.

In respect of the current administrative role of the employer, it is possible to argue that immigrants of both legal and illegal types are vulnerable to all sorts of abusive practices. In the prevailing circumstances in post-Soviet Russia, where basic employment rights are regarded as negligible by most employers, and grave violations frequently occur, the position of aliens in light of the legislation placing even greater power upon the employer endorses discrimination and abusive treatment.

3.3.1.5 Refugees and Forced Migrants as Illegal Immigrants

This is probably one of the most compelling matters in the current debate over illegal immigration in Russia, as the present laws and regulations contribute considerably to the illegal standing of these individuals. The illegality of this group of immigrants originates from two main situations, that is the refusal of appropriate residential status by the immigration authorities, and the initial failure to submit an application by immigrants themselves. Asylum law remains one of the most important of immigration mechanisms that has been developing in the last few years, and is generally one of the avenues providing opportunities for legal stay in Russia.

3.3.1.6 Restrictions in Relation to Russian Nationals

Russian migrants definitely constitute a separate category of people, since different rules apply to them as opposed to foreigners. The movement of these individuals is not based on the immigration law, but on inherent Constitutional rights. There are two types of movement within the territory of Russia-- economic migration and forced migration, where the latter has been a separate area of regulation in the legal system, reflecting humanitarian concerns in this sensitive area. Internal economic migrants are not subjected to regulation by means of any special rules, apart from general administrative constraints in some parts of the country, created largely because of their concentration in economically advantaged regions.

All Russian migrants are protected in the sphere of employment by virtue of Article 64 of the Labour Law Code, which prohibits a refusal to employ any person if he or she lacks registration at the place of residence. However, prohibition of discrimination

of this type cannot be enforced fully, especially if discrimination in the registration procedures has been very significant at the regional level of legal regulation.

3.3.2 The Legal Consequences of Violations of the Immigration Law

Each of the abovementioned immigration law mechanisms, carries with it certain notions of 'breaches of the law', serving as criteria for the status of illegality and corresponding sanctions. The Russian system of immigration law lacks an all-embracing codified legal instrument which would cover all possible types of violations in the immigration sphere. Therefore, the legal meaning of 'a breach of the law' could be identified in the whole variety of legal acts, such as the recently adopted law on the legal position of aliens with the amended law on entry and departure and the Code of Administrative Violations[52] could comprise a sound equivalent of a unified immigration act.

Immigration law violations nullify the legality of aliens' status in Russia and consist of any breaches of the legal administrative regimes that foreigners commit within the territory of the country. Initially, the adverse effect of these violations extends to reapplication for visas or residence status, when immigration or entry clearance bodies can refuse either to grant or to extend leave to enter or remain.

In this respect, the law on entry and departure, in its Article 26, established grounds for the denial of admission to the alien, such as:

- Violation of rules on crossing Russian borders at the port of entry;
- Facilitation of entry by using forged documents or by means of deception;
- Presence of valid convictions for crimes committed either in Russia or abroad;
- Perpetration of two or more administrative offences in Russia, resulting in subsequent convictions;
- Failure to submit the Migration Card on previous visits to Russia;
- Failure to pay in full any administrative fines or to reimburse expenses originating from administrative removal or deportation (such refusal expires only after payment).

The law on the legal position of aliens likewise contains a detailed specification of situations which shape a breach of immigration law, such as Article 7 that established grounds for a denial or withdrawal of temporary residence status. Criteria for the refusal of residence status under this immigration regime may be partly juxtaposed

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[52] Federal Law No.195-ФЗ, dated 30th of December 2001.

with those in the law on entry and departure and, among other elements of public safety and security, include previous deportation from Russia and the previous imposition of any other administrative punishments for a violation of immigration laws.[53] All this is specified in addition to the grounds of lack of proof of the financial means necessary for living in Russia by a foreigner and his family,[54] lack of a living space after three years of residence in Russia,[55] and sham marriages with Russian nationals.[56] Decision-making in the area of a denial or withdrawal of permanent residence status regulated in Article 9 of the law has been based on the same principles and criteria as the ones outlined in cases of temporary residence.

Almost all situations involving foreigners' irregularity lead to the legal outcomes such as the denial of visas, residence permits or their extensions, subsequently resulting in the enforced departure of an alien from Russia, either by means of administrative removal or by deportation. Article 3.10 of the Code of Administrative Violations regulates the removal of aliens for administrative offences, such as breach of regimes of the state border (Art. 18.1), violations of border-crossing regimes (Art. 18.4, para. 2), violations of residential regimes (18.8), violations of employment regimes (Art. 18.10) and, finally, violations of the immigration rules concerning asylum seekers (Art. 18.11).

More generally, the administrative removal of foreigners for breaches of these administrative regimes has been made the subject of Article 34 of the law on the position of aliens, while deportation is a sanction envisaged by Article 31 only for overstaying. Article 34 has introduced administrative removal from the country at the expense of an alien or an organisation which was initially responsible for inviting an alien. The newly adopted Governmental Decree No 167 introduced a special levy that would be imposed on employers inviting foreign workers into Russia, and would serve as a financial warranty charged only for the removal operation. If an alien is a clandestine entrant, or if he or she entered independently, as in the case of CIS nationals, then he or she is subjected to removal at the expense of the federal budget.[57]

Because Russian immigration legislation implies a wide variety of punishable violations, even within the available administrative code, the term 'breach' can be problematic, and reflects the labyrinths of administrative decision-making. The

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[53] Article 7(7).
[54] Article 7(8).
[55] Article 7(9).
[56] Article 7(12); the marriages should be declared as invalid only by the court.

emphasis in relation to the entire system of treatment of foreigners in the legal system has been placed on the exercise of a large administrative discretion by interior authorities, which are allowed to act in all essential spheres of life. The requirements of registration at the place of residence, work permits, tightening of refugee policies, in addition to the available restrictive legislation on the position of aliens, will probably serve as a double measure of internal control, which will pose an unavoidable obstacle to the legality of foreigners.

3.3.3 Summary

Russian immigration control over the position of foreigners may be said to originate from a few quite segmental regulations, and the major problem in this regard concerns the enforcement of the presently changing legal acts. And the current enforcement machinery has been relatively inexperienced in handling new tasks in immigration and internal control. However, enshrined within the law is a very strict code regarding the control of aliens, which has yet to be enforced.

For example, legislation does assign substantial administrative authority to multiple officials and employers. Particularly, local Interior Ministry offices responsible for the status and residential affairs of immigrants have become too powerful and over-bureaucratic and pose an obstacle for the just function of the immigration control system. Currently, the system is not transparent for the judiciary either, which acted only in a few refugee cases, and, normally, is too slow and conforms to the will of the Interior Ministry officials. Although there is an attempt of coherency in the immigration system, position of aliens is characterised by a frequent abuse.

3.4 Residential and Other Administrative Constraints on Foreigners and Migrants: Practices and Effects of Internal Control

3.4.1 Significance of the Residence Regimes for Aliens

The regime of registration at the place of residence is a significant matter for every type of immigrant, either legal or illegal. The impact of norms in the field of administrative registration at the place of residence has been enormous in shifting the overall position of aliens in Russia towards illegality.

On the legal plane, illegal immigrants hardly possess extensive rights and guarantees in the registration system of Russia. While the registration regime is necessary for all

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[57] Governmental Decree No. 769, dated 24 of October 2002.

persons residing in the Russian Federation, it is available only to those individuals who legally enter and reside within its territory.[58] However, even if an alien has legally entered the country, registration regulations in some areas of Russia are such that they result in illegality, and this concerns not only aliens, but also Russian nationals. Medical insurance policy, school education and social welfare, although not in their entirety, are still residence-based instruments dependent on regional or local policies or legal acts. It is precisely this variation in the degree of illegalisation that is relevant for this chapter.

3.4.2 Federal Regulation of Residence

Article 27, paragraph 1 of the Constitution of the Russian Federation provides for the freedom of movement and residence for all persons who legally reside or move around the country. This basic constitutional guarantee followed another fundamental legal norm adopted prior to the Constitution, i.e. the Federal Law on the Right of Citizens on Freedom of Movement and Choice of the Place of Residence on the Territory of the Russian Federation.[59]

Registration is available to foreigners legally residing in the country. In this regard, paragraph 3 of Article 1 of the law states:

> "Persons who are not citizens of Russia, but legally reside on its territory have the right to freedom of movement, choice to a place of residence or stay within the Russian Federation in accordance with the Constitution, laws and international agreements of Russia".

A place of stay and a place of residence are determined as distinct legal categories. According to Article 2, 'the place of stay' is a hotel, a recreational or health care facility, a camping place, a tourist base, a hospital, or any other facility which cannot be a place of permanent living. The same Article also specifies 'the place of residence', which is a home, an apartment, a living place provided by an employer, specialised residence places (i.e. dormitories, orphanages, hospices, homes for invalids, etc.), and a place where a person predominantly resides as an owner or a tenant in accordance with the letting agreement.

Article 3 of the law requires mandatory registration, although possession or lack thereof should not become the sole factor either creating or impairing the legal rights of an individual subject to registration. This means, hypothetically, that anybody who lives in the territory of Russia, including foreigners, should be registered, but lack of

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[58] Clandestine entrants with a visa requirement will have particularly acute difficulties in registering.

registration should not prevent such a person from a realisation of rights. In practice, instituting registration has indeed become a serious precondition for any activity in society, whereby education, health care and labour rights are entirely dependent on the possession of this special status by any person, regardless of nationality. Even if a person's presence in the country is based on legal grounds, practically every alien has come across multiple difficulties and ambiguities in applying for registration at passport sections of local police stations.

In fulfilment of the abovementioned federal law, the Government adopted Decree No. 713, dated 17 of June 1995, establishing Rules of Registration and Withdrawal from Registration at the Place of Stay or Residence of Russian Citizens on the Territory of Russia, the application of which has been extended to aliens. In accordance with the letter of the Decree (largely conforming to the abovementioned law), there are two main types of registration: permanent registration and temporary registration. Initially, the list of principal requirements introduced by the governmental regulation consists of the minimum standard of living space per single person for permanent registration, and limits on the period of temporary registration. After adopting these requirements, the Constitutional Court of the Russian Federation decided[60] to nullify those provisions of the Decree that established standards and requirements concerning space per person at the place of residence.

Theoretically, most aliens are entitled to any form of registration, but in practice they primarily acquire temporary residence registration, because permanent registration is available only to owners of apartments and homes, and produces much more significant welfare entitlements, including property rights. Temporary registration is a supplementary form of control over the freedom of movement, limited in time, and exists only in tandem with permanent registration for the same person, only if he or she temporarily moves to a different location.[61]

The position of foreigners in the field of registration is subject to slight administrative variations in comparison with Russia's nationals, although the basic requirements concern everyone to the same extent. At the same time, the institution of registration in the Russian legal system is the subject of a contextual dichotomy. On the one hand, federal laws on registration are fundamental, and freedom of movement can be limited only under federal provisions. On the other hand, the major role of

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[59] Law of the Russian Federation No. 5242-1, dated 25 of June 1993.
[60] Decision of the Constitutional Court, dated 2nd of February 1998.

regulating the residence of aliens still falls within the regional acts, which tend not to conform with federal laws.

3.4.3 Regional Regulations on Residence

Many regions have adopted restrictive measures concerning immigrants, particularly those entering the country for employment reasons. The City of Moscow has had a long history of battling with immigration and the inflow of migrant labour, particularly from outside Russia. There has been a long succession of regulations within the last ten years, with the single purpose of stemming the immigrant population in the city. After the notorious regulations of 1995[62] were disputed and ordered to be changed by the judiciary, the Moscow Government has had to withdraw straight restrictions on registration at the place of residence or stay.

New regulations introduced by Moscow Government Decree No. 241-28 are relatively liberal in comparison with the preceding regulations of 1995. In accordance with the Decree, temporary residence, the only possible type of registration for many foreign migrants, is acquired in cases of a legal employment contract, proof of studies at an educational institution, medical treatment, or other compelling reasons. Permanent residence is enormously limited, and is available only to persons born in Moscow or working (serving) in the public sector (army or law enforcement system).

Legal battles were waged by human rights groups around the new Moscow registration rules, which were essential for every type of migrant and immigrant, because in many situations an individual could not register at a place even if the letting contract was signed. As a result, the amended Decree provides for the possibility of registration for temporary residence, and only upon production of a letting contract and a signed statement of agreement of all family members to register the applicant at their place of residence.

The norms and practice generated by the Decree were disputed at the Moscow City Court and the Supreme Court of Russia. As a result of the decisions of the judiciary, limitations on education of migrants' children were abolished. Prior to this, the Moscow educational authorities, on the basis of the Decree, were refusing to educate children whose parents did not possess any registration in Moscow. In fulfilment of the judicial decisions, the Moscow Mayor and the Moscow Region Governor issued a joint

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[61] Paragraph15 of the Governmental Decree.
[62] A Joint Decree of the Government of Moscow and the Moscow Region establishing rules of registration at the place of residence, No. 1030.

Decision[63] amending all the problematic norms of Decree No. 249-28. But separate decisions of educational authorities obliged school principals to report to the police certain cases where parents did not hold documents proving their registration at the place of residence.[64]

Access to the free health care system is conditional upon a permanent residential registration, and migrants have to acquire healthcare rights at the new place, through administrative formalities, or they are deprived of these upon being resident illegally in most large cities. Access to medical care occurs only when immigrants have money or the medical profession shows compassion. Irregular migrants are barred from the opportunity of welfare benefits through a stringent identity checking rules. The aforementioned situations prevail all over the country.

Certain CIS nationals possessing a visa-free entry right into the territory of Russia, used to have separate conditions of stay in Moscow. The Moscow Legislative Chamber had taken steps to regulate the inflow of foreign migrants into the city by adopting the Law on Conditions of Stay for the Foreign Nationals Who Possess the Right for a Visa-Free Entry into Russia[65]. The law of Moscow originally obliged all individuals allowed free entry to register with the police at the place of residence, in accordance with the requirements and regulations of the outlined federal and city regulations. The initial permitted period of registration was six months, with further possibilities for prolongation,[66] and individuals were subjected to a levy charged for the services. The Prosecutor's General Office issued an official protest on some restrictive aspects of the law, especially the one concerning the six-month registration period rule, and appealed to the Moscow Legislative Chamber to facilitate the process of altering its norms. Finally, the Law was abolished[67] in order to bring the city's legal system into conformity with the federal acts, especially in relation to employer sanctions for violation of aliens' employment regimes. The measures were said to be brought into conformity with the Code of Administrative Violations.

Registration at the place of residence is linked to internal control practices, and the police force is the principal actor dealing with the identification and apprehension of

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[63] Joint Decision No. 101-II II, dated 5 February 2002.
[64] www.refugee.ru .
[65] Law No. 33, dated 9th of July 1997, adopted by the Moscow City Legislative Chamber.
[66] Students or those with employment contracts can be registered for the entire time of study or employment.
[67] Law of the City of Moscow On Recognising as Void of Certain Law of the City in Connection with Adoption of the Russian Federation Code of Administrative Violations, dated 18th September 2002.

irregular migrants. Their powers to stop and demand identification documents from individuals are grounded on Article 11(2) of the Law on Police, basically allowing ID checking upon the *suspicion* of a committed crime or administrative misdemeanour; thus there is unlimited authority to stop anyone, especially in view of current terrorist problems in Moscow and elsewhere. In practice, the police infrequently abuse their authority by asking for bribes or by detaining people.[68]

The general combination of a restrictive registration and enormous police powers undermines the authorities' attempts to prevent the illegality of aliens. For instance, the process of ghettoisation of migrant communities accelerates in Moscow, with some districts in the metropolitan area being more susceptible to the negative effects of this. A substantial proportion of migrants indulge in document fraud in order to have a relatively calm residence, sometimes by appealing for support to their ethnic diasporas or organised criminal networks. Such measures of deterrence, as presented in this chapter, are in fact capable of driving migrants' lives into the vast 'underground' and criminal environment. Sometimes these informal bonds with organised criminal groups may explain the high involvement of immigrants with the drug trade, and the facilitation of illegal gambling or immoral services.

3.4.4 Summary

The main issue in connection with both federal and regional registration rules is the fact that they are supported with sanctions when violated by aliens. According to Article 18.8 of the Code of Administrative Violations, failure to register at the place of residence or to follow any other procedure is punishable with a fine, followed by subsequent administrative removal. In reality, however, when confronted by police raids, illegal immigrants who do not possess registration or a Migration Card may be questioned, but still let free, since the enforcement mechanisms of the recently adopted administrative removals have not yet been properly drawn and practised. At the same time, norms envisaging administrative removal carry a high potential for punishing violations of all immigration regimes.

Residence registration is largely predetermined by the Soviet practices of crude police control on the movement of people, and involuntary breaches of administrative rules by immigrants have been a very serious obstacle for the realisation of their civil and labour rights. Such a close residential control is unprecedented for both South

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[68] Many instances of police abuses in Russia are reported by Amnesty International, "'Dokumenty!': Discrimination on Grounds of Race in the Russian Federation", Alden Press, Oxford, 2003.

Africa and the United Kingdom and may reveal a useful experience for these states. The position particularly affects poor undocumented non-professional categories of workers, who enter Russia mainly from all over the former republics of the USSR and have no problem finding employment. However, random checks of passports and the special registration forms adjoined to them have become a daily reality in Moscow or other major cities and, until now, have been the only feasible measure pursued by the Government in order to combat unwanted immigration.

Overall, the system of registration at places of residence in Russia, and particularly in Moscow, has numerous drawbacks, contributing to the formation of illegal aliens in Russia. First of all, the procedures operating under the federal regulations are too long, too laborious, while the regional laws complicate the situation even more.[69] Secondly, there is no unified system of registration procedures throughout the country, and therefore aliens, upon visiting or moving to other places, face difficulties in obtaining registration and subsequently become violators of the law.[70] Thirdly, the system of registration as it operates today may be enforced only if it can be supported with stringent measures of internal control, police interference and policing.[71] Residence control has been ineffective in deterring illegal immigrants from living in Russia, with multiple drawbacks in areas of civil liberties.[72]

3.5 Federal and Regional Legal Acts Influencing the Position of Migrants and Aliens in Employment

3.5.1 Types of Illegality in Employment

As was outlined above, the illegal employment of aliens is a frequently committed offence that is based on violations of the special procedures for hiring foreign labour in the regions of Russia governed by statutory definitions, and operating both at federal and regional levels. Generally, as confirmed in Russian social science materials, illegality of employment refers to a range of circumstances, such as:

- Employment without proper work permits having been issued by the relevant authorities, unless otherwise established by immigration law;

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[69] "Discrimination on the ground of place of living and ethnicity in Moscow and the Moscow Region (August-December 1999)", the Joint Report of the 'Memorial' Human Rights Centre and the 'Civic Assistance' Committee, Moscow, 1999, in Russian.
[70] Ibid.
[71] Ibid.
[72] Russia's Ombudsman, Oleg Mironov, interview with radio station 'Echo Moskvy, 10 December 2001; in the Amnesty International Report, supra, n. 68, in Chapter 4.

- Employment in violation of permitted terms and conditions, or based on expired or forged documents;
- Engagement in entrepreneurial and self-employment activities without prior authorisation by the taxation or registration bodies, or based on expired or forged documents;
- Engagement in prohibited or criminal activities.[73]

3.5.2 Federal Regulation of Legal Access to Employment for Aliens

Currently, there are no major federal laws related to the topic of foreigners' employment, although another type of normative act has set up legal conditions for hiring foreign workers. Presidential Decree No. 2146[74] is the act establishing legal provisions which concern hiring and the employment process with regard to foreign labour in the territory of Russia. In addition to the Presidential Decree, almost every region with substantial economic potential inside the country has introduced specialised legislation, and programmes concerning the employment of foreigners, such as Moscow Government Decree No. 587, dated 16 July 1996.

It is possible to distinguish the roles between both levels of regulation, as the federal acts provide a general framework for hiring an alien labour force, and the regional ones contribute to more detailed rules of hiring and employing the foreign labour force in the regions. This emphasis on division between different levels of regulation is derived from the Constitutional principle authorising the joint regulation of the migratory processes outlined above, but independent formulation of regional priorities and fixing of quotas have become key features in the shaping of employment policy, and are influencing the position of illegal immigrant labour in the country significantly.

The Presidential Decree does not deal directly with illegal immigration issues, but it has envisaged conditions and criteria for granting work permits and for issuing special certificates confirming the right to work and occupation. According to the Decree, the main condition for engaging a foreign employee is an obligation on the employer to apply and obtain employment permissions, where this very practice is similar to both Britain and South Africa. Permissions to employ can be issued to Russian companies and enterprises, ventures with a foreign investment, and to certain Russian or foreign individuals, as well as to persons without nationality who establish themselves within the country.

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[73] Krassinets, supra, n. 1, p. 35.

The Decree has defined a set of documents required for the employer to submit so that he/ she can hire foreigners. The list has identified the exact procedure to be followed in this respect. Among documents which the employer should hand in are an application, a statement (proposal) of the regional governmental bodies evaluating the need and purpose of attracting a foreign labour force, a proposed employment contract, and other documents confirming a preliminary agreement with a foreign national. The initial duration of the permission does not exceed one year. Regional governmental bodies[75] responsible for labour and, partially, for immigration affairs, have been given a substantial role in granting permissions to employ a foreign individual. The employer undertaking to facilitate the application process is subject to the payment of a levy for the procedure. All statements that need to be provided to the work permit body are subject to scrutiny after the priority of domestic employees was established as a given requirement in the employment policy.

After obtaining the right to work acknowledged in the work permit, the foreign national has to apply for a certificate confirming the right to employment within Russia. This certificate is a necessary precondition for taking up any work, and its issue does not provide for possibilities of switching to another employer, a different type of employment or, especially, to employment in a different region of Russia.[76] The Decree identifies foreigners who are exempt from work permit requirements, and this list includes refugees, permanent residents within the territory of Russia, refugee status applicants and some professional categories.[77]

However, the general concept of work permit application remains ambiguous in the Russian bureaucratic system, and discourages employers from undertaking work permit applications. The lengthy and bulky procedures, often fulfilled by untrained personnel and containing unclear instructions, have added to the emergence of illegitimate contract relationships with foreigners. Sanctions on the employer for breaching requirements to obtain permission for attracting a foreign employee have not been spelt out in the Presidential Decree, and have been left to other legislative acts.

The regional level of regulation of aliens' employment in Russia offers a more rigorous and detailed spelling-out of the issue of illegal immigration. In this regard, Moscow has probably faced a very specific situation with regard to the employment of

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[74] The Decree was signed on September 16, 1993.
[75] Normally these are Inter-Agency Liaison Commissions.
[76] This norm has been upheld in the recent federal law on the position of aliens.
[77] Paragraph 18 of the Decree.

'aliens' from both outside and inside the country. Financial opportunities and Moscow's central position, key transport routes and international accessibility produce a genuine melting pot for foreigners and Russians themselves.

3.5.3 Regulation of Legal Access of Foreigners to Employment in Moscow

From the beginning of the 1990s, having experienced considerable inward migration, the Moscow Government adopted the specialised Decree on the Practice of Attracting and Employing Foreign Labour Force in Moscow,[78] amended in 1999[79] and complemented by a general framework of Moscow Law On Recording the Foreign Labour Force in the City of Moscow[80]. The wording of norms is similar to that in the provisions and requirements of the Presidential Decree. The resemblances are mostly found in the application process, but the Moscow Decree also provides for specific details concerning a separate application for a statement concerning the demand and usefulness of attracting foreign employees.

Quite recently, the provisions of all Moscow regulations providing for employer sanctions were abolished[81] to make way for a unified system of sanctions introduced by the Code of Administrative Violations. Currently, Article 18.10 of the Code carries both sanctions against the employer and the foreign employee for the violation of the established order of issuing work permits. Part 1 of the Article envisages a considerable fine on the employer, while part 2 of the Article introduces an administrative fine with subsequent removal if an alien takes unlawful employment within Russian territory.

Requirements introduced by federal regulations, and supported afterwards by the regional Decree, probably leave a wide margin of appreciation for officials' discretionary decisions and, in fact, complicate the entire procedure of applying for work permits. In practice, the entire system in Moscow operates with backlogs and delays, since at various stages the employer facilitating the work permit has to submit from eight to twelve different documents. The city authorities have underlined that priority in hiring has to belong to the existing labour force of the city, thus leaving little if any possibility for aliens to take up employment.

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[78] Decree No. 587, dated 16th of July 1996.
[79] Decree of the Moscow Mayor, No. 183-PM, dated 5th of March 1999.
[80] Law No. 51, dated 19th of September 2001.
[81] The Moscow Law On Declaring Void Certain Laws of the City of Moscow in Connection with the Adoption of the Code of Administrative Violations, No. 43, dated 18th of September 2002.

In the last few years, the Moscow authorities have faced a considerable demand for workers in some areas, such as public transport and medicine, and have had to take some practical steps to attract people from other regions of Russia, and also foreigners, for employment.[82] This measure, however, is probably unable to change the circumstances of the labour market of the city which is considerably saturated with illegal immigrants and migrants, many of whom also represent ethnic minorities. The measures introduced by the Moscow government have hardly deterred a growing number of illegal immigrants, but the negative effect on employment conditions is obvious.

Human rights organisations point to the serious issues connected with inhuman conditions of work. The 'Civic Assistance' group, for example, uncovered large-scale problems and reported on several of the most notorious cases.[83] One of them concerned foreign construction workers employed in Moscow, where a team of Azeri construction workers, contracted by an ethnic Azeri employer, worked on the site of an office building. Forced to hand their passports to their patron, they were prevented from leaving the construction site during the whole period of work, while working conditions involved a 14-hour working day, health problems and deprivation of food. A similar situation could be said to prevail in relation to most of the existing illegal immigrants in Russia. Even more so, there is a tendency towards forced labour practices involving irregular migrants, sometimes amounting to modern-day slavery. The media occasionally reports the release or the lucky escape of undocumented workers from unauthorised detention and forced labour practised by 'employers'—a situation which occurs frequently in Moscow and its metropolitan area.[84] Against this background, the massive violation of workers' rights as to their remuneration or general conditions of employment, seems to be a daily and almost 'normal' reality.

3.5.4 Social and Enforcement Factors Concerning Illegal Employment of Foreigners

Most Russian regional legislative acts have had significance in shaping and defining immigration policy. Illegal immigration in this regard is a reaction to the existence of quotas and constraints concerning the employment of aliens. There is a clear imbalance

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[82] Steps were taken by Decree No. 423 of the Vice-Mayor of the City, on Attracting and Employing A Foreign and Domestic Regional Labour Force in the City of Moscow.
[83] The materials are available on the site www.refugee.ru/rabota/rabota.htm.
[84] Dmitrieva, M. "Poverty is Not a Vice, But a Cause: Only Drugs or Weaponry Smuggling is More Profitable than the Slave Trade," 5(161) *London-Info* weekly newspaper, 13th of February 2004, p. 11, in Russian.

in the labour migration policy for two key reasons. First of all, experts acknowledge a substantial need for migrant workers in view of the country's demographic crisis.[85] In this regard, the quota of 213,000 foreign workers a year is probably too low to address the country's demands in this regard. Legalisation of available illegal immigrants would be another effective solution to the growing demand for migrants.[86] Secondly, imbalance occurs in the handling of labour migration, because of corruption and bureaucratic procedures. In this light, according to Russian social scientists, among the factors contributing to ineffective internal controls in this regard, the following are significant:

- Profitability of employing a foreign labour force with vast possibilities for exploitation;
- Complexity and long duration of procedures involved;
- Widespread discrimination and corruption when confronting applicants for work permits and employment certificates.
- Ineffective mechanisms of control over the employment of illegal immigrants.[87]

These factors are of utmost importance in creating obstacles for the legal employment of aliens, where the administrative side, enshrined in legislation, plays an even greater part in disqualifying aliens for the labour market. The mechanism of application involves the facilitation of official statements, work permits and employment certificates and, if taken together, these separate stages of application complicate the functioning of the system.

Meanwhile, the problems associated with the end of the Soviet era, refugee flows from the former republics of the USSR, and domestic, economic or military matters in Russia itself, have encouraged people to migrate in large numbers. The illegality of thousands of persons is a real fact in the country, where people experience discrimination and, as a result, a decrease in standards of employment and social life. In the sphere of employment, the federal laws currently afford no provision for more humanitarian treatment of illegal immigrants, since even the Labour Law Code, by virtue of Article 16 did not extend substantial labour rights to illegal immigrants, thus leaving them extremely vulnerable as far as their rights are concerned. Therefore,

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[85] Krassinets, supra, n. 1, p. 89.
[86] Ibid.
[87] Ibid., p. 49.

contractual relationships with such individuals are unstable, depending only on the good will of employers who, in turn, often show an inclination to abuse.

There is a lack of statutory acknowledgement of their rights, despite the fact that illegal immigrant workers are involved in a wide range of sectors of the national economy, such as the construction industry, small commerce, and provision of services. Almost 40 % of irregular migrants are engaged in shadow activities, which are not transparent for the taxation authorities.[88] The relative success of illegal immigrants in employment, commercial activities and social adaptation may be associated with the support of the well-functioning ethnic minority diasporas.

In this respect, market-places have probably provided democratic economic incentives to illegal migrants, where work could be quite rewarding, although regarded as an illegal entrepreneurial activity and part of the informal economy sometimes closely linked to the criminal world. At the same time, because of police control measures, and despite illegal payments to racketeers for "protection", these individuals feel very insecure. The issues of criminality and impaired social integration are other issues that emerge from the phenomenon of illegal immigration, where migrants could be hypothetically blamed for violation of basic norms of law and morality, but the excessive constraint by governments at all levels demoralises individuals, and often encourages their affiliation with criminal activities.

Illegal migrant workers are subject to removal from the country, in accordance with paragraph 4 of the abovementioned Presidential Decree No. 2146, where it is spelled out that removal should take place only at the expense of the employer, where this concerns employees with work permits. Currently, once detected on employment sites, illegal migrant workers either holding or lacking work permits, are relieved from penalties, unless fined for violations of the residential registration rules discussed above, since requirements for removal are not fully operable in the current situation. At the same time, the recently adopted Governmental Decree No. 167 discussed above may change circumstances, since potential employers will face financial obligations for the migrant workers, even at the stage of facilitating invitations. In addition, the policy-makers will probably shift the enforcement of responsibilities to the employers for the illegally employed workers under any circumstances.

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[88] Ibid., p. 76.

3.5.5 A Case Study: Chinese Nationals in Russia

A special issue tied up with matters of labour migration in Russia arises over the inflow of Chinese migrant workers and illegal immigrants. Since 1992, the channels for Chinese migration have been widened, allowing them to take up employment within the territory of the Russian Far East and Eastern Siberia. The basis for labour immigration of Chinese workers was laid down by the Agreement on Principles of Attracting and Hiring Chinese Nationals at Organisations and Companies of Russia,[89] signed by the Governments of both States.

The abovementioned Agreement envisaged both substantive and procedural norms for attracting Chinese labour. The Agreement established several steps that a Chinese worker should follow in order to take up employment. As Article 1(2) prescribes, a Russian company initially has to conclude an agreement with the specialised Chinese company accredited by both Governments. In accordance with Article 3(1), contracts should not exceed a period of three years. As far as the general legal position of the workers is concerned, Article 2(3) envisages the same rights and guarantees as exist for the domestic work force, so long as the person complies with Russian laws. The Agreement has likewise envisaged terms and conditions for termination of the work contract with the Chinese employee, where the grounds for termination include violations of Russian laws, and breaches of work discipline, leading to dismissal in accordance with Russian labour legislation. The major novelty is that Chinese workers and employees who enter Russia under the Agreement are subject to the visa-free regime of arrival, as implied by Article 12 of the Agreement. This is achieved, either by a special mark in the ordinary foreign passport, or by the issuing of a specialised passport for provision of services. Chinese tourists are not subjected to strict scrutiny along with the preliminary entry clearance on entering the country either.

Most Chinese migrant workers in the Russian Federation generally have a low level of education,[90] and normally take low-skilled employment not always demanded by the local people. According to the specialised study, Chinese migrants, 72 % of whom are employed as labourers, are largely represented in three main industries: the construction, agricultural and commercial spheres.[91]

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[89] Dated 19th of August 1992.
[90] 87 per cent of Chinese workers have an incomplete secondary education.
[91] Krassinets E. "International Migration of Population in Russia in the Conditions of a Transitional Period", Moscow, Science Publishers, 1997, p. 34.

Chinese workers have been using legal ways to obtain employment in Russia, but a fair percentage of them abuse these means of entry by conducting illegal activities. Entry with deception, the illegal employment of Chinese workers via changing to another employer, or a switch to business activity have contributed to the creation of a serious problem over the last years. The number of Chinese illegal immigrants in Moscow alone constitutes almost fifty thousand people, with the overall number being hundreds of thousands in Siberia, where Chinese tourists and workers overstay and contribute to the formation of unregistered businesses.[92]

A criminal environment has likewise originated from the inflow of immigrants from China-- almost eight thousand Chinese firms operating in Russia have been targeted by Chinese organised crime groups, with over a hundred individuals being killed, and thousands tormented as a result of criminal activities.[93] Racketeering is one of the common crimes generated in the Chinese ethnic environment, with an annual turnover of at least five million GB pounds for each criminal group.[94] In addition to these issues, Russia, due to the relatively liberal regime for Chinese immigrants, has become a transit point for further transportation of illegal immigrants to Western Europe, another illegal activity conducted by Chinese criminal groups. Sham marriages have been another type of stay-by-deception for Chinese immigrants, where some pay a price ranging from seven thousand dollars in Moscow to about one and a half thousand in other regions.

Federal and local authorities are concerned about the facts of illegal immigration, and recent changes in legislation were probably caused by fears of the overall immigration process. A recent case of municipal efforts to deter illegal immigration in the Far East of Russia is represented by the decision of city authorities at the port of Nakhodka limiting the number of work visas to about 1200 year, although this decision alone did not stop 'tourism', with its accompanying overstaying. Violations of immigration laws are a particular concern, since very little has been done by the state to facilitate and enforce the return of workers to their home country.

Chinese workers pose distinct enforcement dilemmas, which are quite outside the ordinary in terms of Russian immigration law. Entry of Chinese workers is often legal, but their residence and activities in the country are often contrary to laws and

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[92] Rumiantsev E. "'A Human Snake': Illegal Chinese Immigrants Flood the World". Eastern Express Newspaper (addition to the Possijskie Vesti), issue of 14th of March 2001, pp. 16-17.
[93] Ibid.
[94] Ibid.

regulations concerning their access to the Russian territory. These features of Chinese economic migration will demand considerable immigration control efforts, and probably also limitations on cross-border admission of these individuals to Eastern Siberia.

3.5.6 Summary

The system of aliens' admission for temporary employment determines the shape of regimes and the reality of illegal immigrants. The Russian reality confirms the assertion established in the theoretical chapter that widening of labour migration channels may decrease irregularity incidence of aliens. On the other hand, the substantial social effects of illegality, revealed in sociological materials on the Chinese and other migrants, may be regarded as negative in Russia, such as criminality and the informal economy. This other conclusion also confirms the idea of the theoretical chapter that internal control measures should accompany any liberalisation.

As far as the comparison with the system in the United Kingdom and South Africa is concerned, labour migration policies in Russia are less coherent and indeed more ineffective than in either of these states. In addition, progressive notions about labour migration are not better accommodated by the system than in the UK or South Africa. Better administrative handling of temporary migration is something that the Russian Federation could learn from the experience of the United Kingdom.

3.6 Illegality of Refugees and Forced Migrants in the Russian Federation

3.6.1 Refugees in the Russian Immigration System

A traditional issue tightly connected with aliens' illegality in the country is the problem of refugees and migrants, inasmuch as it affects the discussion on illegal immigrants in Russia. Issues surrounding the legal position of refugees and migrants reflect the complex reality of administrative and social regimes related to these persons.

The Russian legal system acknowledges three different types of asylum provided by the Russian state: political asylum, envisaged by norms of the Constitution, a general asylum envisaged on the basis of the Law on Refugees, and temporary asylum based on exceptional grounds.[95] The first type of asylum, political asylum, is subject to

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[95] Rucheikov, supra, n. 11, p. 32.

Constitutional regulation by Article 63 which states that its award should be in compliance with recognised norms of international law. In accordance with Article 89 of the Constitution, provision of political asylum is the competence of Presidential decisions: so far, no one has been granted political asylum through this procedure.[96]

The most commonly used type of asylum has been the granting of refugee status regulated by the Law on Refugees.[97] For the time being, over 3000 people annually apply for refugee status in Russia, but only 10% finally receive it. The third type, temporary asylum, means a delay of deportation on humanitarian grounds, when a person cannot be returned to the country of origin because of possible persecution. If the circumstances preventing deportation disappear, then the person could be returned without delay. A new Governmental Decree No. 274 'On Determination of Temporary Asylum within the Territory of Russia'[98] complements the Law on Refugees in regulating issues of temporary asylum.

The Decree does not specify humanitarian circumstances required for acquiring temporary asylum status and, likewise, it does not outline grounds for the refusal of this status. Meanwhile, the government proposes such a procedure where, upon a single application, the immigration body would be considering both the refugee status and the temporary asylum issues at the same time.[99]

For the topic of this thesis relevant provisions are enshrined in the aforementioned Law on Refugees, and such provisions are procedurally and substantively similar to the norms of the 1951 Geneva Convention Relating to the Status of Refugees. According to Article 3 (2) of the Law, the entire refugee application process is divided into two substantive stages: the preliminary review, and the determination process on the merits of the application. The juridical capacity of applicants emerges only at the stage when the application is declared admissible, with a number of guarantees available to the persons expecting a final decision. In this case, the scope of rights and guarantees extends to positive obligations of the state to provide assistance in matters of housing, transportation to the place of residence, health care and food, as well as assistance in acquiring professional training and employment. Those few persons who finally acquire refugee status are subject to more substantial guarantees, and have basically the same jurisdictional capacity as Russian nationals, apart from the right to

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[96] Ibid., p. 33.
[97] Federal Law on Refugees No. 4528-1, dated 19th of February 1993.
[98] Adopted by the Government on 09.04.2001.
[99] Rucheikov, supra, n. 11, p. 35.

vote. In accordance with Article 13, if individuals are denied such status, they are subject to deportation and punitive measures if they fail to comply with requirements to leave the country, unless the authorities take a decision to provide temporary asylum status on humanitarian grounds.[100]

Aliens applying for asylum could be regarded as being present in Russia illegally in a number of circumstances. First of all, the authorities may refuse to consider the asylum claim on its merits (i.e. after the preliminary review) if the claimant, being an illegal entrant, does not submit the claim within 24 hours of arrival in Russia.[101] Secondly, even if the refugee complies with this and other procedural requirements, administrative problems arise concerning their residence in the country. For instance, at the preliminary review stage, which may continue for 18 months, asylum claimants do not receive any documents confirming their status.[102] At the determination stage, i.e. when decisions are taken on merit, asylum seekers are supposed to receive the asylum-seeker certificate, but in practice they are issued only the letter.[103] Therefore, at all stages of the asylum application process, these people are vulnerable in terms of residential registration and police control,[104] since registration facilitation, being an important element of internal control, demands substantive documented grounds.

This results in a situation where asylum seekers are subject to police abuse and, upon denial of registration, cannot receive medical care. The recognised refugees are not always in a better position, because authorities can still refuse to register them at the place of residence. Furthermore, the Moscow authorities, for example, at one stage adopted Executive Order No. 1000,[105] envisaging limitations if a refugee or a forced migrant applies for registration. In such a case, the authorities demand written permission from the owner of a house or apartment, consenting to provide living space to such a person during the whole period of the status validity (three or five years). In this regard, the main problem tied up with refugee issues becomes the growing number of de facto asylum seekers and refugees whose status in the country is irregular.

Due to the explicit nature of permission to take up employment as envisaged in Subparagraph 8 of Article 6 (1) for the admitted asylum applicants, and in

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[100] Temporary asylum is granted to those persons who are subject to deportation, but whose departure to the country of nationality may cause inhuman treatment or persecution.
[101] Article 5.1.7 of the Law on the Status of Refugees; also in the Amnesty International Report, supra n. 67.
[102] The Amnesty International Report, supra, n. 67, in Chapter 6.
[103] Ibid.
[104] Ibid.
[105] Dated 17th of December 1997.

Subparagraph 9 of Article 8(1) for persons recognised as refugees, there are no grounds for a breach of immigration law. However, in reality, employers infrequently hire immigrants only on the basis of registration at the place of residence, with this practice adversely affecting even recognised refugees. In Moscow until recently, for example, sanctions were imposed upon employers for hiring individuals without registration at the place of residence.[106] Unpublished acts limiting employment rights are often introduced by local authorities throughout the country, and actual discrimination in hiring has been the key feature of the position of refugees and asylum seekers, despite Article 19 of the Constitution of Russia prohibiting any form of discrimination.

Regional lobbies extend influence over the migration bodies responsible for status-determination, with the purpose of limiting the number of successful claims for such status, especially since fulfilment of the state's own legal obligations to these individuals is a matter under the competence of regional authorities. Inability to substantiate serious guarantees financially, as outlined in the Refugee Law, leads to a shift in government priorities in respect of the asylum system. Moscow authorities are particularly keen on stemming the inflow of already existing and 'would be' refugees or migrants, and application for either of these status categories is fraught with complications. For example, the Moscow Government initially allowed submission of applications only to those who are registered in Moscow at the residences of their close relatives for at least a six-month period,[107]but later the decree was nullified by the Supreme Court of Russia.

A lot of policy problems are created out of a desire by the Government to reduce the numbers of asylum seekers. Immigration officials state that, since 1997, when wording in the law on refugees was redrawn, the procedures for official recognition as a refugee have become more complicated, thus demanding more checks on the individual's own identity and circumstances.[108] The introduction of procedural changes reflected on a number of people who had actually been granted refugee status.

According to the Government, a low proportion of recognition as a refugee is tied up with the fact that most applicants have made unfounded claims, but a foreigner denied refugee status could still legalise his or her position for a period from several months

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[106] Moscow Registration Rules No.1030 of 1995, currently out of legal force.
[107] Moscow's Mayor Executive Decision No. 1057 PM, dated 28 September 1999.

to a couple of years, since the appeal procedure took a long time.[109] However, reports from the regional refugee rights protection groups[110] reveal that most of the regions have been deliberately reducing the number of refugee status grants over the last few years, which has resulted in the emergence of a particularly tough issue concerning the situation of individuals from outside the former Soviet Union. Most of them representing troubled states of Africa and Asia are denied official refugee status, although the same people are occasionally recognized by the UNHCR as persons in need of protection. There have also been numerous problems in implementing the Russian legislation on granting immigrants permanent residence status in the Russian Federation.[111]

The dynamics of a number of people possessing refugee status in Russia has not been reassuring over the last few years. If in 1997 the number of refugees stood at 239,359 persons, by 2001 their number fell to 22916 persons,[112] because the authorities were keen on diverting many claims from the CIS states into the realm of forced migration.[113] The inflow of people with sufficient grounds for being granted refugee status has not ceased to be substantial, but most of them received immigration advice to apply for Russian citizenship first, and then later for forced migrant status. During all the period of enactment of the law on refugees, only 622 individuals from outside the CIS received refugee status.[114] Among them were a few Africans, 5 Chinese nationals and the rest were Afghanis, this despite the fact that Afghanis alone during Taliban rule comprised almost 150 thousand refugees within Russian territory,[115] most of them remaining illegal. Be this as it may, there is going to be a further reduction in the number of refugees, mostly former USSR nationals, who have been given refugee status without strict scrutiny during the recognition or

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[108] Rucheikov, V. "Problems in Organisation of Immigration Control and Provision of Refugee Status to Foreign Nationals within the territory of Russia", *Conditions of Administrative and Judicial Practice on the Matters Connected with the Position of Aliens and Forced Migrants*, Moscow, 2001, p. 25.

[109] Appeal can be submitted to the Appellate Commission of the Immigration Agency and then to the courts in all instances.

[110] At the website: www.refugee.ru .

[111] It is not quite clear what course will be taken by the Interior Ministry after adoption of the recent law on the position of aliens in Russia. Restrictions are likely to be applied, but more definitions and formal grounds for both obtaining and withdrawing permanent residence will establish coherent criteria allowing to dispute decisions in courts.

[112] Gannushkina S. "Law and Politics of Russia in the Field of Forced Migration", the seminar materials, supra, n. 11, p. 90.

[113] There are fewer extensive obligations on the part of Government for forced migrants than for refugees.

[114] Gannushkina, supra, n. 108, p. 91.

[115] Ibid.

identification process. Currently, from 2.5 to 3 thousand foreign nationals annually apply for refugee status in almost thirty regions of Russia, while the rate of success of applications is generally very low, amounting to about 10 per cent.[116]

With a trend of numbers of successful refugee claims falling in the country, a vicious circle seems to exist for many individuals with serious claims, as this rate also indicates that a low number of people actually legalised themselves in Russia. That is probably why some foreigners who arrive in Russia do not apply for refugee status within the country and prefer to stay illegally, especially when there are possibilities for illegal employment or residence, thus subjecting themselves to stringent internal control. On the other hand, the Government contends that in the event that control becomes more stringent over the residence or employment of aliens, the number of applicants will eventually rise to 15 or 20 thousand a year, because now the only way of legalisation in the Russian Federation is through applying for refugee status.[117] Introduction of an opportunity for temporary asylum could be a step forward, which may increase the number of people applying for such status in the next few years.

Human rights organisations point to instances of an inadequate response to the issue of refugee protection by the immigration authorities. For example, in contravention of the law on refugees,[118] an individual can be deprived of refugee status due to the fact that he or she finally receives registration at the place of permanent residence, as if 'permanent registration' means settlement within the territory of Russia.[119] At one point, this created challenges for refugees, especially since the Constitutional Court, in its decision No. 4-П dated 02.02.1998, found that permanent registration did not provide an absolute right to be present at the place of residence. The owner of the apartment or house can change his or her decision regarding consent to register a person at his/ her place of residence and the person will lose all rights, subsequently turning into an illegal immigrant. The status of refugee can also be forfeited if an individual commits a crime or even a breach of the law, and thus it can make a person an illegal immigrant.[120]

The illegality of asylum seekers occurs in the case of violations of certain rules and restrictions. Asylum seekers are subject to sanctions under the circumstances involving serious breaches of residence regimes in Russia. First of all, according to Article 18.11

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[116] Rucheikov, supra, n. 108, pp. 25-26.
[117] Ibid.
[118] Article 9, paragraph 1, subparagraph 1 of the Federal Law on Refugees.
[119] Gannushkina, supra, n. 108, p. 91.

of the Code of Administrative Violations, flight by asylum seekers from residence at a place specially designated for them by immigration authorities (normally specialised residence centres), is punishable by an administrative fine and removal from the country. At the same time, the Article considers removal as a discretionary measure in combination with the fine. Secondly, asylum seekers are subject to administrative punishments pursuant to Article 18.12 of the abovementioned Code, when more general residence regimes within Russia envisaged by the law on refugees are being violated. These regimes are emerging from obligations to fulfil various registration procedures with the immigration authorities, such as passing on information relating to any changes of juridical circumstances, personal data and places of residence.[121] However, these violations do not lead to removal from the country, but rather to administrative fines, although possibilities exist that in case of accumulation of these administrative breaches, removal or a denial of other forms of residence status would be certain.

In a number of cases, administrative challenges and absurdities have also occurred in asylum determination practices, when, for example, in order to obtain permanent residence status in Russia, the individuals applying for such status are forced to acquire new passports in the countries which they have left. Because departure from those states was often a result of violence or ethnic conflicts, this requirement directly contributes to the illegality of this particular category of persons, since permanent residence in itself serves as the most essential precondition for acquiring Russian citizenship.

The most common type of immigration law violations committed by applicants for asylum represents a situation where asylum seekers are denied refugee status, but are still capable of staying in the country without proper authorisation. Many individuals from other states of the former USSR could re-enter on the grounds of visa-free access into Russia, although, by taking up employment, the offensive behaviour takes another course, and violates either registration rules, or restrictions on employment. Document fraud and other offences in order to avoid restrictive legal regimes contribute to the formation of a criminalized environment around refugees and asylum seekers.

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[120] Article 9 (2) of the Law on Refugees.
[121] These obligations of asylum seekers are envisaged in Article 8 of the law on refugees.

3.6.2 Position of Forced Migrants and Internally Displaced Persons in Russia

Slightly different circumstances emerge in connection with the other group of migrants. In this regard, the Russian legal system distinguished between the term 'refugee' and 'forced migrant'. The terms 'forced migrant' and 'refugee' have almost identical substantive meanings in jurisprudence, but the term 'refugee' relates to foreigners, while the term 'migrant' means someone with similar circumstances as a refugee, but a national of the Russian Federation.

Illegal presence in the sense of Russia's actual laws and regulations concerns not only those individuals who are aliens, but also those persons who possess Russian nationality, and who could rather be regarded as 'illegal migrants'. Russian nationals, who find themselves in the same circumstances as asylum-seekers, are subject to the application of another legal act dealing specifically with the issue of protection of forced migrants or internally displaced people. The Law on Forced Migrants[122] provides a definition of the forced migrant and of criteria that normally contribute to the grounds for granting such status. By virtue of this law a Russian national is protected either in a situation of internal instability in some parts of Russia that makes him move to other places in the country, or in case of civic and military disturbances abroad which affect the Russian national residing there and make return to the Russian Federation unavoidable.

In accordance with Article 1(4), persons from the republics of the former Soviet Union initially holding refugee status, but consequently obtaining Russian nationality can transform their status into that of forced migrant. Because forced migrants and internally displaced persons are citizens of the Russian Federation, they possess entitlements to employment, social welfare, education and other spheres of protection throughout the entire territory of Russia. In practice, however, registration and other procedures create illegality for these individuals, despite their nationality.

3.6.3 Case Studies: Underprivileged Position of Refugees in the Russian Federation[123]

Besides the very stringent nature of rules concerning the granting of humanitarian status to strangers, everyday living for newcomers can be a real problem, extending to

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[122] Federal Law No. 4530-1, dated 19th of February 1993.

[123] Based on the Report submitted by the Memorial Human Rights Centre, its 'Migration and Law' programme, to the UNHCR office in Moscow.

all spheres of life. There are two main case studies representing the situation of refugees and their illegality.

3.6.3.1 Case 1

One of the reports of the Civic Assistance human rights group to the UNHCR office in Moscow[124] lists facts concerning the treatment of migrants of both foreign and domestic origin. A compelling issue for the last years has been the treatment of Turks-Meskhetins in the South of Russia, where this ethnic group, previously displaced from Uzbekistan by violent ethnic disturbances in the 1980s, started buying properties and achieved a fair concentration of their population. The regional response to the movement of this group was to illegalise any presence of these individuals, many of whom were nationals of Russia by the time the report was issued.

Legal acts in the Southern region of Krasnodar[125] legislated with violations of federal laws,[126] imposed restrictions on the purchase of properties, notary actions following property bargains and registration at the place of residence—all directed against the Meskhetins. Local courts have acted in general compliance with the regional legal acts, despite their openly illegal character. Even after the alterations of the acts were adopted, authorities still persisted in using basic limitations on the legal capacity of migrants in the region. Lack of registration at the place of residence and deficiency in property status meant treatment of Turks equivalent to the treatment of illegal immigrants who are totally alien to the country. A very common practice of the police used to be arrests and the placement of such individuals in police custody, with some people having to spend ten days or even weeks there.

3.6.3.2 Case 2

Among other groups of immigrants, Afghanis have been entering numerous areas of Russia. Whether legally or illegally, these people used to escape from the Taliban regime, and many persons have stayed in Russia as a result of this migration process. Until 2001, the largest category of individuals applying for refugee status was comprised by the Afghanis. According to governmental estimates, there are now over

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[124] The report was submitted by me in September 2000 to the UNHCR office in Russia.
[125] Act of the Krasnodar Region # 9-K3 "About Residence and Living on the Territory of the Krasnodar Region", with changes adopted on 18th of October 1998.
[126] The regional law contradicts the federal one if it decreases guarantees provided at federal level. Regions can only increase the legal protection of people within the realm of minimal guarantees envisaged at a federal level of regulation.

150 thousand Afghanis residing in Russia, while in Moscow alone the number is fifty thousand.[127]

Since 1997, immigration bodies admitted only six thousand applications for refugee status from Afghanis, and almost twelve thousand of these applications were at the preliminary stage of registration of applications. At the same time, the UNHCR has dealt with over 27 thousand Afghanis, many of whom did not report or apply to the official immigration bodies for refugee status, thus preferring to remain in the country illegally,[128] probably because the percentage of successful applications has not been over sixteen per cent for this category of individuals.

Particular attention should be dedicated to the plight of the former Afghani orphans brought to the country. There has been a bilateral intergovernmental agreement permitting the USSR to take children into the country for upbringing and education. Teachers of these children have been Afghani nationals, undertaking the task of providing culture and language education to these children and teenagers.

Almost twenty years later, many of them were unable to receive any form of legal status in Russia, despite the country's vow to be the USSR's legal successor, and these people currently have no other documents except for the identification document from the UNHCR. In the opinion of the Government, former Afghani orphans have not lost their culture or language and have traditionally kept relations with their Embassy, claiming such relations even during the years of the Taliban. On a number of occasions, immigration bodies have undertaken to accept refugee status applications from these individuals, but only on personal merits.[129] The interior ministry was conducting an identification of these persons, with further decision-making in this area. Most of them possess Afghani passports, but only a few of them applied, for instance, for permanent residence in the Russian Federation, instead staying in the country illegally.

The abovementioned Governmental Decree on temporary asylum is said to have been specifically designed for Afghanis trying to settle in Russia at least temporarily, and its contribution to the formation of legal status for Afghanis could be invaluable.

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[127] Rucheikov, supra, n. 11, p. 36.
[128] Ibid.
[129] Ibid.

3.6.4 Summary

Illegality is a stigma that overlooks all aspects of the lives of refugees and migrants and, in fact, making strangers illegal is probably one of the major policy goals in many regions. The Russian asylum policy is multifaceted and in every respect restricts, if not damages the chances of (potential) refugees for enjoyment of full status. The main issue in this regard is the fact that the post-Soviet authorities in Russia weakened and in some cases dropped responsibility for the Soviet legacies, i.e. especially its moral obligations in respect of many individuals. This has immediately increased the vulnerability of aliens, particularly post-Soviets and Afghanis, in their internal legal position inside the Russian Federation. Indeed, internal status of asylum seekers and refugees impairs their ability to fully integrate and illegalises them. Particularly, no incentive exists for the potential asylum seekers to apply for the status.

3.7 Conclusion

The analysis that has been presented regarding the system of Russian immigration law generally answers the main question of the research and hypothesis, inasmuch as it demonstrates the effects of excessive constraints on aliens. One of the problems of the present chapter was to draw conclusions on the immigration policies without statistical information on all essential sides of control or enforcement, where statistics are not normally made available by the authorities. Nevertheless, the Russian administrative and immigration legal system presents a clear example of how the law may excessively contribute to the illegality of all migrants, particularly those originating from underprivileged backgrounds and impoverished states. This chapter has contributed in uncovering the role and capacity of the police measures which exist in the country, such as considerable restrictions on the freedom of movement endorsed by the new law on the position of aliens in Russia and, furthermore, by police authorities through the system of registration, and the general limitation on the legal capacity of all aliens.

Perhaps of all three states of the research, Russia has the most restrictive system. On the surface, the Russian government has been relatively more generous in recognising the need for migrant workers and immigrants than Britain or South Africa. Indeed, a total number of both temporary residence permits and work permits constitute over 600,000 a year, but it does not mean that this potential has been fulfilled, because of

the failure in administrative handling.[130] The Russian administrative machinery has a more prohibitive and conservative impetus in respect of dealing with all individuals than in the UK or South Africa. For instance, the chapter on Russia does not cover substantively the issues of welfare rights of irregular migrants, since there is a total prohibitive control in administering benefits, state housing and even medical care.

The cornerstone of such deterrent immigration policies concerns a restriction on movement of aliens within the country serving as an initial obstacle for legal access for residence or other purposes. Particularly, residence regimes, although failing to create coherent internal control, nevertheless, contribute to the administrative abuse and insecurity of all immigrants in the country. Very few, if any, effective judicial mechanisms exist to deal with the situation.

These features shape and affect the position of illegal immigrants in the country. They have no recourse to claiming substantive rights. At the same time, their numbers are growing. In the light of this, no legalisation or liberalisation policies are envisaged by the government to deal with the problems of economic demands or the looming demographic crisis. Refugee policies, as in Britain or South Africa, have likewise been designed to deter the migration flows at any cost, even though it is contrary to Russia's role of the USSR successor. Asylum seekers and refugees find themselves in a vicious downward spiral of a lack of sufficient support structures.

Such immigration system either generates fraud or a total legal nihilism in relation to these very administrative regimes in the spheres of labour migration and residence control. Efficiency of stringent control has been undermined, by the cumbersome nature of the control itself. The immigration and administrative policy of Russia needs to change inasmuch as it should combine practical and realistic approaches, along with the idea of effective control over the movements of aliens. The new laws on aliens have not yet provided assurances that this shift to a more realistic administrative and immigration control will actually take place.

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[130] No data are available to evaluate how many permits are actually granted each year, but the reality of bureaucracy contributes to the presumption of a low application success rate.

4 Legal Position of Irregular Migrants in South Africa

4.1 Current Trends and Dimensions of Illegal Immigration in South Africa

Illegal immigration in contemporary South Africa may be regarded as a controversial topic, where evaluations differ seriously and where both adamant proponents and opponents enter the discourse with highly polarised opinions.

Estimates as to the presence of illegal immigrants and the effects of illegal migration into the country vary in the debate on contemporary legal and social science. The predominantly clandestine character of immigration into the country, with its insufficiently tight border control, contributes to difficulties in identifying the exact number of illegal immigrants in South Africa. Estimates in the early nineties suggested that by 1995 the country housed almost 5 million illegal immigrants.[1] In the year 2000, the government gave only approximate figures which stated that from six to twenty per cent of the current South African population is made up of illegal immigrants.[2]

Although numbers concerning deportation and overstaying by immigrants cannot reflect the exact scope of the presence of undocumented migrants, forced repatriations amount to almost 160,000 a year,[3] while overstayers constitute over 900,000 people in the region.[4] The figures connected with overstaying could be only a relative sketch of the situation, but nevertheless produce points for concern, and per se do not provide any possibility for diluting the scope of the problem of illegal immigration. Despite the rough estimates of irregular migrants in the country, its scale is perhaps slightly greater than in the UK or Russia.

The main source and type of illegal immigration has been clandestine immigration from Mozambique, Zimbabwe and Angola. Relatively porous borders with the neighbouring states have made it possible for millions to come across to South Africa. Clearly, with the deep crises in these states, thousands if not millions of people dream of coming to the relatively prosperous South Africa. The presence of these individuals

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[1] South African Yearbook, in Minaar, A., Pretorius, S. and Wentzel, M.. "Who goes there? Illegals in South Africa", 12 (Winter 1995) *Indicator SA*, p. 33.
[2] *Finance Week*, 11th of February 2000. Figures were drawn from the Home Department statistics.
[3] White Paper on International Migration, Government Gazette No.19920, 1 of April 1999, Chapter 6, provision 4.3.2.
[4] Figures provided by Lieutenant-Colonel L. Boshoff of the SA Defence Force; in Solomon, H. "Contemplating the impact of illegal immigration on the Republic of South Africa", 26(1) (June 2001) *Journal of Contemporary History*, p. 2.

in the country is substantial, and easily identifiable by the still growing, appalling squatter camps, with devastatingly poor 'tin houses' constructed by illegal immigrants alongside those of the poorest native South Africans. A growing number of communities in South Africa experience and feel somewhat confrontational towards illegal immigrants, who are believed to draw on their resources and undermine small business opportunities.[5] Undisguised xenophobia has been on the rise against illegals, thus making them victims of prejudice and sporadic violence, both by community members and law enforcement officials.[6] In the media, one of the representative provocative statements is the following:

> "In Durban the situation has reached the point of no return. Foreigners might even lose their lives to residents whose tolerance has been stretched to the limit. The sooner the government acts, the better, before they say Zulus are like this and Zulus are like that."[7]

In its extremity, this statement shows the attitude of many South Africans, while opinion polls reveal hostile attitudes to foreigners. In this vein, major public opinion holds the position that immigration should be restricted, or even banned (80%), with a fair proportion (about 60%) believing that immigration weakens the economy and puts a strain on the resources of the country.[8] It is probably the tangible results of illegal immigration, and the internal pressure of poverty in South Africa that provoked comments by the Home Affairs Minister, Mangosuthu Buthelezi, that illegal immigration will threaten the Reconstruction and Development Programme in South Africa.[9]

Indeed, it is probably difficult to explain and support the inflow of manual labour in a labour-abundant country with a 40% unemployment rate. South Africa has its own serious problems in the development agenda, such as life below the poverty line for 53% of the population and a shrinking job market.[10] In the social science circles of South Africa, however, some observers justify a more welcoming approach to illegal

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[5] This is obvious from the sociological surveys reported by Solomon, ibid, pp. 4-8.
[6] Ibid., at p. 9; also in Human Rights Watch Report, "Part 4: The Treatment of Undocumented Migrants in South Africa/ [Chapter on] Attacks against the Foreign Hawkers/ [Chapter on] Physical Abuse During the arrest Process", in *Prohibited Persons: Abuse of Undocumented Migrants, Asylum-Seekers, and Refugees in South Africa*, New York, Washington, London, Brussels, 1998, available on the site: http://hrw.org/reports98/sareport .
[7] Mthembu, T. "Foreigners Must Behave", *Sowetan Sunday World*, 12th May, 2002; contribution of the SA Media project operated by the University of Free State.
[8] Nkuta, Z. "Most Want Foreigners to be Sent Home", *Sowetan*, 23rd October, 2001; available at the University of the Free State SA Media database, ibid.
[9] Solomon, supra, n. 4, p.
[10] Ibid., p. 17.

immigration. Maxine Reitzes, for instance, argues that it is generally difficult to prove the hypothesis that only negative effects are produced by illegal immigration.[11]

Although she offers little data to contradict the government's claims, in the view of Reitzes, illegal immigrants may still bring some benefits to the host society in South Africa via the increase of economic activities by immigrants.[12] The same author also introduced a human rights-based approach in the scientific agenda, arguing that these rights are universal and inalienable in every aspect, including freedom of movement.[13] Opposed to this, Solomon holds the position that illegal immigration places multiple and additional burdens on the host society.[14] What could reconcile these views, however, is that reduction of all aforementioned pressures by means of enhancing economic development in South Africa should be addressed by the government, a fact which is cogently stated by Hussein Solomon.[15] But, at the same time, the notions of fundamental human rights should be observed by the state conducting protective policies, and this idea can be drawn from Reitzes's work.

That the government's actions have to be balanced enough not to work to the detriment of basic human rights on the one hand, and not to endanger public life on the other, is possibly an obvious conclusion to be drawn from current discourse. This balanced approach is particularly important due to the specificity of the South African problem of illegal immigration. From the sociological point of view, South African illegal immigrants can be divided into four main categories:

1. South Africans born here, but who have never been registered;
2. Foreigners who have entered and stayed in South Africa as economic migrants;
3. Immigrants who initially enter on legal grounds, but who subsequently overstay the limits set by their documents;
4. Clandestine immigrants, many of whom are forced migrants fleeing war or famine.[16]

There is an indication in South Africa that the majority of irregular migrants in the country are clandestine migrants, who become the major source of migration into the

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[11] Reitzes, M. "Immigration & Human Rights in South Africa". in Crush, J (ed.) *Beyond Control: Immigration & Human Rights in A Democratic South Africa*, Southern African Migration Project, Cape Town, 1998.
[12] Ibid.
[13] Ibid.
[14] These views are well presented in the current paper.
[15] Solomon, H. "Of Myths and Migration: Illegal Immigration in South Africa", University of South Africa (UNISA) Press, 2003, Chapter 1.

country. However, in addition, there is the presence of a sufficient number of forced migrants who, at the same time, may be regarded as illegal immigrants under the immigration legislation. They demand more humanitarian, rather than utilitarian, treatment. Nevertheless, this humanitarianism does not per se contradict the negative effects of illegal immigration, but amends all available scientific and practical agendas concerning illegal immigrants and their position in the country, as argued below.

4.1.1 The study of social and economic effects of illegal immigration on South Africa

There are numerous arguments surrounding the pros and cons concerning illegal immigration in South African social science, as demonstrated above. Human rights organisations and certain writers are specifically concerned with xenophobia and the views of illegal immigrants themselves on the issues,[17] while, on the other hand, government-affiliated and independent research centres[18] provide for different perspectives on the issue.

South African debate has to be focused primarily on the possible contribution and negative impacts of illegal immigration on the country. The assessment of these factors is conducted at such a time in South Africa, when governance, law and order are somewhat shaken as a result of the change of the system. Therefore, studies on negative effects, however sound, may encompass slightly exaggerated views on illegal immigration in light of popular negative attitudes.

Initially, it is the economic costs of illegal immigration that should be taken into account. The central question in this respect, considering that employment becomes a powerful pull factor for illegal immigration, concerns the impact on the South African labour market and domestic work force. The majority of irregular migrants entering South Africa are nationals of the underdeveloped African states, with their dependence on subsistence farming in their countries of origin[19] being basically similar to that for most of South Africa's nationals, almost 40% of whom are unemployed and

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[16] Sinclair, M.R. "Unwilling Aliens: Forced Migrants in the New South Africa", 13(3) (Winter 1996) *Indicator SA*, pp. 16-17.
[17] Reports of Human Rights Watch, supra, n. 6 and standpoint of Maxine Reitzes, a contemporary South African researcher, infra supra, n. 11; also Reitzes, M. "Strangers truer than fiction: The Social and Economic Impact of Migrants in Johannesburg Inner City", Centre for Policy Studies/ Social Policy Research Report No. 60, Johannesburg, 1997.
[18] Human Sciences Research Centre, an organisation affiliated with the government and working under the auspices of Nelson Mandela.
[19] Based on the Southern African Catholic Bishop's Conference, "Mozambican Refugees in South Africa", SACBC Masungo Project, Pretoria, 1993; in Solomon, supra, n. 4, p. 14.

predominantly uneducated people, in many cases competing for very limited employment opportunities.[20]

Competition within the low-skilled job market, as well as in the sphere of social welfare resources is probably unavoidable in some industries between the domestic employees and illegal immigrants, especially when studies reveal a substantial presence of undocumented workers in very essential sectors of the economy.[21] The reports produced by the trade unions show a tendency of employers to hire illegal immigrants, because they are prepared to work for extremely low wages.[22] In addition to mainstream industries, irregular migrants are trying to work in the informal economy,[23] where hawking represents the most common type of business activity. The overall impact on the economy could be regarded as negative from the point of view of many observers: however, no exact estimates comprehensively prove these results, especially in light of the improvement in business activities which are boosted by migrant workers.

However, in addition to the economic costs, irregular migration poses dilemmas as to the social impact on the crime rate and the spread of diseases in the country. First of all, South Africans increasingly blame illegal immigrants for their contribution to an increase in the crime rate. Against the background of the drastic increase in the number of violent crimes, any mention of illegal immigrants' contribution to this compelling social problem produces some social resonance. The available statistics reflect figures of immigrants' involvement in crime at different periods. The data available for 1994 revealed that almost 14% of the total number of crimes were committed by illegal immigrants, while at the same period, 13,8% out of the total number of deported immigrants have been arrested for serious crimes.[24] In 1996, the figures representing the territorial scope of the problem, reveal that in several selected provinces, undocumented migrants committed from twelve to thirty-seven per cent of the total crimes.[25]

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[20] Minnar, A. and Hough, M. "Who Goes There?: Perspectives on Clandestine Migration and Illegal Aliens in southern Africa", HSRC Publishers, Pretoria, 1996, p. 208.
[21] Toolo, H., Bethlehem, L. "Labour Migration to South Africa" paper presented at the National Labour and Economic Development Institute, Johannesburg, 31 August 1994; in Solomon, supra, n. 4, p. 15.
[22] Solomon, ibid., p. 16. There are several main unions which have reported a decrease in conditions of employment in several sectors, such as construction, catering and domestic work.
[23] Minaar and Hugh, supra n. 20, p. 132; also Solomon, ibid., p. 17.
[24] Minaar and Hugh, ibid., p. 212.
[25] Colonel van Nierek, "Illegal Immigrants' Impact on Crime", Seminar on population movements into South Africa, Institute for Security Studies, 3 September 1996; in Solomon, supra, n. 4, at pp. 16-17.

Another type of datum is available which argues for the considerable involvement of irregular migrants in certain kinds of criminal activities, such as smuggling and the sale of illegal arms or drugs, prostitution and commercial crimes.[26] Johannesburg, considered by many Africans as a city of great opportunities, experienced an enormous inflow of illegal immigrants and an outburst of illegal activity. There, according to the Commander of the Brixton Murder and Robbery Unit, approximately sixty per cent of home burglaries and bank robberies are committed by illegal Zimbabweans.[27]

At the same time, one of the basic preconditions for the emergence of crimes committed by illegal immigrants has been the poor adaptability of all illegal immigrants in the context of very few possibilities available to immigrants in the country. Most of the illegal immigrants slip into and remain in a disadvantaged situation which stimulates them into entering the criminal world.

A separate issue closely associated with illegal immigration is the scale of diseases to which undocumented immigrants have contributed. South Africa's illegal immigrants originate in impoverished countries of the continent, where widespread diseases, such as tuberculosis, malaria, yellow fever, cholera and, finally, AIDS flourish, with malaria and AIDS constituting the most serious problems. With all of these factors, even in the most developed South Africa, there is hardly any reliable information concerning the health issues of its own nationals, while the inflow of people from other impoverished nations makes monitoring even more complicated, and only random data are available. In the case of Mozambican immigrants, for example, the staff of the Impala Platinum Mine Hospital identified malaria cases in almost ninety per cent of Mozambican workers, and a significant number of HIV cases among that migrant community.[28] The spread of HIV in South Africa has likewise been encouraged by prostitution, where a serious role has traditionally been played by human traffickers and foreign prostitutes.[29]

Irregular migration in South Africa poses great challenges for the social order and welfare and the case is perhaps even more confronting than in the UK or Russia, not least because there is a widespread poverty and a substantial disparity between the black and white communities in the society. An additional inflow of similarly poor

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[26] Minaar and Hugh, supra n. 20, pp.212-214; Solomon, supra n. 4, pp.18-19.
[27] "Foreign robbers flood South Africa", *The Independent on Sunday*, 27 March 1999; in Solomon, ibid, p. 17.
[28] Solomon, ibid., p. 21.
[29] Minaar and Hough, supra n. 20, p. 214.

people only fosters further social problems with their illegality becoming a catalyst for emergence of anti-social behaviour.

4.1.2 South African Border Control and Human Smuggling

South African borders have historically had a tendency to be porous, due to the fact that, despite the political divide, people of the same ethnos lived in the Southern African region, with close ties and affiliations always being customary.[30] Over the last few years, South African borders have become almost transparent because of factors of liberalisation in the country. Borderlands are hot spots, with tensions growing in relation to their protection and control. The circumstances of border control in South Africa were eloquently described by Minaar:

> "Illegal immigrants enter the country with ease. There are sections of the border not covered with fencing, for example where a railway line crosses the border….People merely walk across. Lesothans and Swazis can cross even more easily."[31]

In this regard, along the border with Mozambique, the infamous 62-kilometre electric fence was constructed to complicate access into the territory of the republic for clandestine migrants, but the fence proved to be almost useless in stemming people from entering the country.[32] The arrest figures for the border stretching from Botswana to Mozambique actually highlight the scale of clandestine migration into South Africa, even considering that it is only a small percentage of the people who are getting caught, where, for 2001, the figures comprised almost 37,758 people.[33] Considering the cost of South African efforts to protect borders, which is currently 16,000 Rands per person (approximately 1200 GBP), calculated in relation to the number of clandestine migrants detected. This is a costly and not fully effective activity for the government and the public.

According to reports from the national Defence Force, human smuggling has been a very lucrative business on the borders of South Africa, thus creating circumstances where desperate people have to pay the smugglers.[34] Once the border is crossed, people will be picked up by certain taxis which demand money for transporting them

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[30] Regional Task Force North. "Border protection and Undocumented Migrants", (August 2002) *SA Soldier,* p. 16.
[31] Minaar et al (*Indicator SA*), supra, n. 1, p. 35.
[32] Ibid.
[33] SA Soldier, supra n. 30.
[34] Ibid.

to the Gauteng Province (Johannesburg and Pretoria area).[35] Illegal movements of people generate a whole range of negative factors, resulting in an increase of other illegal activity associated with the presence of a substantial number of individuals involuntarily placed outside the scope of the legal system.

4.1.3 Summary

The impact of illegal immigration on the South African society and economy may certainly be described as negative. Illegal immigration overburdens the economy and the main public services. As was outlined in the White Paper, illegal immigrants are likely to produce a whole variety of negative effects on the situation in the country:

- competition with South Africans for scarce resources;
- competition for all basic public services;
- competition for job opportunities and reduction of standards in employment;
- contribution to the increase in crime rate and corruption in the country;[36]
- contribution to the spreading of diseases;
- contribution to the socially challenging issues of smuggling and trafficking.

The arguments of the negative effects should not be exaggerated, however, since illegal immigrants may not be blamed for the past and present government's failures to maintain legal order and economic growth. Economic circumstances in South Africa are worsening over time, and illegal immigrants, unwittingly contributing to a certain percentage of the current problems, simultaneously become scapegoats for all the misfortunes associated with the situation. Perhaps, South Africa presents a new reality of immigration control, inexperienced in other states, such as Britain or Russia where the "bottomless" socio-economic destitution in the society means that many positive economic features of migration are always politically overshadowed. In addition, there is likely to remain a disparity of wealth between South Africa and the rest of the continent shaping a potential for further immigration flows.

4.2 General Law and Policy Framework Concerning Illegal Immigration

Without any exaggeration, the South African authorities have referred to the issue of illegal immigration as one of the most notorious problems confronting the country. The recent statements enshrined in two major policy documents, the Green Paper and

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[35] Ibid.
[36] White Paper, supra, n. 3, para. 3.1.

the White Paper on issues of immigration, contain an evaluation of this problem from both a humanitarian and a law enforcement perspective.

The present Government, as one of its major policy goals, proposes to maintain effective control over migration flows into the country by means of establishing a legal and institutional framework to that end. And the recently announced creation of the Immigration Service, a new agency responsible for immigration affairs, is called upon to control the migration of aliens, not only at state level, but also at the level of local communities.[37] Prevention of illegal immigration is thought to be more effective if implemented by communities, alongside state authorities, inasmuch as communities are supposed to collaborate with law enforcement agencies in order to identify illegal immigrants, and to establish control over their access to banking, educational and medical facilities,[38] where this policy goal was later enshrined in the newly adopted 2002 Immigration Act.

According to some commentators, the authorities' stand on illegal immigration was not precise or constant, even in the regularisation policy once pursued by the government.[39] In this regard, amnesty to illegal immigrants from other Southern African states announced by the Department of Home Affairs, has promised permanent residence to qualifying individuals.[40] Initially, the programme targeted at least one million individuals, but resulted in only eighty thousand applications, and was extended indefinitely by Home Affairs. By 2000, the programme had legalised 350,000 SADC residents.[41] At the same time, however great this number, the scale of the presence of irregular migrants is even more substantial.

Governmental statements have been reflecting the policy trend in the tightening control over the entry, presence and, particularly, employment of illegal immigrants in the country. In the sphere of labour, changes have been particularly sound in the years following the White Paper, and most of its points were gradually absorbed into the 2002 Immigration Act and subsequent Regulations. The White Paper attempts to harmonise two differential views on the employment and residence of aliens: attracting

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[37] Ibid., para. 5.1.
[38] Ibid., paras 5 and 5.3.
[39] Solomon, H. "Illegal Immigration into South Africa: What Policy Options?", 31(4) (December 2001) *Africa Insight*, pp. 20-21.
[40] Qualification criteria were the following: continuous residence from 1991, engagement in a productive economic activity, relationships with a spouse or partner in RSA, dependant children born in RSA, lack of possible criminal offence committed in connection with the 1991 Aliens Control Act.
[41] Nkuta, Z. "Most Want Foreigners to be Sent Home", *Sowetan*, 23rd of October, 2001.

those investors, tourists and professionals who may benefit the country,[42] on the one hand, but also to advance 'affirmative action' in immigration[43] on the other hand; i.e. priority should be given to South African nationals in the job allocations, especially in less skilled employment. In practice, however, this results in a tightening up of control over immigration for employment. Initially, there used to exist the 'two gates' policy of attracting a foreign labour force into the country: a conventional work permit system, and a framework of bilateral agreements with other Southern African states on principles of attracting a foreign work force. These agreements mostly concerned access to mining and agriculture, where South African employers are allowed to recruit workers from other states. Additionally, with the aid of special arrangements which used to be permissible under section 41 of the Aliens Control Act, farmers could acquire the foreign labour even inside the country by registering alien workers on a post-hoc basis, thereby legalising possible illegal immigrants.[44]

Prior to adoption of the 2002 Immigration Act, the government was keen on eliminating these gaps and loopholes which allowed de facto employment to illegal foreigners under the widespread practice of exemptions from the legally acceptable system of attracting a foreign labour force. Employers used these loopholes of legislation in a way that was tantamount to a breach of the basic principles of the immigration law.[45]

Now, however, the employment policy will be subject to changes and, as the White Paper states:

> "The greater latitude in respect of the entry of broadly defined tourists, traders and businessmen should be accompanied, as proposed in this White Paper, by more stringent controls at administrative and community level to ensure that any person so admitted does not exceed her/his stay or engage in non-permitted work activities."[46]

The progress of this policy, however, remains precarious, since there is a difficulty in maintaining and regulating a flexible approach. Indeed, the Government fails to enforce barriers to illegal immigration in its employment dimension, while proposing over-regulation within the system of attracting foreign workers to companies experiencing a need for employees.

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[42] White Paper, supra, n. 3, Chapter 7, Provisions 6.1-6.4.
[43] Ibid., Chapter 4, Provision 4.
[44] Ibid., Chapter 6, Provisions 3 and 4.4.6.
[45] This is evident from the article by Crush, J. "Temporary Work and Migration Policy in South Africa", Briefing Paper for Green Paper Task Team on International Migration, February 1997.
[46] White Paper, supra, n. 3.

The government's views on illegal immigration embrace acknowledgement of substantive elements available in the science on migration, such as so-called 'push' factors, i.e. economic or political problems in the sending states, and 'pull' factors, i.e. welfare and employment opportunities for aliens in South Africa.[47] Being unable to address problems in other countries of the region, the government is predominantly undertaking to reduce the "pull" factors.[48] These factors attracting alien workers, as the Government admits, can also be reduced by extension of the enforcement of labour law guarantees and, simultaneously, by imposing tax obligations upon all migrant workers, of both regular and irregular types.[49] However, the policy statement does not go as far as that, but further insists on eliminating incentives for domestic employers to hire illegal immigrants, which in turn should result in an increase of enforcement measures to prosecute unscrupulous employers.[50] The new Immigration Act reflects this restrictive notion; enforcement of labour guarantees for illegal migrants is still an unresolved matter.

To sum up, the immigration policy poses huge dilemmas, despite proposals and expectations of tight controls to curb illegal immigration. First of all, despite a growing number of illegal immigrants being removed from the country, the policy does not manage to drastically decrease their presence. Secondly, legal immigration channels are very few and largely restrictive. Thirdly, budgetary constraints are preventing the country from facilitating effective immigration control. Fourthly, a growing xenophobia towards irregular migrants in the society, mostly among the black communities, may undermine understanding of any positive features of labour migration.

There is also a strong regional context of immigration policy in the country. Over the last few years, the South African Government has been promulgating measures to increase co-operation with other Southern African states in the sphere of the movement of persons and goods. The goals were ambitious enough to create a 'United States of Africa', or the African Union.[51]

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[47] Ibid., Chapter 6, provision 4.2.1 .
[48] Ibid., Chapter 6, provision 4.3.3 .
[49] Ibid., 4.4.2 .
[50] Ibid., Chapter 6, provisions 4.2- 4.4.
[51] Solomon, H. "Towards the Free Movement of People in Southern Africa?", Occasional Paper No. 18, March 1997, Institute for Security Studies, p. 24; also in Cilliers, J. "Towards the African Union", 10(2) (2001) *African Security Review*, pp 105-108.

The policy of integration among Southern African states has been shaped by two consecutive Protocols on the movement of individuals in South Africa. The first document, the Draft Protocol on the Free Movement of People in the Southern African Development Community, was designed for the single purpose of facilitating free travel and circulation of goods within the community. For the Protocol to take full effect, four phases of its realisation were envisaged: firstly, it offers visa-free entry for all SADC nationals into the member states; secondly, the implementation of the right of free residence; thirdly, the right to establishment and work; and, fourthly, elimination of internal national frontiers between all the member states.[52] The initial stage of facilitation of free entry for a short visit formed the subject matter of Article 15(2), which provides that within three years the Member States will fulfil the Protocol, inasmuch as it allows for visa-free entry.

The Protocol, however, was finally turned down by two Member States, Botswana and South Africa, since it provided for unlimited opportunities of travel for individuals between the states, but with enormous economic disparities.[53] The richer countries, which withdrew from ratifying the Protocol, were keen on preserving the tighter immigration control, because the Agreement was fraught with disorderly migration flows.[54] Another evident argument against the fulfilment of the Protocol was the realisation that the document would demand resources that many governments lack.[55] In this regard, Hussein Solomon points out the failures to establish a free-movement area in the context of almost every regional trade or co-operation agreement between states with differentiated incomes and opportunities, such as NAFTA.[56] On the one hand, the recent EU enlargements seem to contradict Solomon's argument, since Eastern Europe is becoming an integral part of the union established by the wealthier states. On the other hand, what partially supports Solomon's argument is the fact the European Union cannot as yet accommodate other bigger countries of the region, such as Ukraine and Romania, precisely for the reason of income and economic disparity.

Probably for similar reasons the Draft Protocol was de facto dropped in Southern Africa, but a new document was developed in this regard, i.e. the Draft Protocol on

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[52] Article 2 of the draft Protocol, also in Solomon, ibid.
[53] Mpedi, L.G. "Labour Movement within the Southern African Development Community in the Light of the South African White Paper on International Migration", 12(2000) *Mercantile Law Journal*, p. 398.
[54] Williams, V. "Towards the Free Movement in the Region", 2(3) (October 1998) *Crossings*; in Mpedi, ibid.
[55] Mpedi, ibid.
[56] Solomon, supra, n. 51.

Facilitation of Movement of Persons. The new Protocol pursues several moderate policy goals:

- Facilitation of the movement of SADC nationals in the Member States by means of a gradual relaxation of immigration regimes;
- Encouragement of bilateral agreements between states, with the further development of a single regional multilateral treaty in this regard;
- Co-operation in preventing illegal immigration within the region;
- Improvement of the external border control in the region;
- Promotion of common immigration policies.

The protocol still facilitates free movement, but only on a very limited scale, by changing basic definitions of a short stay, which means a visit not exceeding a period of thirty days, provided that the individual meets certain requirements. The Draft Protocol, however, was not signed by the Member States, since the unstable situation in some of the countries that would have been parties to that agreement would have resulted in a lack of control over their territories.[57] Despite this, possibilities remain that this last multilateral agreement will finally facilitate integration and free movement dialogue in the Southern African region.

4.3 Norms of the South African Immigration Law Related to the Status of Irregular Migrants

The main bulk of South African immigration law was shaped during the years of Apartheid, when restrictive regimes were introduced towards foreigners, who were made subject to strict immigration control, continued by the 1991 Aliens Control Act No. 96. Subsequently, the law was amended and, finally, the 2002 Immigration Act was adopted to replace the 1991 Act. The new piece of legislation re-enacts some notions of the previous act, thus continuing a certain legacy of restrictive immigration control, but at the same time changing the nature of residence permits or labour migration systems in place. Currently, however, at the time of writing, legal judicial battles are raging in respect of the recently introduced Immigration Regulations, because of procedural violations in the process of adoption. At the same time, this thesis has to rely on these Regulations, as the only available and de facto applicable immigration rules.

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[57] Ibid.

4.3.1 General Legislative Norms on Illegality of Aliens

The initial issue that needs to be addressed concerns the general definition of an illegal immigrant in the South African legislation. From the legal point of view, as was outlined by section 1 of the Immigration Act, an 'illegal foreigner' is anyone who contravenes the South African immigration legislation by committing breaches of immigration law, where this section includes a 'prohibited person' referred to below. The Immigration Regulations refer to three situations of illegality, such as: prohibited persons, undesirable persons and, more generally, illegal foreigners, i.e. all those to be deported in connection with immigration offences. More specifically, the meaning of immigration legislation stipulates that a person may be regarded as being illegal in the following circumstances:

1. Entering the Republic of South Africa (RSA) at a place other than a port of entry, i.e. clandestinely, in contradiction to section 9 requirements of the Immigration Act;
2. Remaining in the RSA without a valid residence, or after the expiry of a residence permit;
3. Acting in contravention of his/her permit, i.e. in cases of unauthorised work or other activity;
4. Breaching the prohibition of entering the RSA as a result of being a prohibited or undesirable person in accordance with South African law.[58]

Main definitions of illegality drawn from the previous era have been largely endorsed by the new immigration legislation. The Immigration Act hardly introduced any serious changes into the practical meaning of illegality, since basically the same scope of immigration offences still applies to aliens. However, instances of irregularity enshrined in each of the immigration offences have been slightly altered, such as the introduction by the 2002 Act of a new immigration category of 'undesirable persons'. Under the present South African law, definitions of both undesirable and prohibited persons contribute significantly, but not exclusively, to the general formulation of illegality. Indeed, despite the importance of undesirability and prohibition on entry or stay, it is possible to argue that the majority of illegal immigrants are probably those considered to be illegal foreigners in the sense of deportation, i.e. persons in breach of conditions of entry or residence, or who enter clandestinely.

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[58] Minaar and Hough, supra, n. 20, p. 14; also in Solomon, H. "Who is an Illegal Immigrant?", 5(6) (1996) *African Security Review*, p. 1.

The 2002 Immigration Act introduced new, very limited criteria for the prohibited person by dispersing illegality into various categories and, in addition, by shifting the previous grounds of prohibition into the realm of immigrants' 'undesirability'. Section 29 established the definition of prohibited persons, i.e. individuals who do not qualify for admission, or for temporary or permanent residence statuses:

- People infected with infectious diseases, where the list is determined by legislation and regulations;[59]
- People with outstanding warrants against them on account of crimes against humanity or other grave crimes;
- Previously deported individuals who were not rehabilitated by the Home Affairs Department in the *prescribed manner,* where the specific procedure is assigned by paragraph 34 of the Immigration Regulations;[60]
- Members of organisations advocating racial hatred or violence;
- Members of terrorist organisations.

The new act amended the substantive grounds for prohibition to enter or remain, but retained the norm itself. In contrast, the repealed 1991 Aliens Control Act, in its section 39, used to specify those individuals who may be regarded as 'prohibited persons', and provided quite different criteria, such as individuals likely to become a public charge, persons deemed undesirable by the Minister, anybody living through the earnings of prostitution, persons who were convicted for certain offences in other countries, those having a mental illness or any other affliction (unless they are accompanied or provided for by patrons), individuals afflicted with serious contagious or communicable diseases, people previously removed from the country on the ground of committing immigration offences, or *ordered to leave the Republic*, any other category declared prohibited under other provisions of this Act. Section 11(1) of the Act added another criterion for the prohibited persons category—those who enter South Africa without a valid passport or visa, unless they are citizens of the country. The entire list of prohibitions, including the provisions of sections 39 and 11(1) was related to illegal immigration. Prohibition mostly used to concern an initial lack of

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[59] As provided by the Immigration Regulation 34(1) mentioning International Health Regulations Act no.28 1974 and public notices of the Department of Health.

[60] Rehabilitation takes place if: the individual swears a solemn affidavit, the Department has no reason to believe that the person will violate the act again, the person was absent from the Republic for four years and has paid off the required costs and fees.

grounds for entry or presence in the country, but it did not explicitly extend this to possible further immigration law violations.

The category of prohibited persons used to work in connection with other substantive norms governing the issuance of entry or residence permits. The provision of Article 41 gave authority to the Home Minister to avoid the restrictive character of immigration law, by authorising him to issue permits for entry or residence within the territory of the Republic, where this procedure provided the basis for de facto legalisation of illegal immigrants in the Republic.[61] This practice was applied to asylum seekers and illegal immigrants, inasmuch as the latter were entering employment in the farming sector.[62]

The newly introduced concept of undesirability has a striking similarity with the 'prohibited persons' category, as was endorsed in the 1991 Act. Section 30 of the 2002 Immigration Act includes the following:

- People likely to become a public charge;
- Persons identified as undesirable individuals by the Home Minister after consultation with the board;
- Persons judicially declared incompetent;
- 'Unrehabilitated insolvents';
- People ordered to depart in terms of this Act;
- Individuals who are fugitives from justice, etc., whereupon application to the Department on any grounds may be waived in relation to the affected person.

In declaring anyone an undesirable person, the Home Affairs Department will need to fulfil certain requirements and, in particular, to notify this individual in accordance with section 35(1) of its intentions and reasons to consider such an individual in this way. The two concepts of prohibition and undesirability which exist in immigration law have not been exclusive in dealing with illegal immigration; rather, as mentioned, a link with the existing normative framework governing the issue of illegal immigration in the country is needed, especially since the majority of illegal immigrants are probably those people who enter clandestinely, or who breach their conditions of stay.

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[61] These provisional legalisation opportunities, however, were limited in the scope of application, and strictly conditional. For instance, by virtue of Article 41(6)(a), overstaying amounts to a criminal offence and results in subsequent arrest without a warrant and, finally, removal under the 1991 Act.

This leads to the third generic identity of illegal immigration, referred to in the law as comprising 'illegal foreigners', a term which may be only abstractly defined. No precise contents of this category of persons are known in immigration law, except for the element of prohibited persons. Therefore, the extent of such terminology may only be presumed, but in practice it embraces clandestine entrants, overstayers, and those committing a breach of the conditions attached to the stay of a particular alien. 'Illegal foreigners' are subject to deportation in accordance with section 32(2) of the 2002 Immigration Act,[63] but, once again, this norm does not specify the contents of that term. So, one could suggest that 'undesirability' is the widest category of all, since it embraces people who are ordered to depart (to be deported) and perhaps meaning 'illegal foreigners' which, in turn, clearly embraces only the category of prohibited persons.

However, this is only conjectural, and there are two possible clues for identifying the legal definition of irregularity which can be found either within the realm of punishable offences, or within the scope of available conditions attached to the entry or residence of aliens. As for the imposition of legal sanctions, this plays a vital part in identifying the scope of unlawful practices which are envisaged in section 49, by introducing criteria for immigration offences and their corresponding sanctions. The section established several of the most important immigration offences relevant to the illegality of immigrants in the Republic:

- General offence of entering and remaining in the country in contravention of the Act— punishable by a fine or a maximum term of three months' imprisonment (para.1(a));
- Failure to depart, when that is ordered by the department of Home Affairs— punishable by a fine or a maximum of three months' imprisonment (para.1(b));
- Deliberate assistance to foreigners entering the country in contravention of the act— resulting in a fine or a maximum term of one year's imprisonment (para.2);
- The knowing employment of aliens in contravention of the act bears a corresponding sanction of a fine or a maximum term of one year's

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[62] Klaaren, J. "Immigration and the South African Constitution." in Crush J. (ed.) *Beyond Control: Immigration & Human Rights in a Democratic South Africa,* Southern African Migration Project, Cape Town, 1998, p. 62; also in Minaar and Hugh, supra, n. 20, p. 116.

[63] The issue of deportation is dealt in the part of the chapter concerning residence and internal control mechanisms.

imprisonment for the employer, with sanctions increasing if the same offence is repeated (para.3);

- Assistance in the receipt of public services to a foreigner holding no entitlements is punishable with a fine (para.4);
- Various situations of corrupted assistance enlisted in para.5 of the Article, which are conducted by any civil servant who intentionally facilitates the provision of false or inaccurate information, invoked to benefit the illegal foreigner, is punishable by a maximum period of three years' imprisonment (para.5);
- Non-compliance with obligations envisaged in sections 42-46 and imposed on individuals or institutions in South Africa (identity control over foreigners during the provision of accommodation or public services) is punishable by a fine, or a maximum imprisonment not exceeding 18 months (para.6);
- Various other instances of conspiracies, fraud and illegal pressure practised by officials or third parties.

Only two substantive elements of sanctions refer explicitly to the behaviour of aliens, while all other instances serve as less specifically preventive in many spheres of aliens' life in the country, being more relevant as internal control measures. The other legal offence of overstaying dealt with below and envisaged by section 50, also contributes to the scope of what an 'illegal foreigner' is. Punishable offences in relation to foreigners once again give a very general idea, and there is only a very vague link with undesirability or prohibition on aliens' entry or presence, but provide some relevance for the term 'illegal foreigner'. The general legal clarity of the term exists only in the distinct linkage between the aforementioned section 32 (deportable offences), and section 49, paragraph 1 (punishable offences of illegal entry or residence and failure to depart). As for the rest, the law and policy probably focus distinctly on preventive measures on behalf of the state bodies or agencies and, within the realms of 'prohibited' or 'undesirable' persons, they attempt to prioritise only grave cases of illegality, while leaving too great margins for identifying illegal foreigners on the executive decision-making. Previously, within the realm of the repealed 1991 Act, the "prohibited persons" category was responsible for all situations of illegality.

However, as was mentioned above, what complements this general notion of irregularity, open to interpretation, is the system of conditions attached to every type of entry or residence in the Republic of South Africa. It is mostly those sections of the

2002 Act that regulate issues of residence permits, both temporary and permanent, and that concern likewise the matter of the prescribed conditions of stay in the Republic which are important for the present thesis.

4.3.2 Methods of Legal Entry or Stay and Conditions Attached to the Entry Permits

From the point of view of illegality, it is of crucial importance to delineate the scope of permitted activities which may be conducted by the foreign individuals in the country. Relevant sections of the 2002 Immigration Act and the Immigration Regulations[64] cover all the main forms of entry and temporary residence. Remarkably enough, all entry categories in South Africa are included in the legislative act supplemented by Immigration Regulations, while in the UK, for instance, Immigration Rules, specifying the categories of entry, are subject to the discretion of the Home Secretary. It is obvious in this regard that in choosing the regulatory framework of immigration law, each government has to reach a balance between flexibility existing in executive discretion and safeguards normally enshrined in the legislative act. The South African immigration regulation is flexible enough, since it fixed the main definitions in the law and provides authority to the Government to outline an operational framework in the Immigration Rules. The permit classification given in the 2002 Act depends on the activities; and is as follows:

- Temporary residence permit (section 10);
- Visitor's permit (section 11);
- Diplomatic permit (section 12);
- Study permit (section 13);
- Treaty permit (section 14);
- Business permit (section 15);
- Crew permit (section 16);
- Medical treatment (section 17);
- Relative's permit (section 18);
- Work permit (section 19);
- Retired person's permit (section 20);
- Corporate permit (section 21);
- Exchange permit (section 22);

[64] Government Gazette No. 24100, Notice No. 1480, 25th of November 2002.

- Asylum (section 23 and the special legislation);
- Cross-border and transit passes (section 24).

It is probable that not every ground of stay or entry is relevant for the discussion on illegal immigration, where specific temporary permits may be excluded from close scrutiny, such as the entry categories relating to crew and diplomatic permits, medical treatment, or to the retired persons and, to some extent, relatives' permits. It is possible to distinguish between these categories, since they do not form or govern considerable flows of immigrants, even if they reflect policy trends in relation to the access of foreigners into the country.

The permits regulating the economic activity of foreigners are of crucial importance, but should be discussed separately below, while temporary residence covers only a few basic areas where illegality is likely to occur, such as: visitor's permits, temporary residence permits, study and treaty permits. These legal notions indeed shape the framework of illegality since, under the system of these regimes, there is a possibility of falling into the category of illegal immigrants, by violating certain conditions attached to any form of residence.

In this regard, each area of permitted entry and residence contains certain constraints. For example, issuance of the temporary residence permit, initially for a period of three months, is subject to the condition set out in section 10 (4) prescribing that an individual does not eventually become a prohibited or undesirable person. In addition, section 10 (5) of the Act leaves open the possibility for the Department of Home Affairs to attach 'reasonable individual terms and conditions' to temporary residence, where this encompasses discretionary authority for shaping the sphere of illegality. On the other hand, overstaying does not pose an immediate offence, because by virtue of paragraph 18(6) of the Immigration Regulations, holders of this permit are protected, even after its expiry, by the possibility for issuance of a visitor's permit, provided that they prove that some obstacle (force majeure) prevented them from applying for the renewal. The Immigration Regulations envisage similar possibilities for illegal foreigners who are family members of citizens or residents.

The issue of visitors' permits, regulated by section 11 of the Act, may be facilitated by the issue of an entry visa,[65] and is subject to legislative restrictions in employment, as provided by the wording of the Act. The permit authorises issuance for a period from three months to three years, the latter term being subject to individuals' having

sufficient financial means to cover the whole period of residence. According to paragraph 19 of Immigration Regulations, the visitor's permit is applicable to most essential purposes of a foreigner's presence in South Africa, such as tourism, education shorter than three months, private visits, and even working activities, if conducted in fulfilment of the contract and not exceeding a three-month duration, which is 'concluded, remunerated and calling for performance abroad'.[66]

It is under this category of entry or stay that the illegal foreigner was mentioned, and explicitly provided with the possibility to enter, because the immigration officer may be given discretion to deal with the illegal immigrant, and even to issue a visitor's permit to such a person upon presentation of supporting documents or evidence in each case.[67] In accordance with the Immigration Regulations, admission of the illegal foreigner is possible only if an immigration officer communicates the issue to the Home Affairs Department, as prescribed by paragraph 19(e), while the Department is making a final decision. Therefore, illegality does not prevent foreigners from applying for permission to enter or remain, although the discretionary power of the Home Department may render such possibilities illusory, and dependent on the policy priorities at the time of implementation.

As far as a study permit is concerned, it is issued for studies at bona fide educational institutions at any level. Although without providing direct entitlements to employment, work is permitted by virtue of sections 13(3)(a) and 13(3)(b) on a part-time basis during attendance at an institution for higher education, and on a full time basis during vacation periods. Paragraph 22(6) of Immigration Regulations authorises the employment activities of students on condition that these should not exceed twenty hours a week on a part-time basis, with the withdrawal of this requirement during vacation periods. Perhaps similarly to the UK situation, this possibility is enjoyed by many foreigners as a full-time employment concession and makes this immigration category attractive for abuse by bogus students.

Treaty permits are designed for a separate, complex category of individuals who enter the country for various purposes, in accordance with international agreements, including treaties concluded for specific purposes, such as the South African Development Community.[68] The last category of legal entry, the cross-border passes

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[65] Immigration Regulations, para. 19(b).
[66] Paragraph 19(1)(a).
[67] Paragraphs (6) (a) (b) (c) (d) (e) (f) and (g).
[68] Supra, pp. 174-175.

issued to a national from a neighbouring country, may be regarded as rather irrelevant for the discussion, since only a very insignificant proportion of illegal immigrants from these states comply with the requirements associated with obtaining these or any other permits.

All the abovementioned permits provide the legal framework for regulating residence for various purposes, which finally becomes the major objective of any given immigration permit system. Therefore, the major violation of any residence permit is a stay over the period permitted for each entry category. Overstaying the period corresponding to all the aforementioned forms of temporary residence is punishable by section 50(1) of the 2002 Immigration Act as an administrative offence carrying the prescribed R3000 fine. As the Article explicitly states, 'the fine will be imposed on detection of the overstay and exacted when such foreigner is admitted or makes an application with the Department'. The idea of breaching other residence permit conditions is possibly linked to section 49(1(a)) referred to above, which makes only a general mention of non-compliance with the Act.

Temporary residence is the major factor of legality for every alien, and it is these regulations, in addition to admission principles, that are often violated by migrants. At the same time, in light of the terms and conditions assigned to every permit by virtue of Immigration Regulations, the norms are not very restrictive or penalising, as obvious from the discussion on temporary residence permits.

4.4 Aspects of Aliens' Employment Policy in the Republic of South Africa Influencing Position of Irregular Migrants

South Africa has traditionally relied on a foreign labour force in some industries, particularly the hospitality, mining and farming sectors. There is a certain combination of measures that can assist in attracting foreign workers into the country, such as the existing *work permit system*, the system under the bilateral agreements among the Southern African states and the corporate permit system, i.e. supplying permissions to employ a foreign labour force to institutions and companies. These three systems will probably be interconnected in practice, since work permit facilitation will still be impossible without the availability of corporate permits issued to companies, while international agreements concluded by South Africa on the issue often determine both national industries in need of corporate permits, and the countries from which workers

have to be invited. Employment of recognised refugees or asylum stands out separately, since it is a matter of different statutory regulation.

The work permit regimes form a separate substantive dimension of the immigration policy, since they are responsible for the criteria and the demand for foreign employees invited into the country annually. The demand for work permits is substantial, and comprises large numbers, with South Africa issuing over 19,000 work permits to foreign nationals in 2001. The cornerstone of this policy is the provision of section 19 of the 2002 Immigration Act and the subsequent Immigration Regulations, where the legislation envisages three types of work permits: a general work permit, an exceptional skills permit and an intra-company transfer permit. Determination of quotas for the employment of foreign nationals, laid out for particular industries, is one of the decisive factors in the immigration policies of the South African state.

The work permit process has to be initiated by the prospective employer, who should meet the basic requirements of the process:

- Diligent search for an employee in the Republic, but inability to find a person with equivalent qualifications to the ones in possession of the foreign national;
- Submission of all necessary documentation proving that the foreign national will receive the same treatment and conditions in employment as any domestic employee;
- Fulfilling the obligation of notifying the Department of any changes in employment status or when the foreign national ceases to be employed.

Most of the documents dealing with employment conditions have to be certified by the chartered accountant working for the employer.

A range of obligations are in existence in connection with the operation of the work permit system. Paragraph 3 of section 19, for instance, places an obligation on the foreign employee to notify the Department that he or she continues to be employed, and that conditions of employment remain the same. Provisions of section 38(4) place other responsibilities upon the employer, in addition to his or her involvement in facilitation of the work permit, i.e. an obligation to inform the Department of termination of employment, or any other breach of status committed by a foreigner, and to keep the records related to employment of an alien for two years after such termination.

4.4.1 Corporate Permits

The legal employment of aliens in South Africa has not been purely a matter of individual work permits, since the economy has traditionally relied on the intake of foreign labour in certain sectors, where the prospective employer was authorised to invite alien workers. For this very purpose, the new Immigration Act of 2002 envisages a norm governing the issuance of the corporate permit for inviting labour from the designated industries.

Prior to adoption of the 2002 Act, the Aliens Control Act gave way to a practice that allowed for the hiring of foreign workers in avoidance of the work permit system, by virtue of section 41, under which it became possible to grant permits to illegal aliens needed for the agricultural sector of the economy, primarily for seasonal and temporary work. Today, the Government attempts to regularise the process of attracting workers, and the concept of corporate permits was provided for in section 21 of the Immigration Act. This type of permit is issued to corporate applicants. Generally, there are three main situations when a corporate permit is issued: employment of workers under ordinary procedures, employment in connection with the bilateral agreement with a foreign state and, finally, temporary or seasonal work.[69]

Section 21 introduced the application process for corporate permits, which the Home Affairs Department will be issuing, after consultation with the Departments of Labour and Trade and Industry and will determine the maximum number of foreign workers who may be employed. The Department will consider a range of documents required to process the corporate permit, where the main role is assigned to the statements which firstly reveal that employment conditions for such workers will be the same as they are for the nationals; and secondly, that the corporate employer will co-operate to keep the Home Affairs Department informed when the foreigner violates the law, and also that possible deportation costs will be covered. According to section 21 (4)(b), the corporate permit holder should actually employ a foreigner, and make the necessary remittances to the alien's home country.

The process of application for the corporate permit does not withdraw the obligation from the employer to apply for the employee's work permit. The Home Affairs Department, in accordance with paragraph 30(9)(a) of the Immigration Regulations, must issue a work permit within fifteen days from the time of the application submission. The holder of the corporate permit, as well as the company implementing

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[69] Essence of paragraphs 20(3) (4) and (5).

the intra-company transfers of the workers, has certain obligations concerning the monitoring and reporting of the employees' compliance with the basic conditions of stay and employment.

These obligations on the employer form the subject matter of section 21(2)(b), prescribing that the corporate permit holder takes adequate measures to ensure that foreign employees comply with all the main conditions imposed by law. In particular, as clarified by paragraph 28(11) of the Immigration Regulations, the corporate permit holder should ensure firstly that the employees are employed in the specific position as authorised by the corporate permit[70] and, secondly, that foreign employees depart from the Republic on completion of their duties.[71]

As far as intergovernmental agreements are concerned, those could be concluded by the Government as worded in section 21(4) of the Immigration Act, which reflects the long-standing practice of the bilateral agreements of South Africa relating to attracting foreign labour. Such labour agreements were concluded under the previous regime with several countries of the region, such as Mozambique, Malawi, Swaziland and Lesotho, with the purpose of supplying workers for the South African mining industry. These agreements are still in force, and may be substantially relevant to the modern employment situation. Special bilateral accords still provide these possibilities for the cross-border movement of workers, such as in the case of the farm workers supplied from the South Province of Zimbabwe to the Limpopo Valley, or even the legalisation of large numbers of illegal aliens within the countries by hiring them legally for employment in certain industries.

Currently, the large industries use subcontractors to hire the labour force from within the country. Labour brokerage has become another crucial way of attracting foreign workers into the economy, and it is responsible for providing almost a hundred thousand employees annually.[72] The main industries that demand such a number of foreign workers for recruitment are mining and agriculture.

However, the intergovernmental agreements have not recently been very effective, especially with the farmers, since the South African employers hardly need bilateral accords to hire people from outside the country, as the same practical effect can now be achieved by hiring illegal immigrants from within the state[73] since, in the farming

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[70] Immigration Regulations, para. 28(11)(ii).
[71] Immigration Regulations, para. 28(11)(iii).
[72] Crush, supra, n. 45, p. 4.
[73] Ibid, pp. 4-7.

industry, most of the workers from the neighbouring countries are hired without proper authorisation. Although the immigrant workers can be provided with the official work permit through the process facilitated by farmers, this has proved to be largely ineffective.[74]

The major conclusion to be drawn from the experience of South Africa is that, despite the long-standing programmes of attracting foreign labour into South Africa on a large scale, the flow of illegal immigrants and refugees into the country is so considerable that it has gone beyond the manageable sources of migration. Additionally, despite attempts by the government to establish a tighter control over clandestine employment through introducing the corporate permit, the process is becoming increasingly bureaucratised. Indeed, in comparison with the section 41 exemption provided previously by the 1991 Alien Control Act, this contributes to a greater load of paper work for employers in order to facilitate a work permit. Illegal employment, being the least administratively demanding process, serves as a plausible, albeit somewhat illicit alternative to the legal employment function.

To that end, there is a huge human resource in Africa available for immigration in order to assist the country's development. However, the factors of instability on the entire continent, including wars, famine and uncaring oppressive governments, have contributed to such pressure on the South African society and labour market, that all the regular mechanisms of attracting both foreign and indigenous South African labour have become almost useless. It is because of the particular combination of circumstances, i.e. restricted employment opportunities for foreigners, pan-African pressures to emigrate, and porous borders, that further bureaucratisation becomes counterproductive for the legal policy in question.

4.4.2 Employment of Illegal Immigrants

Theoretically, one can glean from the legal practice and immigration control system that unauthorised employment, i.e. outside one of any schemes responsible for attracting foreign labour into the Republic, is illegal. However, the 2002 Immigration Act characterises illegal employment only by imposing principles or conditions of entry for individuals on some permits, where visitors' (section 11), students' (section 13) or temporary residence (section 10) permits are particularly relevant. Obviously, unauthorised employment may be deemed illegal on the part of an immigrant, but the

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[74] The underlying tendencies are described by Crush, ibid, p. 6.

precise mechanism by which this would occur is not very clear, since this type of employment has not been specified as one of the immigration offences on the part of an immigrant in the wording of section 49, nor declared a deportable offence by virtue of section 32, nor adhering to the undesirable or prohibited persons criteria laid out in the relevant provisions of the Act. Therefore, illegal employment is an implicit offence enshrined in a breach of residence conditions, where the practice of being employed outside the available mechanisms is implied, but not covered by the corresponding notions of immigration offence. Therefore, the question arises as to the precise meaning attaching to the employment of clandestine migrants, upon whom no residence conditions may be officially, or practically, imposed.

At the same time, the Act provides for control mechanisms over employment of illegal aliens, where such employment control is enshrined in section 38 of the Immigration Act. By virtue of the Act, South African nationals are prevented from employing the following categories of persons:

- An illegal foreigner, i.e. most probably illegal entrants or overstayers;
- A foreigner without authorisation to work, i.e. possibly those individuals who do not hold the necessary work permits;
- A foreigner, if his or her work is contrary to the conditions or capacity envisaged in his/her immigration status, meaning possibly those persons whose work permit prescribes employment only with fixed employers.

The employer is obliged to ascertain in good faith that no illegal alien is employed by him or her, as provided in paragraph 2 of the section. Paragraph 3 establishes the scope of presumption against the employer, i.e. when the illegal alien was employed in contravention of the immigration law, where it is inferred that the employer knowingly employed an illegal alien. The further presumption enshrined in paragraph 5 concerns the situation where the illegal immigrant is found on the premises of the employer, i.e. an illegal immigrant is therefore presumed to be employed by the owner of the premises. At the same time, section 38(2) provides for the defence of the employer, which can be invoked if the employer proves that the illegal alien is employed in good faith, or when the employer demonstrates compliance with the requirements endorsed in paragraph 2 of the section. However, it is impossible to determine how the presumptions in paragraphs 3 and 5 operate along with the employer's defence enshrined in paragraph 2.

In a similar vein, educational institutions are prevented from providing training to certain foreigners if they are:

- Illegal aliens;
- Aliens whose status does not authorise them to take any training;
- Foreign nationals residing on terms or conditions 'different from those contemplated in such a foreigner's status'.

Once again, there is a presumption against such an institution if the illegal alien is found on its premises, unless the prima facie evidence suggests the opposite, as established overall by section 39 of the Immigration Act.

Similarly, the previous Aliens Control Act of 1991 outlined stringent definitions and mechanisms for the employment regime relating to foreign nationals. According to paragraph 1 of section 32, South African nationals were prevented from employing, training, and entering into agreements or actual conduct of any paid work or business activities with an alien in contravention of the Act. Paragraph 2 of the section extended this general norm to situations where a foreign national was prohibited from participating in any of the activities by virtue of the temporary permit issued to him or her, while paragraph 3 referred to similar restrictions applicable to residence permits issued for a particular area of the country. Furthermore, in paragraph 4, it was declared a criminal offence to commit acts in contravention of paragraphs 1, 2 and 3.

The current Act outlines sanctions against the employer by virtue of section 49 (3), envisaging an administrative fine or imprisonment applicable to the offending employer. The employers' sanctions present a sound incentive for abstaining from this type of illegal activity but, in reality, the enforceability of employers' sanctions in the current system is hardly successful. As the Human Rights Watch and Jonathan Crush point out, hardly any employers were punished in connection with the employment of illegal aliens.[75] Other evidence suggests that the government used employers' sanctions randomly, rather as a demonstration measure to impose punishment only in respect of a few unscrupulous employers, while making no real efforts to eliminate the actual practice of employing undocumented workers.[76]

The functioning of the employment sanctions' system in the legal process may have an impact on the sphere of foreigners' employment, thus deeming immigrants taking employment punishable at the de facto level. As Jonathan Crush points out:

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[75] Human Rights Watch Report, supra, n. 6, Chapter on Labour Exploitation, in "Part 4: Treatment of Undocumented Migrants in South Africa"; also in Crush ibid, p. 6.

"The primary aim of existing policy is to identify them, arrest them, and deport them as expeditiously as possible."[77]

4.4.3 Employment and Living Conditions for Illegal Immigrants in South Africa

In the South African legal system, a foreign worker is fully protected by the labour and immigration laws, so long as his or her status remains legal in accordance with the immigration legislation. The status of legality is conditional, and related to the observance of all conditions of stay and, particularly, employment by an alien as envisaged in the immigration acts. However, in reality, illegal immigrants form a harshly exploited category of individuals and employees in South Africa, possessing no entitlements in their status, and almost no mechanisms for the protection of their rights. Traditionally, illegal immigrants have been employed in several industries: agriculture, accommodation and catering, construction, domestic work and informal trading.[78]

As specialised research on the topic reveals, illegal immigrants are heavily exploited in South Africa, which is obvious in the case of workers in the farm or hospitality sectors. As a rule, illegal immigrants are prepared to work for considerably lower wages and lower guarantees than domestic employees, but what is specific for South Africa, however, is that standards in the employment of illegal immigrants are extremely low, and may, at best, mean very basic remuneration in return for fulfilment of work.

Wage levels in the employment of illegal immigrants in agriculture are at least four times lower than those which pertain to domestic workers. While the domestic worker may receive a salary within a range from £120 to £150 as a monthly remuneration, the illegal immigrant, particularly Mozambican, receives only from £20 to £35 a month.[79] The precarious situation connected with the employment of illegal immigrants does not, however, concern adult males only. While general deprivation and conditions of employment have been traditionally described by observers as 'shocking' and

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[76] *Finance Week*, "Policy Goes Mad", 11th of February 2000.
[77] Supra, n. 45.
[78] Study by the National Labour and Economic Development Institute, reported in Toolo, H. and Bethlehem, L. "Labour Migration in South Africa", the research paper for the workshop on Labour Migration, 31st of August, 1994; in Solomon, n. 15, p. 103.
[79] Human Rights Watch Report, supra, n. 6, Chapter on Labour Exploitation, in "Part 4: Treatment of Undocumented Migrants in South Africa; also in Crush, supra, n. 45, p. 10.

'harrowing',[80] conditions of work for women or children are even more alarming, since they could be exposed to toxic materials or substances.[81]

Human Rights Watch reports that among the illegal alien labour force on the farms, there are many children as young as ten,[82] whose wages are most often considerably lower than those of adults.[83] Women may likewise be placed in a separate category in terms of treatment, since their labour is considerably cheaper than that of illegal immigrant males. Considering instances of inflation occurring in respect of the South African Rand and, as a result, increasing consumer prices, even these extremely low wages depreciate.

Although many employers tend to treat workers' remuneration fairly, in some other instances, aliens are not paid for their work, with farmers or other employers deploying intimidation and possibilities of reporting illegal workers to the police;[84] physical abuse of undocumented workers was also reported.[85] Despite the disturbing evidence, the farming sector is not the only one where abusive treatment of undocumented workers occurs; rather, it is just more transparent for the purpose of fact-finding. In the catering or construction sectors, disturbing practices of exploitation are likely to be equally compelling. Indeed, in addition to that in the countryside, the reality of exploitation in Johannesburg could be even more acute. There is as yet insufficient sociological evidence, but forced labour is becoming alarmingly characteristic for the circumstances in which irregular migrants as a whole find themselves.

4.4.3.1 Labour Law Issues

The contemporary labour law in South Africa does not provide sufficient opportunities for protection of irregular migrants against abuse by employers. The regulatory framework in connection with the employment relations of workers has been set up within the Basic Conditions of Employment Act No. 75 of 1997. Initially, the Act provides for all main definitions referring to employees, farm workers, domestic workers and others. According to section 213, the term 'employee' means 'any person who works for another person or for the State, and who receives, or is entitled to receive, any remuneration', as well as anyone 'who in any manner assists in carrying on or conducting the business of an employer'. What is relevant for these

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[80] Crush, ibid., p. 10.
[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] Human Rights Watch Report, supra, n. 6, Chapter on Labour Exploitation.

provisions, if read in the literal sense, is that the law leaves open the possibility that 'anyone' with whom the contract of employment is concluded, could refer to irregular migrants, and therefore even their rights may be protected.

However, the precise meaning of these provisions in reference to the rights of undocumented migrants is not clear, and probably open to future judicial interpretation. At the same time, considering the character of irregular migration in South Africa, i.e. the degree and scope of illiteracy and poor adaptability of local illegal immigrants, substantive rights will remain difficult to ensure.[86] Indeed, the Act can only potentially provide grounds for generous protection in numerous spheres, such as remuneration, working hours and vacations.

4.4.3.2 Housing of Irregular Migrants

As far as the living conditions of irregular migrants in South Africa are concerned, the predominant form of residence in the country is privately rented accommodation. However, what particularly features in the everyday life of irregular migrants are the appalling circumstances of dwelling and existence.[87] In the inner city of Johannesburg, for example, whole districts are inhabited by African immigrants, such as the areas of Hillbrow and Berea.[88] There, the material conditions of life are harrowing, with many people swamping the small premises, which are usually infested with parasites or diseases. The moral conditions are no better, since violent gangsterism, prostitution and a drug culture are implanted in the entire being of these places. There is evidence that the Nigerian mafia (often represented by Nigerian illegal immigrants) controls entire residential blocks, thus with no law or order afforded to those inhabiting them.[89] Elsewhere, the presence of irregular migrants is evident from the existence of poor tin huts on the outskirts of villages or townships. From estimates made in the early nineties, one gleans that almost eighty per cent of illegal aliens reside in informal settlements or squatter camps,[90] with the trend unlikely to improve over time.

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[85] Ibid.
[86] Crush, supra, n. 45.
[87] The following account is based on my personal interviews with people and observations of that area of Johannesburg in January 2003.
[88] Examples of growing irregular migrant communities are given in the following book by Solomon, supra, n. 78, p. 91.
[89] "Home From Home for Foreigners", *Sowetan*, 24th of February, 2003, p. 18; SA Media database—the University of the Free State project.
[90] Shutte, D. "Migration: The Status Quo and Prospects for Southern Africa", ISSUP Bulletin, No. 6, 1993, at p. 9; Solomon, supra, n. 15, p. 107.

The underlying tendency concerning the existence of irregular migrants in South Africa is that they share the plight of most underprivileged people of society, although their position could be regarded as even worse, since in the absence of any rights or guarantees extended to these individuals, they are also compelled to find 'alternative' means of earning a livelihood in order to ensure their survival. Those people living on the appalling margins of South African society, are often dragged into the criminal world, and this may possibly explain the crime rates incident to irregular migrants, as revealed above.

4.4.4 Summary

It is highly unlikely that the position of irregular migrants in the labour or housing spheres will improve during the period of their residence in the country. Rather, with current South African problems of population increases being disproportionate to economic growth rates, as well as capital and brain drains, irregular migrants are becoming even more disadvantaged, both from an individual, and a group perspective. However, for many African people, even this reality could be attractive enough as a pull factor for immigration. Despite the welfare crises typifying the realities of life for irregular migrants, South Africa remains a 'dream land' of opportunities for people who experience far worse in their countries of origin.

4.5 Residence, Internal Control and Enforcement Regimes Relevant for Deterring Illegal Immigrants

Although mass immigration in South Africa takes place purely due to economic incentives on behalf of the illegal immigrants, not only employment, but also their everyday residence, raise separate issues under the present immigration law. Previously, in the Apartheid times, South Africa had a system of limitations on the freedom of movement concerning black individuals and a fierce internal control mechanism designed to achieve this.[91] But, after the transition to democracy was initiated, South Africa became quite a liberal country from the point of view of residence control. It is highly improbable that in a state with a sufficiently large population living in townships and squatter camps, close regulation and scrutiny of

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[91] Lapping, B. "Apartheid: A History", Grafton Books, London, 1986, pp. 131-135; in Leonidov, I. "Problem Areas in Affirmative Action Policies of the Republic of South Africa: The Country's Compliance with International Human Rights Instruments", LLM dissertation, Essex University, 2001, p. 25.

population movements will be fulfilled to the full extent, since the state can hardly rely on residence registration or other forms of residence control. However, the agenda and issues connected with internal control are evolving, both in terms of legislation and executive policy-making.

First of all, within the general framework of the 2002 Immigration Act, there exist norms envisaging possibilities for administrative control, inspection of premises, arrest and detention which, taken together, mean the introduction of certain basic forms of internal control and enforcement mechanisms. While the major emphasis in regulation and fulfilment of internal control is placed on the Home Affairs Department, certain norms extend obligations to all institutions providing services.

It is in this vein that the White Paper on International Migration endorses a tight enforcement mission to all the main state and public structures, such as the Immigration Service, police and local authorities. As the document declares:

> "Police should also be trained to detect illegal immigrants and to verify nationality and residence upon arrest of suspects or during other aspects of its interaction with the public and report to the I.S. (Immigration Service)…. The I.S. should also have the training and educational capacity to explain immigration issues to police and local government authorities."[92]

Furthermore, the White Paper suggests certain approaches that prescribe the collaboration of the Immigration Service with local communities:

> "By checking, in co-operation with the community, whether illegal aliens are receiving services from banks, hospitals, schools, and providers of water supply or electricity, they [the I.S.] should contribute to creating a perception that South Africa is not a good receptacle of illegal immigration."[93]

This statement by the Government in itself outlines a clear perception that identity checking will be inevitable, and become the daily practice of local and regional departments. This policy statement preceded adoption of the 2002 Immigration Act, which incorporated these notions in the form of legislative norms. The parallel enforcement role of public and private institutions has been established in two consecutive provisions of the Act, i.e. sections 44 and 45, both of which have been created to oblige state bodies and other institutions respectively to check the documents of individuals so as to identify their status or citizenship.

Furthermore, according to the provision of section 44, on providing services, any organ of the state should identify and report illegal immigrants or individuals whose

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[92] White Paper, supra, n. 3, Chapter 11, paragraphs 2 and 2.1.
[93] Ibid., Chapter 6, paragraph 5.3.

status cannot be ascertained by the Department of Home Affairs. This obligation is limited, with two restraints as to the procedure enshrined in the law. First of all, these individuals should be promptly informed, either personally or via public notices, about the disclosure of their identity or status that may follow and, secondly, this provision should not render useless the constitutional and legal entitlements of all foreigners to certain services. The latter provision of section 45 extends the same principle to include the conduct of private bodies and institutions. The purpose of these legal mechanisms was summarised in the following policy statement:

> "...It will cause aliens to operate in a hostile environment in which it becomes increasingly difficult for them to find employment opportunities, receive public services or conduct a regular life".[94]

Identification of immigrants and their status has likewise been stressed as being the obligation of small businesses which provide accommodation by virtue of section 40 of the Act, and Immigration Regulations (paragraph 42). In case of a failure to comply with the provision, namely by checking passports, subsection 2 of section 40 allows for making the presumption that a foreigner was harboured by the lodger, something which, on its own, constitutes a serious immigration offence. Previously, the 1991 Aliens Control Act contained a similar provision in section 34, obliging lodgers to keep a register of all visitors.

In connection with lodgings or any other interaction with foreigners, the current all-embracing legal definitions of assistance or harbouring are wide enough to be invoked in very many cases. Considering the possibilities for making enforcement efforts, this could be potentially demanding and even dangerous when facilitating the stay of aliens, thus undermining the tourist industry.[95] The presumptions against lodgers, employers and educational institutions referred to above and contained in section 38, are interconnected with the norm of section 42 of the Act. This endorses a general prohibition against aiding and abetting foreigners who are illegal, or who lack the necessary status for certain activities, when these aforementioned individuals provide assistance and support, among other things, in the following spheres:

- Training or instruction;

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[94] Ibid., Chapter 11, paragraph 4.

[95] This norm was referred to as an encroachment upon the interests of the tourist industry in Crush, J. and Williams, V. "Migration Policy Brief No. 2: The New South African Immigration Bill: A Legal Analysis", South African Migration Project, 2001, p. 10.

- Issuing licences for conducting a business, profession or occupation, or for entering into an agreement for that purpose;
- Conducting the aforementioned activities in co-operation with illegal aliens;
- Harbouring illegal aliens by providing accommodation;
- Letting, selling or making available any moveable property in South Africa.

This norm can be regarded as a manifestation of an enforcement regime in relation to immigrants, since this extends considerable sanctions against the general public in case of any collaboration with illegal immigrants. This sanction penetrates traditionally private legal spheres such as transactions with property, provision of educational services, and collaboration in conducting business activities. As was argued in the paper prepared by the South African Migration Project, this may bring about xenophobia, by presenting the illegal alien as 'a legal leper', regardless of the circumstances in which the persons failed to comply with immigration rules.[96]

The above listed measures are enshrined in the existing internal control mechanisms consisting also of policing and sanctions. In this regard, the Immigration Inspectorate is entitled to conduct activities towards identifying illegal foreign nationals in South Africa. Section 33 provides for various mechanisms of search, arrest and detention *with a warrant*, or under the competent person's consent and other mitigating circumstances, *without a warrant*—all subject to substantive limitations on interpretation of the section. The search for, as well as the detection and apprehension of illegal foreigners in the Republic leads to the final goal of the entire internal control, i.e. deportation from the territory in accordance with section 32 of the Immigration Act, while administrative removal is not available anywhere in the Act or Regulations. Deportation is connected with guarantees of due detention and appeal processes preceding deportation, embracing the following safeguards within the meaning of section 34:

- The right to be notified in writing of the decision to deport, as well as the right to appeal;
- The right to request judicial confirmation of detention and, if not issued within 48 hours, to qualify for immediate release;
- The right to be informed of rights upon arrest;
- The right not to be detained for more than 30 days without a judicial warrant;

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[96] Ibid., p. 11.

- Detention in accordance with the 'minimum prescribed standards protecting dignity and human rights'.

The possibility of appeal is evident in the deportation process, as envisaged by virtue of section 8 of the Immigration Act.

Despite essential limitations and safeguards regarding the search, apprehension and deportation procedures, the reality is, in fact, different from the desirable goals. Searches or apprehensions are often conducted through deployment of special police units, or even military personnel, targeting both criminals and immigration offenders, where the treatment is far removed from the legally outlined principles. One of the reported examples was Operation Kick-Off in the Hillbrow area of Johannesburg, a joint initiative between the army, police and immigration bodies, which was described in the following way:[97]

> "Those too slow to get away were nabbed by the soldiers, their modest merchandise—boiled eggs, chips, sweets—scattered and kicked aside. Some were dragged back as they tried to flee. Street corners that had been hives of activity minutes before were suddenly deserted."

It may well be that the abovementioned example of an alert and raid conducted in Johannesburg portrays the only realistic internal control method, especially since immigration authorities are operating in a harsh environment riddled with criminal violence which, in any event, will possibly have an impact on possible implementation practices. However, during enforcement operations or routine checking of immigrants, grave breaches of personal integrity may occur. First of all, identification tactics are often arbitrary and superficial, such as discerning linguistic accents, appearances, vaccination marks, or putting specific questions to migrants.[98] Secondly, as was reported by the Human Rights Watch, police and immigration authorities frequently destroy IDs or other documents belonging to immigrants, which would otherwise have confirmed legal residential status.[99]

Subsequent deportations are likewise conducted in a swift and harsh manner with an inobservance of procedural guidelines, such as properly informing detected individuals of their illegal status before the deportation process begins. At the same time, it is a matter of judicial interpretation by South African judges whether deportation practices

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[97] Moya, F-N. "This is Where Armageddon Will Start", *Weekly Mail and Guardian*, 18th of September 2003, p. 8; provided by the SA Media database— University of the Free State project.
[98] Minaar, A. and Hough, M. "Causes, Extent and Impact of Clandestine Migration in Selected Southern African States", Human Sciences Research Council, Pretoria, 1995, pp. 90-91.

could be regarded as inadequate in terms of the immigration law. One of the recent High Court decisions banned the summary arrest of foreigners suspected of illegality, as well as confirming the adherence of the immigration system to the procedures of issuing deportation orders and providing recourse to appeal for aliens, especially in the context of individuals' detection in planes, ships and trains.[100]

The specificity of South African immigration deportation policy refers to the fact that a substantial number of irregular migrants are represented by those who were previously apprehended or deported. These individuals arrive clandestinely, and leave the country with deportation becoming an ordinary means of travel, thus abusing the immigration system. Moreover, clandestine entry in itself does not pose possibilities for monitoring or control of the immigration situation. Understandably, the legislation introduced additional criminal penalties to deal with such breaches of immigration legislation.

Section 34(5) specifies two situations concerning illegal residence, likewise in circumstances of previous immigration offences, by providing the following:

> "Any person other than a citizen or a resident who having been—
> a) Removed from the Republic or while being subject to an order issued under a law to leave the Republic, returns thereto without lawful authority or fails to comply with such order; or
> b) Refused admission, whether before or after the commencement of this Act, has entered the Republic,
>
> Shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months and may, if not already in detention, be arrested without warrant and deported under a warrant issued by a Court and pending his or her removal, be detained in the manner and at the place determined by the Director-General."

This norm of law contributes to the considerable powers of the Home Affairs Department in combating irregular migration in an increasingly important sphere for South Africa, because clandestine entry committed by previously deported aliens is one of the gravest and most widespread immigration offences.

However, in addition to the issues arising from enforcement practices and repetitive illegal entry and residence violations, a particularly compelling contemporary challenge concerns the situation of document fraud and illegal 'regularisation' which is infrequently available to irregular migrants. Although legalisation channels are

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[99] Human Rights Watch Report, supra, n. 6, Chapter on Abuses Committed During Detection and Arrest: Arbitrary Identification Procedures, in Part 4.
[100] Ellis, E. "Judge Spells Out Rights of 'Illegal' Foreigners", *Sunday Tribune*, 27th of April, 2003, p. 8; the SA Media project, ibid.

available in the country, many illegal aliens exploit opportunities of corruption on the side of officials. As the Home Affairs Minister, Mangosuthu Buthelezi, once asserted:

> "Corruption is everywhere in this country and my department has serious problems because staff are handling money and they have opportunities... Once this kind of payment [bribes] established a foothold in a department, the problem spreads like a cancer into other areas as workers became used to the idea of making money on the side."[101](sic)

This statement by the Home Affairs Minister may also be attributed to the illegal ID issuance infrequently facilitated by immigration officials and, additionally, to the general operation of the enforcement system, as was revealed in the Human Rights Watch Report.[102] The scores of illegal immigrants either access corrupt officials for legalisation in employment or within the social welfare system, or have money extorted from them on being arrested, detained and deported. The efforts proposed by the current Government to improve immigration control will probably be thwarted by thoughtless corruption: this will render impossible many potential solutions to illegal immigration issues, including those to be conducted by private and public bodies with the purpose of verifying the immigrant's status. Corruption levels in the South African immigration control are more substantial than in the UK, for instance, probably because of systematically underpaid staff and insufficient educational efforts within the immigration control system.

Although by and large South Africa lacks the necessary tradition and resources for the tight enforcement of immigration law, the South African government aspires to establish a stringent administrative control and its enforcement in relation to the situation of aliens. The emergence of the ID culture, the existence of excessive powers on the part of the immigration authorities, supported by more than decisive and somewhat too draconian, almost extralegal measures, have become a reality in the country. Nevertheless, the government's actions are somewhere behind the developments of the illegal immigration agenda, such as the actual scale of clandestine migration. In particular, the corruption problem at Home Affairs could render control over the foreign population non-existent. The government might rather end up taking propagandistic steps to penalise certain individuals or entities, but being unable to succeed on a large scale.

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[101] Peta, B. "Illegal Immigrants Are A Perpetual Problem Compounded by Corruption, Says Buthelezi", *Cape Times*, 14th of October, 2003, p. 6; SA Media database—University of the Free State project.
[102] Human Rights Watch Report, supra, n. 6, Chapter on Abuses Committed During Detection and Arrest: Bribery, Extortion and Theft During the Arrest Process, in Part 4.

4.6 *Access of Illegal Immigrants to Social Welfare and Public Services*

The irregularity of immigrants' status in the field of social welfare may be reflected in three substantive situations relevant within the South African legal discourse, and identifying illegality via three different routes:

1. First of all, when residing legal foreigners gain access to restricted benefits or certain public services either by mistake or fraud;
2. Secondly, when residing illegal immigrants effectively access welfare benefits or public services;
3. Thirdly, when foreigners enter South Africa in order to have access to the welfare state provided to them by official negligence or fraud.

The first two situations are common and typical for almost every jurisdiction, but the third type of irregularity arises only in respect of South Africa, where, as outlined below, aliens from the neighbouring states cross the country's borders for the single reason of claiming benefits or acquiring essential services. As far as the first situation is concerned, permanent residents are becoming more and more able to acquire social security legally[103] and therefore the sphere of possible illegality is shrinking in this respect. Nevertheless, for most other aliens, these various situations arising in respect of social welfare entitlements converge at the points of the general restriction concept concerning access of foreigners to what could be regarded as prerogative guarantees for the country's nationals.

Provisions of the 2002 Immigration Act laid out grounds for possible constraints on aliens' access to the welfare state. Section 30 of the Immigration Act, when establishing the categories of individuals undesirable for gaining entry to South Africa, mentioned those who were likely to become a burden on public funds. This restriction concerns any foreigners attempting to proceed to or reside in the Republic without adequate funds covering all their essential needs during their stay in South Africa. This requirement of possessing sufficient funds is enshrined in other provisions establishing qualification criteria for entry or residence; for example, by authorising immigration officers to check the availability of funds on entry of an immigrant into the

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[103] Peete, F. "Non-Citizens Win Round One in Benefits Battle", *Pretoria News*, 22nd of May, 2003, p. 2; SA Media database— University of the Free State project. This article reports the case law which extended social benefit payments, envisaged by the Social Assistance Act, to permanent residents.

Republic.[104] Legal restrictions in light of immigration law refer both to the social benefits and to public services.

Although aliens are generally excluded from any access to essential public services, such as health care, education or public funds, it is conceivable that utilisation of the welfare state services is not possible unless mistakes or fraud are committed. At the same time, in post-Apartheid South Africa, access to basic public services or welfare support could be possible without sufficient document verification. To reverse this trend, the Immigration Act, by virtue of its sections 44 and 45 referred to above, has provided for the norms obliging state and private institutions to identify illegal immigrants who access these services. These norms have become the main feature in the front line of irregular migrants' deterrence from the welfare state. However, in the South African situation, the social effects tend to vary as far as immigrants' usage of basic public services and enjoyment of the inappropriate payment of benefits are concerned.

In the sphere of education, Minaar and Hough[105] report on children from Swaziland and Lesotho crossing the border to gain access to schooling in South Africa, while in the Johannesburg area, over eighty thousand children of illegal immigrants are believed to use the educational facilities.[106] The burden on medical facilities, which are frequently utilised by illegal immigrants, has likewise been reported, along with other examples of the illegal use of public services.[107] However, although these facts may provoke poignant opposition from the general public, provision of education or medical care may be regarded as a necessary humanitarian concession which will not significantly undermine the effectiveness of the welfare state in the fulfilment of its duties to the South African people.

What is dangerous, however, is the constant penetration into the benefit payment system, which directly raises the burden on taxpayers. In this regard, fraud associated with receiving pensions or child benefits, either by obtaining false South African IDs, or by using fake addresses in the country, or even by 'buying' or illicitly adopting infants, has become widespread over the last years.[108] Examples of abuse of the social welfare system indicate that possibilities remain for illegal immigrants to exploit this

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[104] Immigration Regulations, para. 10(3)(b)(iv).
[105] Supra, n. 20.
[106] MAP De Monteclos. "The Mozambican Border: From rigid to porous: New challenges to immigration to South Africa" Milmeo, 1996; in Solomon, supra, n. 15, p. 107.
[107] Minaar and Hough, supra, n. 20, pp. 209-210.
[108] Ibid.

system, without paying taxes or other contributions, something which undermines the integrity of welfare protection in the country. Currently, this extends into an issue of nationwide importance which is reflected in the government's policy goals. In addition to the statutory obligations placed on institutions providing basic services as to checking the identity of all individuals, policy statements by the government aspire to achieve further prohibitions against irregular migrants from uncontrolled overuse of the welfare state. The White Paper concerning immigration policy in South Africa mentions possibilities for using and invoking the limitation clause of the South African Constitution in order to produce a constraint on the enjoyment of all rights by aliens.[109] However, the distinction between bona fide use of facilities and abuse is possibly also acknowledged in the White Paper stating that:

> "In South Africa we will need to determine the extent to which the circumstances of being an alien, either a legal or illegal one, may authorise providing them with a lesser degree of constitutional protection."[110]

Furthermore, the White Paper refers to experiences of other states in producing limitations only on socio-economic and political rights of aliens, while retaining protection of substantive civil rights.[111] Therefore, the question which forms the cornerstone of debate is whether actual access to the most essential public services can be refused at all. Chapter 11 of the White Paper dealing with enforcement principles specifies that institutions providing these services should check the identity of individuals and inform them that they could be reported to the Department of Home Affairs, but none of the 'essential or constitutionally mandated public services' should be withheld.[112] The task of Home Affairs is rather to create a 'culture of verifying IDs'.[113]

The South African government's aims to minimise fraud or expenditure on irregular migrants is understandable in a situation where many South Africans enjoy few, if any, possibilities for decent living. However, in this very light, the White Paper's acknowledgement of humanitarian standards could be rendered fake. It is highly probable that all foreigners, whether legal or illegal, could experience inappropriate treatment or xenophobia because of attempts to access education, medical treatment or general emergency needs. Additionally, it is generally unclear from the South African

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[109] White Paper, supra, n. 3, Chapter 6, paras 2.1-2.3.
[110] Ibid., para. 2.4.
[111] Ibid., para. 2.3.
[112] Ibid., Chapter 11, para. 4.
[113] Ibid.

legal policy standpoint which services any foreigner is actually entitled to and which will not lead to further difficulties in substantively interpreting the government's generally liberal policy statements.

Even acknowledging that fraud in relation to public services or welfare benefits is an extremely negative feature of the contemporary South African situation, total alienation of illegal aliens from basic public services cannot be chosen as a tool of deterrence, simply because this does not serve the policy goals of eliminating illegal immigration.

4.7 Refugees and Immigration Policy: Illegality of Asylum Seekers in Contemporary South Africa

Despite the fact that the African continent has always been unstable, up until 1991 South Africa had no concept of refugee policy, or relevant legislation to that end. It was not until 1993 that the government signed a basic Mandate permitting the presence of the UNHCR in South Africa, by concluding the Basic Agreement with the UNHCR.[114] In 1996, the country assented to the 1969 OAU[115] Convention on the Specific Aspects of Refugee Problems in Africa,[116] and the 1951 Convention on the Status of Refugees, including its 1967 Protocol.[117] The swift advancement of refugee policies was further fostered by the South African Government, which undertook to produce special regulations concerning the refugee determination process. In this vein, the Department of Home Affairs issued Passport Control Instructions[118] and other substantive documents[119] regulating the asylum determination process under the Aliens Control Act of 1991. Adopted specifically to handle the Mozambican refugee crisis at the time, these were temporary policy documents shaping the refugee determination process in the country.

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[114] Basic Agreement Between the Government of the Republic of South Africa and the United Nations High Commissioner for Refugees Concerning the Presence, Role, Legal Status, Immunities and Privileges of the UNHCR and Its Personnel in the Republic of South Africa; in Handmaker, J. "Who Determines Policy? Promoting the Right of Asylum in South Africa", 11(2) (1999) *International Journal on Refugee Law*, p. 293.

[115] Organisation of African Unity.

[116] 1000 UNTS 46; date of South African assent is 15th of December 1995; in Handmaker, ibid.

[117] 189 UNTS 150; 606 UNTS 267; date of South African assent is 12th of January 1996; in Handmaker, ibid.

[118] Passport Control Instruction No. 20, Guidelines for Refugee Status Determination of Mozambicans in South Africa, and Passport Control Instruction No. 23 amending Instruction No. 20; in Handmaker, ibid.

[119] Form BI-1590, Eligibility Determination Form, form BI-1594 and other documents; in Handmaker, ibid.

Until recently, the legal status of a refugee was determined by complicated mechanisms outlined in the 1991 Aliens Control Act, not particularly designed to address humanitarian notions in immigration and refugee issues. According to the Aliens Control Act, entry without proper visas could render an individual a prohibited person subject to deportation in accordance with section 39 of the Act. However, only because of section 41 in the same Act, also referred to above as an important exemption for temporary labour migration policy by providing for the possibility of issuing a temporary permit to prohibited persons, asylum seekers could be granted temporary residence rights.[120] Currently, the entire framework of refugee protection is enshrined in the 1998 Refugees Act No. 130[121] adopted for this purpose.

The issues of refugee protection have been closely connected and even coterminous with issues of illegal immigration in South Africa. Indeed, the practical borderline between both notions lies in the availability of refugee status or registered asylum claims, where this qualifies a foreigner for humanitarian protection. In the vibrant, warlike, unstable and economically desperate conditions of the African continent, the probability of migration flows has been extremely high. Nevertheless, considering official reports, South Africa has avoided the massive refugee flow crisis in the last decade. In terms of estimates by the Home Affairs Department, from 1994 to 1999 over 54,704 people applied for refugee status protection, and, out of this number, only 8,504 applications for asylum were approved.[122] These numbers of asylum claimants in South Africa are an utter underestimation of the actual flows, since many people displaced by disastrous wars or disturbances remain illegally in the country. Numbers of actual refugees from the destabilised Democratic Republic of Congo, for example, should be very high, because they are visually present in the streets of Pretoria or Johannesburg, often begging for donations.

In fact, in the reality of life in South Africa, it is impossible to distinguish many illegal immigrants from actual refugees, especially considering possible threats from the non-state actors who are plentiful in the countries of origins. Indeed, both official and unofficial refugees mostly arrive in South Africa from other African states where they have experienced disturbances of peace or order. The ethnic origin of refugees varies, but most often they come from Angola, Somalia, Congo, Liberia and in great

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[120] Handmaker, ibid., pp. 295-296; the system endorsed by the 1991 Act reminds one of the British system of asylum seekers' treatment, where this category may enjoy entry only on an exceptional basis.
[121] Assented to by parliament on 20 November 1998, Juta Statutes, Vol. 5, 1998.
[122] Department of Home Affairs (DHA), June 1999.

numbers from Mozambique. In addition, there are also individuals from the South Asian continent who apply for asylum in South Africa.

As far as officially acknowledged asylum claimants are concerned, on the legal plane, provisions of section 3 of the 1998 Refugee's Act fully comply with the foundational definition of asylum criteria laid out in the 1951 Convention on the Status of Refugees. Section 2 of the Act envisages guarantees against extradition or removal from the country if the foreigner is threatened or subjected to persecution on conventional grounds. Initially, upon arrival at the port of entry, the asylum seeker is definitely subject to immigration control, and the Immigration Officer has every authority to issue an asylum permit to enable the asylum seeker to report to the Refugee Reception Office within fourteen days, for the purpose of section 2(1)(a) of the Refugees Act, as provided by Immigration Regulations (paragraph 32(2)). After that, as established by section 22, the Refugee Reception Officer is granted authority to issue the asylum-seeker a permit for temporary stay, after an asylum claimant submits an application form in conjunction with Article 21.

Provisions of section 22(1) further specify that the permit is subject to certain conditions and restrictions defined by the Standing Committee responsible for the refugee policy, where the conditions and time-frame of the permit are amendable, a process which may be fulfilled by the Refugee Reception Officer. The main conditions are represented by a ban on employment or study within the first 180 days after the permit issuance; after that period, an asylum seeker is permitted to apply for the withdrawal of these limitations.[123] The permit is subject to withdrawal if, among other factors, such as rejection of the asylum claim, manifestly unfounded application, or other issues, the asylum seeker contravenes any conditions attached to the stay in South Africa, as specified in section 22(6)(a). This sanction actually provides for the ground of illegality in relation to all asylum applicants, further leading to the possibility of detention, as envisaged in section 23 of the Refugees Act.

The category of asylum seekers is not the same as that pertaining to refugees, where the latter are fully protected by law, and possess almost the same socio-economic entitlements as the nationals of South Africa. Application for asylum may still be refused on the grounds provided in Article 24 (3) of the Refugees Act, such as a

[123] Paragraph 3(3) of Regulations to the South African Refugees Act, 6th of April 2000; Government Notice, Department of Home Affairs, No. R 366.

fraudulent, abusive or unfounded application. On the same basis, the temporary stay permit may be withdrawn by the Minister in accordance with Article 22(6).

Once refugee status has been granted to the asylum seeker, he or she is entitled to certain rights and guarantees in accordance with the law. The Refugees Act in its Article 27 outlines the scope of this general status of a refugee, which generally embraces the following rights:

- Full legal protection prescribed in Chapter 2 of the Constitution, including the right to remain in the country;
- Application for the immigration permit;
- Identity documents in accordance with Article 30 of the Act;
- Employment;
- The same level of healthcare and *primary education* as the South African nationals themselves.

However, despite the substantive rights envisaged for recognised refugees, their protection remains vaguely problematic. There are indications that refugees are not receiving assistance from the government or the public, which makes them subject to 'extreme hardships and suffering', even in terms of providing for daily basic needs.[124] What contributes to the struggle for refugees is the widespread xenophobia on behalf of the country's nationals, stemming from increased competition for the scarce resources or jobs.[125] Treatment of refugees on accessing essential public services, such as medical care or schools, is sometimes discriminatory, too.[126] Refugees' humanitarian circumstances have provoked great concerns on the part of NGO's, especially in light of the position of unaccompanied minors and refugee children, because these organisations have turned out to be literally helpless on confronting the compelling reality of poverty and need.[127] There are reasons to believe that the marginality of refugees provoked by humanitarian circumstances brings about their illegality; for example, three-month registration procedures imposed on recognised

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[124] Williams, V. "In Need of Protection: Good Policy versus Harsh Reality for Refugees in South Africa", 9(3) (November 2000) *Track Two*, p. 10.
[125] Ibid., p. 11; also in Naicker, P. and Nair, R. "To be a Refugee in South Africa: Ordinary People Living with Extraordinary Pressures", 9(3) (November 2000) *Track Two*, pp. 13-14.
[126] Ibid.
[127] Thiel, G. "Promised Land Brings Despair and Suffering for Refugees", *Cape Times*, 22 of April, 2003, p. 6; the SA Media database— University of the Free State project.

refugees as an obligation may jeopardise them simply as a result of costly travel to the Home Affairs Department, or because of the necessity to take a day off work.[128]

At the same time, ethical issues may arise in relation to extending additional protection to refugees and, in fact, by doing so, uplifting them in comparison with South African nationals. Indeed, how justifiable would refugees' 'affirmative action' be in a country where millions of nationals barely survive in almost hopeless circumstances? Plausible solutions should rather enshrine the ban on their discrimination in the socio-economic sphere and basic humanitarian support, such as food and essential public services. Additionally, the state should withdraw burdensome procedures for refugees' compliance. Since uplifting by means of direct substantial cash support is extremely problematic and even unethical, the state should adopt the policy principle by which the less it is able to contribute to the refugee, the less it should demand of the refugee. The same principle should apply to the situation of asylum seekers.

Opportunities to remove refugees are limited only to a few exceptional possibilities on national security or public order grounds, and subject to safeguards in respect of the decision-making process. Meanwhile, in the entire humanitarian protection agenda, an even more complicated position belongs to asylum seekers, since they have fewer entitlements than refugees, and, unlike persons granted refugee status, may tend to act in contravention of the conditions attached to the temporary stay permit, such as limitations on employment. Indeed, asylum claimants have powerful incentives to be employed in the country, which many of them subsequently fulfil, and become illegal in light of the immigration law. In accordance with section 23, asylum seekers may be detained during the refugee status determination process, primarily in order to prevent behaviour that obviously signifies illegality. In accordance with the provision, detention automatically follows withdrawal of the temporary asylum-seeker permit, i.e. withdrawal of the legal ground of stay in the country, and simultaneously makes an applicant an illegal immigrant.

As in many other states, asylum seekers are subjected to a range of negative experiences in South Africa, which is rather unavoidable in the current legal framework concerning asylum seekers and refugees. Among these factors, there is a deeply corrupt process of status determination, along with very poor conditions of

[128] Naicker and Nair, supra, n. 125, p. 14.

detention in custody.[129] There have been various cases reported on maltreatment by police staff of asylum seekers and refugees, and even murders due to abusive treatment in custody.[130] One fundamental flaw of the refugee protection system in South Africa relates to the fact that the government does not publicise possibilities and actual legal means for many aliens from the African continent to apply for and acquire asylum in the country, where this mostly affects illiterate and the most disadvantaged potential asylum seekers. Although an increase in the numbers of asylum seekers would mean a growth in expenditure on immigrants themselves, the remaining option is doubtless to have them residing illegally in the country.

These unofficial refugees experience enormous problems living in South Africa, because their status is fully commensurate with that of illegal immigrants in the country. The following case study on Mozambican refugees may help to reveal the trend in the overall situation concerning the borderline between asylum seekers and illegal immigrants.

4.7.1 A Case Study on Mozambican Refugees and Illegal Immigrants in South Africa

The situation with Mozambican immigrants presents a particularly compelling case in contemporary South Africa. Mozambican immigrants have contributed to the existence of a very longstanding problem for the society and the state. Ever since 1985, Mozambican refugees have been fleeing the civil war and, more recently, the appalling economic conditions in the country.[131]

South Africa, being an Apartheid state at the time, fiercely resisted the inflow of immigrants from Mozambique, although finally the government agreed to allow for the reception of refugees in the homeland territories, relatively independent areas, where black people had full rights of residence.[132] It is in these areas that immigrants from Mozambique received treatment similar to that of refugee protection during the years preceding the democratisation of South Africa. The democratisation process in the country brought changes to the refugee policies and, finally, a change in the perception of the state towards Mozambican forced migrants. The increase of humanitarian

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[129] Human Rights Watch Report, supra, n. 6, Chapters on Corruption in the Asylum Process and on Asylum Seekers in Detention, in Part 5 " The Treatment of Asylum Seekers and Refugees in South Africa.

[130] Edmunds, M. "Refugee dies at Home Affairs", *Mail and Guardian*, June 13 to 19, 1997.

[131] Sinclair, M.R." Unwilling Aliens: Forced Migrants in the New South Africa.", 13(3) (Winter 1996), *Indicator SA*, p. 15.

[132] Ibid.

awareness led, to some extent, to the formal recognition of these immigrants as refugees,[133] but, by 1994, the civil war was over in Mozambique, and the South African state concentrated its efforts into reversing the immigration trend. In this vein, the government started pursuing the Voluntary Repatriation Programme jointly with the UNHCR, which was designed to enable Mozambican forced migrants to return to their country of origin.

The Repatriation Programme, however, did not succeed in returning a desirable number of Mozambicans: this number only climbed slightly to over 31,000 people, out of a total of 350,000 refugees. In fact, as Sinclair points out, the majority of the Mozambicans sensed that any initial registration for refugee status could mean final repatriation from the country and thus they were reluctant to report for asylum application.[134] In addition, Mozambicans' refugee status was lifted by 1997, thus confirming the temporary character of refugee status in the country.[135] Currently, a problem area persists concerning Mozambican refugees who have turned into illegal immigrants over the last few years. In addition to other Mozambicans who entered the country by means of contravening immigration law, they form a distinct category of illegal immigrants, despite initial claims of forced migration and persecution.

Technically, immigration of Mozambicans to South Africa has always been clandestine and fulfilled through the Northern border and the Kruger National Park— a dangerous route characterised by the presence of wild animals, snakes and border fences. Despite the existing 62,2 kilometre electrified fence, the border has experienced a mass influx of Mozambicans.[136] Moreover, the end of the civil war resulted in an increase of irregular immigrants from Mozambique. During the period after 1993, there have been reports regarding a dramatic increase in the number of illegal immigrants: 250,000 in 1993,[137] to at least 800,000 currently. Other estimates reveal that, as early as 1994, the total number of both illegal immigrants and refugees from Mozambique in Mpumalanga Province alone constituted eight hundred thousand. While the statistics reveal a much less significant total number of individuals who have been granted refugee protection, repatriation figures for Mozambican immigrants have grown very substantially, and amounted to over 70,000 people in 1994,[138] and 131,689

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[133] Ibid., pp. 16-17.
[134] Ibid., p. 17.
[135] Ibid., p. 15.
[136] Minaar et al, supra, n. 1, p. 35.
[137] Minaar and Hugh, supra n. 20, p. 114.
[138] Ibid.

people in 1995.[139] Indeed, traditionally, the majority of removals from South Africa occurred in connection with Mozambican immigrants. The case of these immigrants is compelling, as they have experienced degrading treatment in South Africa, such as labour exploitation, police abuse or brutality.[140]

First of all, the significant matters that need to be addressed refer to the extent to which the position of Mozambican refugees can be equated to the one of illegal immigrants and, secondly, how to eliminate their illegal presence. Currently, there are only economic reasons for their residence in South Africa which, in itself, does not warrant humanitarian protection and, in fact, provides grounds for sanctions as to illegal immigrants. Nevertheless, the South African government has possibly reduced their protection too dramatically, and taken advantage of the political changes in the neighbouring country which meant that the pool of refugees was transformed into one of irregular migrants. On the basis of Mozambican immigrants, it is probably difficult to resolve the humanitarian dilemma of distinguishing between refugees and economic immigrants which, in the words of one observer, 'has taken a particularly sharp edge in South Africa, with Mozambicans found in rural areas defined as refugees, and those found in urban areas defined as illegal aliens'.[141] As far as the elimination of the problem is concerned, Mozambican migrants are not excluded from the amnesty afforded to SADC nationals and, currently, their treatment depends upon the government's policy in this respect.

The main conclusion in relation to South Africa's refugee policy is that the refugees' irregularity is actually intertwined with insufficient government efforts to provide refugee status to all who are in genuine need of protection. Instead, the government attempts to conceal and limit the availability of refugee status by means of affording it only minimal publicity among South Africa's immigrants. In addition to a slightly unrealistic employment policy, this serves as a contributing factor to the illegality of many aliens.

4.7.2 Summary

The governmental policy in the Republic, as in almost every other state has to respond to two main challenges, i.e. the scale of providing refugee protection to aliens,

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[139] Ibid.
[140] Human Rights Watch Report, supra, n. 6, in Part 5; also in Franco, A. "The Catastrophic Situation of Mozambican Migrants", 10(2) (2001) *African Security Review*, pp. 118-119.
[141] Dolan, C. "Aliens Aboard: Mozambicans in the New South Africa", 12(3) (Winter 1995), *Indicator SA*, p. 30.

and their treatment during the various stages of in-country residence. First of all, the government should show greater acknowledgement of the need to extend refugee status to as many individuals as possible, thus making efforts to avoid the illegalisation of substantial numbers of actual refugees. Secondly, the in-country treatment of asylum seekers and refugees should be more lenient, and embrace the idea that within the limited welfare possibilities that exist in South Africa, such aliens should enjoy more freedom in respect of providing for themselves and not being overburdened with excessive requirements.

4.8 Conclusion

Irregular migration in South Africa has brought about numerous socio-economic and political problems, albeit embedded in the country's past and the current economic difficulties which the state and the public are encountering at the moment. Although some policy statements make an attempt to acknowledge the humanitarian perception towards the position of irregular migrants in the country, the overall policy trend is restrictive in relation, not only to undocumented migrants themselves, but also to the whole range of immigrants, be they refugees or economic migrants. Even though the state does indeed need to protect the indigenous labour market, there are no assurances that the bureaucratised procedures which exist in the country at the moment can assist in achieving that end.

In some other respects, the position of irregular migrants is characterised by a whole range of restrictions and enforcement policies, particularly in light of expansion in terms of internal control mechanisms. However, at the same time, the success of the chosen policies is not ensured, since irregularity in South Africa is largely intertwined with the clandestine movements of people. Perhaps, the country's immigration policy needs an overhaul to ensure better protection of the borders on the one hand and simultaneously, more liberal admission policies and humanitarian perception regarding the position of all types of immigrants on the other.

5 Concluding Analysis: Comparative and International Legal Aspects of Immigration Policies in Relation to Irregular Migrants in Britain, Russia and South Africa

5.1 Introduction

The main task in this chapter is to produce a scale of possible country-specific comparisons between the three countries as far as the legal position and internal juridical capacity of irregular migrants is concerned. It is possible to derive three major theoretical postulates relevant to the fulfilment of the present comparative research.

First of all, the structure of immigration legislation is almost the same in every jurisdiction, as far as the main elements of regulating the status of aliens and their admission are concerned. Indeed, there are hardly any unconventional structural mechanisms of immigration or administrative control, and the entire sphere of immigration policies could be divided into six stages, such as admission, internal control and residence, access to the welfare state and, finally, employment of immigrants or treatment of asylum seekers and refugees.

The corresponding terminology is quite uniform for all the three states, too, apart from certain variance in details, and one specific mechanism of registration which is unique to the Russian legal system and categories of prohibited and undesirable persons which exist in South Africa. Rather, the differences in every jurisdiction lie in the combination and emphasis on concrete policy measures responsible for the characteristics of immigration control. Additionally, one needs to take into account the uniqueness of each of these states in terms of scale, socio-economic effects, and related political agendas of irregular migration, and these very features probably explain the differing identity of the states in respect of immigration laws and policies.

The second feature is that it is not only legal norms that have to be compared, but also their social outcomes. Although the 'normativist' philosophy could be regarded as being inherent in any legal sphere representing administrative methods of regulation and, more precisely, immigration law, social reality should not be ignored either, not least because the best criteria for testing and verifying any particular statute have to be derived only from social life itself. Indeed, legal regulations which bring considerable

socio-political distortions and encroachment on fundamental human rights or humanitarian principles are no use at all.

The major assumption underlying the comparative agenda in this regard refers to the fact that immigration regulation is not represented per se by obstructed juridical norms, but is rather connected with living policy instruments linked to a highly political environment. Thus, it is irrelevant simply to produce a normativist comparative study, because norms and instruments are either identical, or highly similar in most states. Rather, it is indispensable to look at the variety of legal realities originating from these very norms against the background of domestic legal systems and corresponding social circumstances. Comparison of these norms as policy instruments forms the major task of the proposed research.

Thirdly, basic criteria for the forthcoming analysis have to be drawn, in order to build up the comparative study. The main standards established and spelt out in the theoretical chapter have underpinned all the substantive elements and, for the purpose of this chapter, they may be summarised as follows:

- Consistent reduction of economic incentives for immigrants' irregularity by means of liberalising economic migration;
- Adequacy of immigration law and its structural consistency, measured not only by the presence of all the necessary legal elements, but also by the response to both positive economic factors and the adverse social impact associated with irregular migration. This should include the following features:
    1. Effective internal control, meaning the structural coherence of the main instruments supported by stringent immigration law enforcement, or by possible community involvement inherent in immigration policy;
    2. Reduction of excessive constraints on foreigners' position, which means the alleviation of their incrimination in numerous spheres of life and within the legal system.
- Availability of humanitarian protection and limited juridical personality to irregular migrants.

These policy criteria are relevant for the position of irregular migrants in all countries of residence, along with the proposed elements concerning various spheres of immigrants' lives. At the same time, there are two key trends responsible for all of the other aforementioned immigration areas— the existence of excessive restrictions on

aliens, and a lack of any humanitarian protection for irregular migrants. All the other aforementioned features could be regarded as being connected to these key elements.

In addition to comparisons based on these features from a cross-country perspective, there is a universal international law applicable to the agenda of illegal immigration, i.e. particularly to the area governing the status of illegal immigrants, which will be invoked as another standard-setting mechanism. International legal regulation produces a significant agenda of its own. It will be substantively juxtaposed with the comparative analysis of domestic immigration law, but the usage of these mechanisms will be focused on a few areas of immigrants' welfare, because the available international law does not cover all spheres of immigration regulation, being concerned only with topical socio-economic elements. However, reference to social welfare and employment embodied in international legal instruments could be enough to generate controversy in relation to the domestic immigration laws, which are largely at variance with international standards.

5.2 Dimensions of the Irregular Migration Phenomenon in Britain, Russia and South Africa

The comparative analysis in this chapter deals with three different legal historic phenomena. Britain, in the first instance, is an established liberal democracy with colonial legacies being extended to all sides of its immigration legislation. South Africa, being a former British colony and having had a close affiliation with Britain in the past, initially adopted some of the British features in its immigration policies, such as the recently repealed Aliens Control Act of 1991, where legal techniques slightly resembled those of the former British Aliens Control Act of 1905. Nevertheless, South Africa has its own distinct immigration history, reflecting a difficult political struggle within the society, along with a troubled Apartheid past. Notable elements of Apartheid, such as pass laws for Black individuals, could generally reflect tendencies for future immigration policies. Russia does not share any common heritage with either of the states and is geographically remote, but has an authoritarian past. The roots of the Russian legal system may be affiliated with the German one, where a tendency towards stringent administrative control has been inherent in the legal regulations.

The common tendency among these three jurisdictions, however, is signified by restrictive approaches to immigration, although in the Russian and South African experiences there have been authoritarian legacies. These distinct models of immigration regulation nevertheless provide valuable information on the notions and developments in immigration control in these specific countries and also universally. There are hardly striking differences in the overall policies. Rather, the states deploy distinct tactics in pursuing goals in relation to immigration regulation.

Secondly, a notable basis for the comparison is represented by the socio-political agenda which differs in all three states. Irregular migration as a social phenomenon is embedded in every state's unique legal system, social and economic conditions, as well as external circumstances, such as the problems of neighbouring states. That is why the scale of illegal immigration varies in these three states, with the numbers of undocumented migrants differing in each case, as was outlined in the country-specific materials. At the same time, there is a striking similarity in terms of uncertainties of policy response.

Initially, in none of the countries investigated in the thesis are there precise estimates as to numbers of irregular migrants. The governments, particularly in Russia and South Africa are capable of proposing only approximate and politically motivated estimation ranges,[1] while in Britain the government openly deems any presentation on the issue in question as being highly speculative.[2] This leads to the assertion that controlling immigration is a highly difficult task for all state apparatuses involved thereby highlighting its largely unmanageable character. Nevertheless, this signifies the importance of developing clearer characteristics and studies on irregular migration for the sake of formulating policy mechanisms. At the moment, there is no agreed concept of response to irregular migration or to its numerical dimensions.

In this regard, the major problem exists in South Africa, with its persisting dichotomy in terms of the socio-legal science, encompassing completely different views on the overall immigration process and its scale,[3] which is perhaps greater than in Britain or Russia.[4] Indeed, both supporting and opposing analyses concerning the immigration situation have to be treated with caution, because of a strong tendency towards political or ideological motivation on the part of both parties. In Russia, the

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[1] Sections 3.2 and 4.1 above.
[2] Section 2.1 above.
[3] Section 4.1.1 above.
[4] 4.1 above.

character of public debates has been politically intricate due to the embracing of both liberal and restrictive arguments, with the issues focusing rather on ethnic balances inside the state, since the present in-country minorities belong to the same immigrant groups, all originating in the former USSR.[5] In Britain, immigration policy evaluation and debates are also grouped around both liberal and restrictive stands on immigration, with racial and cultural dimensions being in the frontline of the agenda.

Although it is impossible to establish truth in the "numbers game" in Britain, Russia and South Africa, the structure of irregular migration could indeed be plausibly identified, following information analysis concerning every state:

- South Africa hosts a large and prevalent pool of clandestine entrants, possibly making them the majority in terms of the number of undocumented migrants;
- Within the British agenda, irregularity is mainly associated with asylum, overstaying and breach of conditions;
- Russia mostly faces the challenge of a widespread breach of residence conditions, overstaying and conditions restricting employment, and illegal immigration is mostly comprised of former Soviet nationals.

In light of the current tendencies, it is possible to argue that the South African challenges are greater than those confronting the other two nations, because clandestine entrants may not be placed under rigorous administrative control. Indeed, (failed or legal) asylum seekers, overstayers and violators of residence conditions are somehow, at least initially, registered as being present within the state's domain, while clandestine entrants are not likely to be considered; these individuals are not initially cleared for entry, with their true identities hidden, unpredictable and dispersed in the receiving society. Therefore, clandestine entry and subsequent illegal residence are the most problematic forms of irregularity, since the structure of illegality often defines the degree of its social predictability.

As far as the impact of irregular migration in every state is concerned, the country-specific materials have posed some contribution in excess of those in the theoretical chapter. On the one hand, the idea of positive economic contributions by way of immigrants filling socio-economic niches has been confirmed throughout the thesis. There is also consistent scope for both the marginality and criminality of irregular migrants, although these factors often emerge as features derived from legislative responses to migration in general. However, this last tendency is somewhat relevant to

[5] Section 3.2.

a varying degree for each state. In Britain, undocumented migrants are not so likely to commit criminal acts (despite the occurrence of fraud), possibly because principles of admission have traditionally been strict, and people with criminal tendencies are more likely to be weeded out in the visa application process. At the same time, the entire environment surrounding undocumented migrants in the UK provides fertile ground for abuse of the law by employers, subcontractors or other institutions.[6] In Russia or South Africa, social problems associated with irregular migrants are quite symptomatic, and indeed indicate immigrant communities' involvement in crime,[7] although claims of their highly disproportionate criminal incidence in comparison with the countries' nationals remain incorrect and fail to point to the pressures which exist for irregular migrants in many a receiving society. At the same time, a loss of control over population movements in South Africa, poverty inside the country and multiple problems on the entire continent, resulting in an inability to stem clandestine migration, cause even greater damage to the in-country legal system and the social environment than the one existing in Britain and Russia. The tendency which one can derive from the analysis on numbers or dimensions of irregular migration is that in-country destitution of nationals and immigrants only increases possible negative trends of irregular migration, while social, economic and political challenges from the outside may encourage (clandestine) migration and subsequently a greater loss of control over immigration.

5.3 Analysis of General Immigration Regulations: the Socio-Legal Model of Irregular Migration and Legal Framework of Irregularity

As was outlined in the theoretical chapter of the thesis, immigration law embraces two main patterns of legal regulation, i.e. primary and secondary rules.[8] The general framework of immigration norms which were highlighted in the preceding chapters in relation to every domestic jurisdiction is responsible for shaping the primary regulation levers which provide the main principles for the smooth functioning of immigration control. In this regard, all measures are probably designed to respond to two basic

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[6] Such was the case of clandestine Chinese agricultural workers employed by the gang masters2.3.2 above).

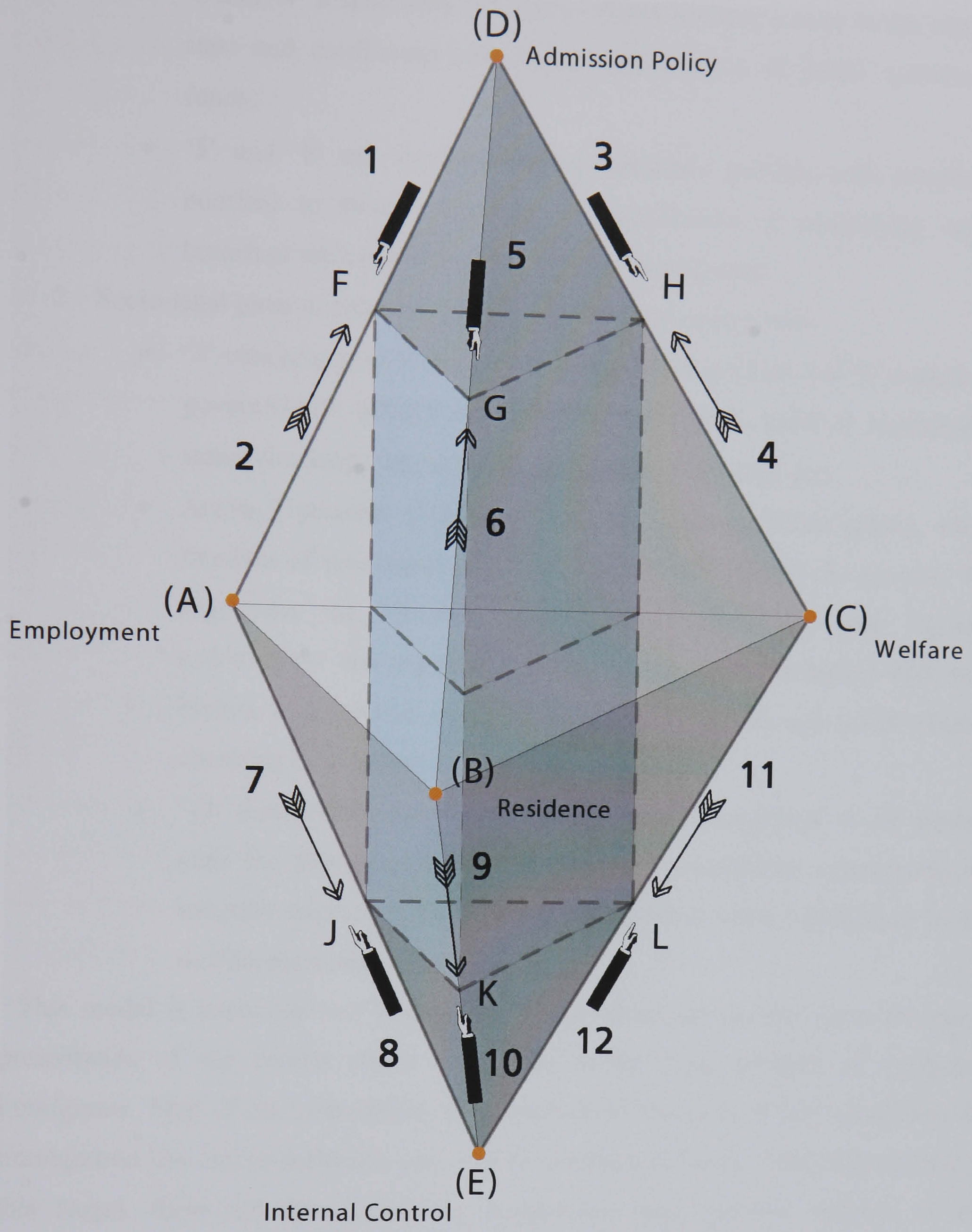
[7] 3.2.1 and 4.1.1 above.

necessities, whereby the primary goal is to eliminate prospects of massive permanent immigration, the secondary one being to establish considerable control over the in-country activities of immigrants, especially the ones of irregular type. However, a complex and often perplexed picture shapes the reality between the goals of immigration control and achievable policy results.

In order to grasp the dimensions of the originating gaps, one has to look at the basic socio-legal trend underlining irregularity and its definitions. The definition of irregular migration is intertwined with the notion of the socio-legal 'space' available to illegal immigrants in the countries of residence, i.e. the definition of the exact scope of their quasi-legal status. To fulfil this complex task, one has to draw a special model in order to identify graphically all the legal interactions and policies shaping the status of (irregular) immigrants. The model of social relationships existing within or outside the law could assist in understanding the phenomenon of irregular migration, especially considering that under any circumstances, the position of irregular migrants is characterised by the existence of a 'social space' which needs to be revealed and defined.

Identifying and positioning the social space (quasi-legal status) of irregular migrants would assist in 'diagnosing' all the characteristics of irregularity and formulating precise policy measures. Indeed, the proposed model could be regarded as the contribution of this thesis to the science and, secondly, as one which underlies all further aspects of policy analysis.

[8] Section 1.3.1 above.



All arrows represent competing socio-legal forces in the admission and internal control spheres.

1. Socio-legal phenomena (arrows) arising from 'admission policies':
    - While arrow 1 is a combination of prohibitions and impositions, such as permitted labour migration schemes and restrictive employment conditions on individual foreigners, arrow 2 represents the ability of immigrants to find entry loopholes in the legislation;

- '3 and '4' respectively are entry criteria limiting access to the welfare state and conflicting with actual consumption of public services or funds;
- '5' and '6' are, correspondingly, residence permits with conditions attached to them, competing with tendencies of overstaying and a breach of such conditions on behalf of immigrants;

2. Socio-legal phenomena which exist in the internal control area:

- '7' concerns genuine employer demands for workers, but '8' represents government's actions obliging the employer to conduct immigration status checking, supported by sanctions on the employer;
- Arrow 9 presents a complex function of the residence sphere, where freedom of movement and basic human rights shape the agenda; '10' represents the interests of the state, enshrining both rigorous enforcement and legislative limits on the safe interaction with state bodies, in particular receiving anonymous tip-offs and police identity checking or residence registration;
- '11' represents either fraud, or the actual accessibility of the welfare state for foreigners, including possible humanitarian concessions for irregular migrants; '12' refers to immigration status verification by the welfare agencies.

This model is based on two basic assumptions which are derived from the entire presentation of the current thesis in relation to the legal position of (irregular) immigrants. First of all, considering the hypothetical situation of life apart from the immigration law and its influence (we may be constrained by the 'veil of ignorance' at this stage), there are three relatively independent and 'private' spheres of life (representing angles A, B, and C of the triangle), such as employment, residence and welfare. As a basic 'axiom', these three areas are interconnected, thus shaping the circle of possibilities for immigrants' behaviour. Therefore, arrows emanating from these points to all other spheres represent immigrants' ability to work, reside and support their welfare in a given country. (Illegal) immigrants can actually find their way in all relatively independent spheres for the multiple underlying reasons referred to throughout the thesis. This has proven to be their realm of life.[9]

[9] This conclusion was spelt out in the book by Jordan, B. and Duvell, F. "Irregular Migration: The Dilemmas of Transnational Mobility", Cheltenham, 2002.

Of course, often enough, legal regulation of these fields of existence takes its own distinct routes, even besides those of immigration law or policy, since these are nevertheless subject to public penetration by means of law and policy. Even prior to immigration policy, immigrants face certain constraints by means of essential rules. Nevertheless, what is more important for the model is to produce notions of the conflicting agenda responsible for the position of immigrants, particularly because it is one of the priorities of immigration policy to constrain immigrants in the domains of residence, employment and welfare. In this regard, the upper and lower spheres (points D and E) represent actual penetration of these areas by immigration policy. As an underlying given axiom, it is essential to point to the existence of only two main general areas of immigration control, i.e. admission[10] and internal control policies embracing all available instruments.

The second theorem originating from the entire country-specific analysis, contends that admission and internal control policies (arrows emanating from angles D and E) are intertwined in a conflicting way with these available private spheres, because the governments are attempting to regulate and to limit the activities of immigrants. The governmental policies originating from points D and E are designed to reach the core of the available 'private' areas at points A,B and C, but most governmental actions meet 'resistance', and enter into conflict with the private interests—precisely where immigrants find 'retreat' in the receiving society. Therefore, for every governmental action or policy, there is a witting or unwitting 'counteraction' on the part of employers, various public or private administrators or managers, immigrants themselves and, finally, in the gravest circumstances, organised traffickers or smugglers. This is a competing and changeable environment, where each irregular migrant lives by the principle of 'catch me if you can', and the government tries to apprehend and remove immigrants, or just to make their lives difficult so as to render the irregularity undesirable and immigration flows manageable and controllable.

At the same time, these conflicting agendas meet at some stage, as reflected by the points of conversion at F, G, H, J, K and L. It is essential for the government to eliminate the gap between actual reality and enforcement intentions, and the current thesis proposes flexible approaches in the immigration sphere, with more liberal regulation concerning all essential actors in the private and public sectors, rather than direct prohibitions and restrictive or blunt enforcement. However ineffective a

[10] The notion of admission includes both pre-entry and on-entry controls.

government's efforts seem to be, this model signifies the classical reality of immigration relationships.

What is meant by the arrows with the adjoining numbers emanating from the admission and internal control spheres, largely concerns the various means and immigration policy mechanisms, most of which exist in the forms of impositions or prohibitions. In the explanatory notes, a comprehensive range of instruments are included and derived from the theoretical and country-specific chapters. As was mentioned above, these competing 'forces' converge at the points specified on the model or, in reality, within some variable borderline areas, and form actual limits (a ceiling) for the status of irregular migrants; i.e. they cannot reach the top or bottom ends of the pyramids for reasons of non-compliance with the law. Nevertheless, these points of convergence only highlight areas where irregular migrants exist within that socio-legal space.

In this respect, an important issue arises as to how graphically to identify the position of irregular and regular migrants. Do legal migrants in particular fill the entire ABCDE figure? Probably not, because initially, exactly as in the cases of irregular migrants who are constrained by the limits (ceiling) drawn between the points of convergence, legal migrants have their own immigration pressures and temptations. Secondly, in order to remain legal, immigrants have simultaneously to comply with both admission and internal control requirements (presented in the opposite corners, D and E, of the figure ABCDE) in every sphere of life. At the end of the day, various temptations, necessities and restrictive policies are capable of confronting legal migrants and driving them into illegality, thus responding to the postulate in the theoretical chapter that illegality is a shadowy and reverse side of what is legal.

Indeed, it is also conceivable from all chapters of the thesis that, in relation to every sphere of life, both admission and internal control policies attempt to pressurise all immigrants by actually confining these legal aliens within a heavily constrained legal space, and simultaneously forcing the already existing irregular migrants to remain in the realm of illegality. Moreover, because of the specificity of immigration control, migrants' circumstances in the receiving societies could be characterised by use of the terms of 'hell', 'purgatory' and 'paradise'. Furthering the Biblical analogy, once in the 'hell' of illegality, immigrants cannot enter a legal 'paradise', unless they first undergo the purgatory represented by the extremely slim chance of legalisation. By definition,

most irregular migrants operate in the margins of society, shaped by conflicting socio-legal forces.

So what, then, would be the precise borderline between legality and illegality? Possibly, by drawing lines between F and J, G and K, and H and L, we receive the needed figure DFGHEJLK, which could explain the correlation between regular and irregular migration. The 'social space' inside this tube-like figure (painted blue) indicates the compliance of migrants with all the essential requirements of admission or internal control, as well as the legal operation in the available private environment. Anything outside this resulting space is probably a 'margin' filled with irregular migrants, thus proving the well-known assertion that illegal immigrants live on the margins of society. Therefore, the approximate social space for illegal immigrants is presented by figure FGHABCJKL, where points A, B and C, being essentially independent, remain the main spheres of gravitation for illegal immigrants, as established by one of the axioms above.

An important question arises as to whether this same model applies to asylum issues. By and large, this model could probably be referred to the position of asylum seekers, since residence of this immigrant group shares the same relevant tendencies, be it gravitation towards the essential independent, or private spheres. At the same time, these issues have, somewhat unconventionally, stretched the limits of the immigration system, not least because only implicit constraints could be imposed, on entry, in respect of the subsequent asylum claim of such individuals. In addition, internal control over asylum seekers is even more powerful and all-penetrating than it is for ordinary immigrants. Although this model is applicable in principle to asylum issues, asylum protection is capable of causing certain deviations to it in this respect.

As a result of constructing this model, it is possible to derive and demonstrate a social mechanism and the tendencies of irregularity encouraged and enshrined in immigration law. First of all, this schema presents and visualises the tendency for illegality to be essentially an outcome of the conflicting interests of the state and private interests of the public. The governmental policy which attempts to ward off irregular migrants on the one hand, and to restrict the position of all immigrants on the other, intends to impose total control, and eventually to shrink, by various means, the possible margins available to irregular migrants. At the same time, escalation of these efforts does not lead to a reduction of illegality and, in fact, becomes counterproductive for the policy in question. Moreover, the stronger the enforcement

and restrictive sides of immigration policies, the more uncertain and mutually tangential the borderlines between legality and illegality are.

Any strengthening of enforcement should therefore be combined with a relative liberalisation, and actual measures that are facilitated to meet the bona fide demands of private and independent interests which actually accommodate irregular migration. It is on these very interests that some abominable social parasites, such as smugglers and gangmasters rest their influence in the immigration and labour process. This is, however, fostered not least by massive state penetration and pressures on the interests of the public. Immigration policy has to stem the possible illegalisation of irregular migrants by decreasing the burdensome conditions on immigration status.

Secondly, it is more and more evident in light of the entire thesis, and in relation to this particular model, that admission and internal controls tend to respond to two different types of challenges in the sphere of immigration, i.e. external ones concerning mostly potential immigrants, and internal ones related to the available pool of migrants. This combination of enforcement actions from both ends tends to be the most all-embracing mechanism of control and deterrence. Even with liberal sentiments in the immigration sphere which have been comprehensively presented in this thesis, law and policy should incorporate all possible elements of internal and admission controls, since improvement of immigration control is not in conflict with liberal policy solutions.

Thirdly, this model portrays the idea of how minor the difference between 'legal' and 'illegal' is, and how really fragile the position of immigrants could be in the receiving society. Policy-makers should also envisage very flexible conditions relating to the status of legal migrants also in order to discourage their shift to the realm of illegality.

Fourthly, this model can apply to all the states under scrutiny, but with certain adjustments. For example, the matter of independence from governmental regulation in the fields of residence, welfare and employment varies from state to state. Indeed, in Russia, for instance, the state is used to penetrating all spheres of life, thereby making them essentially public, while in Britain and South Africa both welfare state and residence are relatively unrestricted. As far as the question of welfare is concerned in every state, it is based predominantly on public funding, and its independence is relative. Nevertheless, however intense public influence on any of these areas is, it is not the same as the penetration of the same spheres by means of immigration law, especially considering that immigrants still operate even in heavily regulated

environments. Therefore, in the model itself, increases in the intensity of legal regulation inside the spheres of residence, employment and welfare may be reflected only in the shrinking of the area ABC, which in itself does not undermine the validity of this model.

Fifthly, this model can assist in highlighting constraints for workable immigration policies. Perhaps possible constraints on the workability of any such model and policy are posed by the unpredictability of immigration flows in themselves. Indeed, if immigration becomes too excessive, the pyramid will probably explode, as will the socio-legal space it represents. From the start, this pyramid is responsible only for the limited space (at the end of the day any society is a defined socio-cultural-legal space knowing its limits at certain periods of time). Moreover, however restrictive or unpleasant, the government actions represented by arrows 1, 3, 5, 8, 10 and 12 can operate only within the borders ABCDE, and symbolise law and order. It is precisely from this point of view, that clandestine migration does not fit even available pessimistic notions. Indeed, being outside any form of control, it makes all limits, presumably ABCDE, porous. With uncontrolled and excessive flows, the well-ordered pyramids which simply require adjustments and rearrangements may turn into bubbles and burst.

Sixthly, the model may also assist in establishing a comprehensive socio-legal definition of irregularity. There have been references throughout the thesis to multiple, but nevertheless similar, forms of illegality. As was revealed in the theoretical chapter, it is relatively simple to define irregularity generically in one sentence or expression, but what is notable for legal systems in the three countries, however, is the dearth of unified, all-embracing definitions incorporated in any given immigration statute, or even in the legal science in Britain, Russia or South Africa.[11] The legislators, for instance, are either incapable of following rapid developments in the immigration sphere, or simply reluctant to formulate them. They therefore allow space for creativity in meeting variable challenges which emerge prior to immigration rule-making, primarily in relation to the secondary patterns of immigration regulation.

On a theoretical level, irregular migration is a phenomenon concerning illegal (informal) entry or residence in the country. Illegal migration derives from the conflict between immigration policy regulation on the one hand, and specific social interests on the other, but primarily gravitates towards available independent socio-economic

spheres. Irregularity embraces immigrant behaviour which contradicts any one, or multiple, norms of immigration and administrative control in the country, be it in the form of conventional overstaying, breach of residence conditions, or illegal entry, as well as the violation of any asylum rules or, particularly, those norms on a more detailed level which are overly restrictive or which over-penalise migrants' position in the country.

These over-restrictions often pose distortions in the overall immigration policy, thus creating areas where irregularity is most likely to occur, such as lack of sufficient labour migration policies or additional restrictions on legal migrant workers' status, deployment of excessive administrative punishments regardless of the degree of violating behaviour, or limitations on the fundamental level of welfare status in the country. Illegal immigration has proved capable of cultivating and proliferating itself over time. In respect of the penetration of illegal immigrants into the society, the migration barrier policies could be compared to 'breaches' in a secluded castle which are widening with time, so long as they are frequently (ab)used by perpetrators.

It could be regarded as being common for country-specific studies that, on a practical level, irregularity follows all structural, albeit interconnected, patterns of immigration control, such as:

- Conditions of entry, i.e. entry clearance and regimes of legal entry;
- Observance of the residence permit system, including overstaying or violation of conditions attached to certain entry categories;
- Basic principles of aliens' employment or access to public funds, which essentially include work permit or employment concession policies;
- Asylum rules, both in relation to their admission or to their in-country residence and support.

Violation of these regimes poses an extensive variety of circumstances fully covered in chapters on Britain, Russia and South Africa, such as:

- Illegal or clandestine entry;
- Overstaying;
- Illegal employment or access to public funds;
- Violation of specific limitations attached to individual immigration status;
- Breaches of rules attached to the status of asylum seekers or refugees.

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[11] 2.23.3.1 and 4.3 above.

It is obvious from all the substantive chapters of this thesis that corresponding sanctions exist for each of the aforementioned violations. In this regard, one must establish the notion of coherent immigration control, both in terms of admission and, primarily, internal control. What are the major purposes of internal administrative control over aliens—the punishment, prevention and deterrence of irregular migrants, or some other goals?

To answer this question, it is necessary to assert that immigration and residence control have to respond to the needs of the community in the form of a close monitoring of the situation and position of immigrants in the country, which indeed needs to embrace collaboration between state agencies, their co-ordination in enforcement actions and, as a result, a certain degree of in-country pressure on (illegal) immigration. Communities and society as a whole need protection from the negative consequences of long-term migration and illegal immigration, such as criminal incidents or the welfare burden. Therefore, a degree of deterrence and prevention of migratory movements is inevitable.

At the same time, although the administrative mechanisms revealed throughout the thesis are deployed with the view that the immigrant population should be stringently controlled and the numbers corrected if necessary, the executive nature of immigration regulation and impetus of its frequently discretionary modes may be so strong as to preclude a balancing policy exercise. Why? Traditionally, immigration policies in each case presented in this thesis, focus on administrative or even criminal sanctions as the central element, thus possibly missing other, more liberal and genuine means of deterrence and prevention of social consequences. In this regard, avoidance of the negative impacts of migratory movement should not amount to a total restriction on the movement of individuals, or to the generation of inflexible rules as to the immigrants' activities.

It is evident that the basic characteristics of administrative regulations in every jurisdiction are created by an emphasis on the types of policies pursued. These characteristics are shaped not least by secondary patterns of regulations outlining specific policy measures, adjoined to the structure of primary regulations, and yet often having a precise and separate meaning for the status of immigrants. So far, in Britain and South Africa, the emphasis in immigration control is centred on admission policies, with a relatively liberal system of regulating the internal status of immigrants. At the same time, the sphere of law in relation to the internal status of immigrants is

evolving in both countries, with great efforts being applied by the governments to establish a policy framework which could be identified as exercising internal control. In the Russian situation, recovering from the legacies of a totalitarian system, residence procedures seem to be emphasised initially, together with police control, for the sake of providing a tight grip on immigration affairs.

5.4 Central Structural Framework of Immigration Legislation in its Response to Irregular Migration

5.4.1 Illegal Entry

Initially, matters of illegal entry into the state play a vital role in shaping immigration routes. British immigration law, for example, clearly spells out juridical criteria related to illegal entry by virtue of section 33(1) of the 1971 Immigration Act, actually extending them to multiple situations of clandestine entry and deception with elaborate rules having being developed under this category of immigration control.[12] At the same time, Russian and South African immigration legislations do not have comparable provisions, and reveal that here illegal entry is equated with the notion of clandestine entry,[13] thus reflecting a lack of precision in formulating the policy in question. Illegality at the entry stage could be implied in those states as behaviour in contravention with existing regimes of entry, such as disembarkation at an improper place or entry without documents.

However, even in outlining the narrower definition of clandestine entry, the British system has more precisely identified it by virtue of section 32(1) of the 1999 Asylum and Immigration Act, envisaging legal criteria which qualify such violations.[14] The British law presents a model in this respect, since elaborate and detailed definitions better respond to the purposes of public policy in this regard. Moreover, the British practice dealing with both illegal and clandestine entries, envisages not only the objective criteria to qualify the offences, but also the subjective elements of intention, as opposed simply to the actual actions committed by immigrants. Therefore, this is

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[12] According to section 33(1) of the 1971 Immigration Act, illegal entry is comprised by multiple offences, such as types of entry without leave, in breach of a deportation order, through the common travel area, by means of deception and, finally, by using false documents or corruption; 2.2.1 above.

[13] 3.3.1.1 and 4.3 above.

[14] This section provides for the following specific types of clandestine entry: actual arrival while being concealed in a vehicle, aircraft or ship, or attempts to do so, extra-territorial embarkation and concealment within the UK's ships or aircraft, and subsequent attempts to arrive in the country's

the most all-embracing policy, which comes as no surprise considering the British emphasis on admission principles rather than on other notions of control.

5.4.2 Residence

Like the entry stage, the sphere of primary residential control is governed by a range of norms concerning residential status provided to migrants by the immigration authorities. A general two-fold policy approach could be deployed in the residence sphere-- initially by means of residence permits and, secondly, by means of specific residence regulations referred to below. As a measure purely of immigration policy, legislative norms specify the whole range of residence permits acquired in relation to different situations, and the states prove to be flexible in choosing the types of permits for the regulation of residence. At the same time, the most general perception of immigration permits exists in Britain, where 'leave to remain' is an all-embracing mechanism, albeit deployed and modified by Immigration Rules for various purposes or residence periods.[15] It is also a fact that governments tend to manipulate certain requirements by attaching them to available and specified permits, where this concerns conditions on which the permits are granted, such as specific limits on time or limitations as to activities or recourse to public funds, as in the UK or in South Africa. This residence permit policy has been of paramount importance in shaping regimes of legality for aliens.

For example, Immigration Rules in the UK contain specifications for the status of visitors and students, as well as for various groups of economic migrants, and outline rules for compliance, such as prohibition or restriction on employment or public funds.[16] Similar structural mechanisms are envisaged in the South African Immigration Rules supported by Immigration Regulations, but, in this country, Immigration Officers have more substantial discretionary authority in dealing with the illegality of aliens than they do elsewhere. For example, overstayers and other illegal immigrants could be treated leniently and actually granted visitor's status, upon communicating their circumstances to immigration authorities.[17] There is no comparable possibility either in Russia or the United Kingdom. Treatment of students, however, is similar in

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territory, and, finally, as a decisive subjective element, immigrants should have intentions either to claim asylum, or to avoid immigration control as a result of such entry.

[15] Sections 2.2.1, 2.2.2 and 2.4.1 above.

[16] 2.2.3 above.

[17] 4.3.2 above.

the UK and South Africa, since they are granted the right to engage in employment for no more than 20 hours a week. Currently, at least in the UK, students are responsible for a major tide of illegality, thus making abuse of this employment rule a widespread reality.

Russian immigration control in respect of residence permits is shaped by the specialised law on the legal position of aliens, where the purpose is not just to outline the rules, but rather to impose limitations on their status. In this vein, regardless of the residence grounds in Russia, aliens are obliged to live only in the areas where the residence permit was granted, and to register at the place of their residence, this latter rule being dealt with below.[18] There are no comparable provisions either in British or South African law, where the nature of the requirements immobilises foreigners and potentially makes them illegal. Although current sanctions for these violations are administrative, the norm in itself bears a striking resemblance to the Soviet system, where similar immigration violations by a foreigner would constitute a national security matter.

5.4.3 Employment

In all three states, the employment of foreigners is subject to specialised legislation governing the principles of attracting a labour force, as facilitated through the work permit system or certain legislative or policy concessions made available to some groups of migrants. It is possible to derive three main types of legal foreign migrants as reflected in the legal practice of these three states, and possibly also worldwide: foreigners who are not in need of work permits, immigrant categories in need of work permits and immigrant groups attracted by policy concessions.

The first category of labour migrants embraces those migrants who, by virtue of their statuses, enjoy employment rights arising from the residence or settlement standing. These include migrants from designated states (EU nationals in the UK), or long-term residents, specific permit-free categories, and recognised refugees— persons who are not directly relevant for the discourse on irregular migration. In this regard, only concessionary policies prove somewhat problematic and directly responsible for attracting undocumented workers, while other groups only shape the overall environment in terms of labour demands.

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[18] 3.3.1.23.4.1 above.

However, together with the administration of labour migration programmes, immigration law in all three states penetrates the sphere which is essentially private, i.e. relationships between the employer and the foreign employee, as it does so primarily by a two-fold effort: either by means of a general prohibition on employment relations between domestic employers and undocumented workers (which is a matter for separate analysis below) or secondly, by introducing obligations and responsibilities on employers in handling immigrant labour.[19] In regard to the latter, Russian legislation, for example, outlines significant obligations on the part of employers of alien workers, who are made responsible for taxation and deportation matters, as well as for informing immigration or state security bodies on changes in the immigrants' employment or places of residence.[20] The employer can also initiate the process of nullifying work permits.[21]

The possibility for tipping off immigration authorities regarding the employee's status was also envisaged in British law by virtue of the 2002 Nationality, Immigration and Asylum Act,[22] while in South Africa the Immigration Act prescribes that the employer keep employment records and inform immigration authorities of changes or breaches of the employment contract.[23] Therefore, in addition to employer sanctions, these responsibilities shape the entire regime of aliens' employment. These and other features will continue to develop and to characterise the future of immigration control in employment. Although the employers' functions seem necessary in order to strengthen the deployment of immigration control, these measures should be viewed in light of the whole administrative tradition in each state. It is quite possible that, in Russia, the employer's role may turn into a nightmare for many an employee who is already deprived of essential employment standards.

5.4.4 Social Welfare

In assessing immigrants' access to the welfare state, it is necessary to identify the two-line approach which is characteristic of every stage in the research. First of all, as far as immigration regulations are concerned, entry or residence in every state is

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[19] Policy-makers actually attempt to establish multiple obstacles to employment by the following means: general prohibition upon employment outside the schemes mentioned elsewhere, and the imposition of administrative functions on the employer in handling the employment process.
[20] 3.3.1.4 above.
[21] Ibid.
[22] 2.4.2 above.
[23] Section4.44.5 above.

subject to the conditions of maintaining and accommodating themselves and their dependants undertaken by aliens in light of the acquisition of visas or residence permits. Therefore, limitations on accessing the welfare state are explicitly determined as one of the functions of immigration control but, as argued below, social welfare does not and should not be subject to over-restrictions in terms of the position of aliens.

5.4.5 Sanctions

The final and inalienable part of the general immigration policy framework is represented by the sanctions envisaged for breaches of immigration regimes. Generally, there are three main types of consequences of immigration law violations: denial of residence status, administrative fines and, finally, deportation or administrative removals. Residence status denial concerns only those individuals who hold residence permits, but who violate conditions of stay; overstayers and clandestine entrants have only fines and removals attached to them. Theoretically, withdrawal of residence status has to be followed by the sanctions of fines or removals but, in practice, the operation of all three modes is not synchronised. One of the existing problems refers to the fact that there is a vast area of offences.

A peculiar trend exists in South African and British legislation, i.e. a combination of both administrative and criminal sanctions. In Britain and South Africa, both fines and imprisonment shape the consequences for both irregular migrants and those who assist them on arrival and residence in the country.[24] Under Russian immigration control,[25] however, criminal sanctions of imprisonment are envisaged only for those who commit an offence of illegal border-crossing, while not envisaging criminal penalties for more serious offences. Smuggling and aiding or abetting irregular migrants are not subject to penalties.[26]

In practice, however, illegal entry or residence, employment or access to the welfare state are subject only to administrative fines and removal from the country. It is possible to argue that administrative sanctions are the most appropriate form of dealing with irregular migrants, whereby criminal punishment often constitutes blank norms of law hardly invoked in individual circumstances. Indeed, the reality of immigration

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[24] Sections 2.2.6 and 4.3 above.
[25] Sections 3.3.2 and 3.3.1.1 above.
[26] For instance, in Britain and South Africa, immigration legislation introduced stiff penalties for these offences, but smuggling and trafficking practices have hardly been affected. Instead, they have become more concealed and veiled from the general public eye, and yet increasingly common.

control conflicts with the effectiveness of criminal procedures which, in most cases, involves immigrants as offenders. Judicial convictions demand too long a time and contravene the policy goal of expeditious removal.

In the same vein, importance should be attributed to the matter of diversifying responsibility for varying degrees of offensive behaviour. While both a negative and a positive impact of irregular migration emerge in respect of the receiving society, policies should focus precisely on the negative aspects of irregular migration. Loss of control over migratory movements and deterioration of socio-economic standards could be attributed to irregularity, but its clandestine forms are particularly responsible for these trends. Therefore, penalties should be substantial enough so as to discourage this form of migration, although at the same time this very policy should not over-penalise immigrant communities by means of disproportionate punishments.

In addition to the gravity of clandestine entry and its meaning for immigration control, there emerge other patterns of two-fold and three-fold forms of illegality, simultaneously embracing overstaying (asylum failure) or clandestine entry, illegal employment and/or access to public funds. The fact of multiple offences is serious enough to necessitate considerable administrative penalties and subsequent removal. However, on the opposite side of the spectrum, persons receiving entry clearance as students, but working beyond the time of permitted employment, or legal migrant workers who switch to other employers in contravention of the immigration rules or who commit minor residential offences, as is possible in the Russian legal system, should not be treated in the same way as the aforementioned categories of overstayers or clandestine entrants. Instead, policies should be in place, which enhance financial incentives for the potentially less offending categories to comply with the rules, possibly by means of special bonds.

Thus, there is an obvious need for unloading the immigration control system by means of distinguishing between different degrees of illegal behaviour, and actually leaving administrative fines in each case, but simultaneously relieving the threat of removal towards some categories of persons who have committed single minor offences. Currently, all countries in this study over-react to minor immigration violations, be they notable examples of employment in the UK or South Africa, or a breach of residential rules in Russia, which in turn means that failures are inherent in the present state of affairs in immigration law enforcement. In this respect, one final principle has to be enshrined and highlighted in immigration control, i.e. removal

needs to be invoked only for those who lack or lose the right to reside in the state, or who commit several immigration violations. Other categories could enjoy more lenient treatment, i.e. just being subjected to administrative fines.

To sum up, in none of the jurisdictions does the law take into account extenuating circumstances for migrants, and nowhere do the legal systems explicitly distinguish between degrees of violation incidences. Therefore, better codification or stratification of immigration law presents an urgent task in responding to the essential policy needs of improving enforcement or control.

5.4.6 Structural features of immigration legislation in the three states

What deserves particular attention in analysing the structural elements of general immigration regimes is the coherence of basic regulations concerning control over the foreign population. As was mentioned in the theoretical outline of the thesis, immigration law concerns numerous areas of life in the country, and comprises both primary and secondary legislation, as well as judicial decisions. First of all, the structural composition of immigration law has an effect on tendencies in relation to every mechanism of legal regulation. In Russia, for instance, immigration regulation of *general* legal definitions of entry, residence and sanctions towards immigrants has been made the subject of three statues,[27] a separate Administrative Code and, in more detail, numerous by-laws produced by the Government or the Interior Ministry. These features indicate that the immigration law shaping foreigners' lives in the country is a recent phenomenon.

The British system of regulating by general principles of immigration control has a clearer statutory structure, comprising the Immigration Act of 1971, subsequent statutes and Immigration Rules, in turn complemented by judicial cases and by-laws emerging in this regard. These differences allow the argument to be made that existence of generalised codified instruments is more convenient for building precise characteristics of immigration control, and the Russian system carries more shortcomings and even 'chaos' in this respect, in addition to the problem of a lack of judicial scrutiny.

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[27] 3.3 above.

South African immigration affairs are governed by a single and structured statute (the 2002 Immigration Act), supported by corresponding Immigration Regulations,[28] although also producing peculiar features for accommodating immigration regimes in this respect. From the very start, the emphasis in immigration policy is to single out certain groups prohibited or undesirable for purposes of entry and residence, with this taking up considerable space and attention in the statutes, while the wide stratum of irregular migrants are omitted from the attention of the law. Irregular migrants in this respect are the individuals committing deportable violations, where irregularity, as this is generally understood, is implied rather than defined by the statute.

A substantial structural feature refers to the fact that any system has to find the right balance between executive discretion and legislative policy, which is generally determined by specificity of the country's immigration system. Perhaps, as was argued in the chapter on South Africa,[29] the legislation has to be assigned a wide scope of regulation, only to be complemented by other normative acts. But it may work in a different way too, as in the British system, where the authority of the Home Secretary has a wider remit than in Russia or South Africa, but the contents of immigration law are vast and perhaps demand more immediate interference by the executive.

Secondly, in each of the three states, the relevance of court decisions varies in accordance with national legal traditions, since the role of the judiciary does not carry the same functional meaning in every jurisdiction. Only in Britain is case law of significant importance, and this very feature routinely ensures better procedural or substantive safeguards in relation to the legal position of foreigners. On a number of occasions, the South African judiciary has likewise contributed to human rights-based scrutiny of executive decisions. In Russia, however, immigration law is dominated more by executive decision-making, with only occasional instances of judicial involvement on a few compelling questions of law. The proper (extended) role of the judiciary is indispensable for immigration law, since it narrows the gaps between the law and actual executive policy-making. Recourse to judicial means is also important for producing a balancing exercise on the human rights' dimensions surrounding the position of irregular migrants inside the receiving states.

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[28] 4.2 above.
[29] 4.3.2.

5.4.7 Summary

What can be derived from the above analysis is that the legal and social sciences should take a close account of all available mechanisms of irregularity formation within legal systems, in order to construct a comprehensive and functional strategy of immigration control. In this respect, the proposed model clarifies the modes and patterns of irregularity formation, the actual adaptability of irregular migrants in the receiving societies and, additionally, assists in deriving a socio-legal definition of irregular migration. In addition to the trends and patterns of irregularity, precise and complete definitions both in general terms and in detail are indispensable for policy formulation. These needs are linked to other issues of structural codification. More substantively, however, policy-makers should review the meaning of sanctions and reduce the burden on immigrants in light of the inflexible conditions of stay or residence.

5.5 Access of Foreigners to Employment: Temporary Migration Policies and their Impact in Britain, Russia and South Africa

Many developed states are confronted with a shortage of unskilled workers for their national economies, but at the same time remain reluctant to extend opportunities to foreign unskilled workers. Historically and traditionally, skilled migration was regarded as more predictable and desirable, while experiments with unskilled labour were finally deemed to be problem-generating.

As was mentioned above, employment regimes related to aliens are shaped by complex dichotomous mechanisms. On the one hand, there is an overall temporary labour migration process in the three countries, facilitated by two distinct methods: work permit schemes or policy concessions (such as conditional permission to work for students or specialised labour schemes), all shaping the right of aliens to work. Groups emerge with distinct regulations in relation to their employment, although asylum seekers possess variable and frail employment opportunities in different states, and refugees are automatically accorded the right to work by virtue of specialised national norms governing refugee protection. In Russia, engagement in employment is

subject to the issuance of ordinary temporary residence status which automatically carries the entitlement for foreigners to take up employment.[30]

On the other hand, there are also explicit employment prohibitions attached to the status of certain migrants at the entry clearance stage. Universally, any employment outside the permitted schemes is subject to prohibition, normally supported by the very meaning of norms, legal sanctions or enforcement of immigration law. As was revealed in the country-specific materials, both the impositions of permitted channels and the prohibitions to avoid or abuse these are fundamental for shaping the employment sphere for foreigners.

There is one obvious and vital characteristic of restrictive admission principles in conjunction with employment, which is that the more prohibitive employment becomes, together with the restrictions on labour migration channels, the more likelihood there will be for illegality to arise among the immigrant population. In this regard, given the theoretical assumption that the quantity of undocumented migrant workers willing to enter is substantial, and that legal entry or residence opportunities are very few and constrained in any state, it is possible to argue that the number of undocumented workers is influenced by the major admission or residence instruments for economic migration policy, since it is those who do not meet the criteria who undertake illegal entry or residence, especially if economic niches are available.

Liberalised programmes shape the overall immigration climate and, in fact, draw numerous potentially undocumented workers into the realm of the legal work force, characterised by a more controllable situation and predictable behaviour. At the same time, as was argued in the theoretical chapter, the success of temporary migration policies can be limited and conditional, since they should correctly accommodate concerns that temporary migration may be growing permanent over time. In order to protect the interests of the receiving society, governments have to facilitate measures which reduce incentives for massive migration and permanent stay, as was argued in the theoretical chapter. Initially, one of the comparative features to be drawn in relation to all three states is the existence of similarities between basic statutory elements, such as the work permit system and specific employment concessions to foreigners.

As far as the British system is concerned,[31] it is grounded on government approved schemes responsible for the intake of workers into the various economic sectors. In

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[30] 3.3.1.2 above.
[31] Section 2.3.1 above.

this regard, until very recently work permit holders, as well as seasonal agricultural workers, working holiday-makers and the newly introduced sector-based schemes, were responsible for meeting the demands for employment by foreigners. Together, these schemes amounted to more than two hundred thousand workers a year, but out of this total number, only a small proportion was comprised by foreign unskilled aliens capable of providing a plausible substitute for undocumented migrants. Work permit criteria have been very high, and have accommodated only highly-skilled migrants. As demonstrated in the chapter on Britain, even some specialised schemes, such as those in the hospitality or catering sectors, were not designed for providing a sufficient supply of workers to meet employers' demands. At the same time, there are serious prospects for changes in the entire structure of labour supply, with the obstacle for migration being lifted in terms of EU enlargement and bestowal of the employment rights to East Europeans. This measure will actually regularise already existing undocumented workers from those states, and will replace any prospects for potential illegal immigrants to gain employment. In this regard, EU enlargement will have a powerful impact tantamount to a temporary migration revolution.

South Africa has constructed an economic migration policy out of the strong legacy of the previous regime, by specifying independent parallel mechanisms for attracting entrants to the labour force,[32] i.e. corporate and individual work permits. Traditional sector-based schemes which were extended as a policy concession for irregular migrants, and which became responsible for attracting thousands of workers, are currently placed in the realm of a corporate permit system. These schemes, now incorporated into the corporate permits, will probably be responsible for attracting workers into the mining and agricultural sectors, and will be based on intergovernmental agreements. At the same time, the understandable attempt of managing the migration system via corporate permits may produce procedural inadequacies, substantial bureaucratisation and corruption. An ambiguity could also be detected as arising in the UK, where the handling of temporary migration programmes is riddled with administrative shortcomings.

On the surface, Russia has the most liberal policy as far as the sheer numbers of foreign workers are concerned,[33] but there are serious operational limitations within the system in question, because the process is restricted, confined by many documents,

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[32] 4.4 and 4.4.1 above.
[33] 3.3.1.4 above.

and characterised by backlogs.[34] In particular, the problem lies in the regional perplexity of the system, since the number of work permits proposed for some regions is below practicable margins, as in the case of Moscow demonstrated above. The regional and local elites controlling the actual operation of these schemes may promote their hidden agendas and create obstacles even for fulfilling the available numbers which make up the intake of foreign workers. Additionally, the overall policy went far in administratively controlling the access of companies to foreign labour by prescribing parallel procedures for initiating permission to provide employment, work permits and employee certificates. This creates a bulky and bureaucratised system, alienating genuine employers from the process of acquiring legal foreign labour.

The study on Russia also demonstrated, albeit in quite negative dimensions, the influence of regional and local community interests on labour migration policies. Indeed, the system in principle acknowledged regional diversity and existence of localised demands, although, for the time being, opposition to migration comes precisely from the local authorities. In Britain, acknowledgement of local interests is only emerging, as in the case of Scotland, but the substantive trend in localisation may be different— towards more openness of migration channels into this region. It seems that, in the future, regional or local dimensions of migration into any society will play a leading role for labour migration policies.

Currently, in every state under scrutiny, irregular migrants still continue to dissolve in the available shadowy environment, and the process has indeed gained momentum. So long as the means to statutory labour migration remain complicated, irregular migrants will attempt to find and to penetrate any available niches that will assist them in obtaining access to employment. Liberal and clearly structured temporary labour migration programmes extend a legal and better controlled supply of workers, although much should depend on the concrete measures embracing mechanisms of control over temporary workers, currently emerging in all these countries. Although without the corresponding intention of policy-makers, special concessions, often administered on a discretionary basis, tend to meet the demands of potential undocumented migrants and their employers.

Concessionary possibilities emerge in almost every state, with notable examples being students, seasonal workers or holiday-makers in the UK, as well as labour migrants attracted by bilateral agreements in Russia or South Africa. The issues arising

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[34] 3.5.

here concern abuses perpetrated by migrants under these entry and employment categories. Although such individuals initially enjoy legal admission into countries and even legal employment opportunities, they fail to comply with conditions imposed on them by virtue of immigration law. Such instances turn into large-scale violations, thus contradicting policy-makers' intentions, and encouraging them to eliminate or to restrictively modify such intentions.

At the same time, the idea of removing or tightening these possibilities may even have an adverse effect and render irregularity even less controllable. Indeed, the pool of irregular student workers in the UK, at least before the free-movement rights for East Europeans were confirmed, tends to interact with immigration authorities by applying for residence leave extensions or police registrations. These immigrants are susceptible to exploitation, but pay taxes, which means that they could initially be tracked as being employed, therefore constituting a more controllable form of illegal employment. This only proves the argument of the theoretical chapter that irregularity has different dimensions and, despite occasional failures of immigration control, some groups are more liable to being monitored than others. Concessions in favour of foreign labour should remain as a substitute for totally clandestine entrants, overstayers or offending and failed asylum seekers. However, these migrants should possibly have financial sanctions attached to their status in case of violations, and first-time regime breaches could be penalised financially, rather than by administrative removal.

Problems with these immigration categories emerge mainly in situations of eventual overstaying, rather than through overworking or changing the prescribed employer, but these offences could be dealt with in the realm of overall functional internal control, and may not possibly be prevented by eliminating labour concessions' policies completely. A relatively lenient attitude towards breaching conditions, however, may not apply to other instances of immigration status abuses, such as employment taken up by visitors. In this respect, a balanced strategy for immigration control should embrace a clearly defined, but not over-demanding, legal status of migrants inside the country, and should be supported by corresponding stringent internal control measures.

5.6 Residence of Irregular Migrants in Britain, Russia and South Africa

As was argued above, residence control measures towards foreigners include various arrangements, where the most visual and universal form of managing migration is to regulate it by means of facilitating temporary residence permits, i.e. by granting conditional temporary permissions to remain in the country, as was outlined above. In this respect, a correlation exists with visa policy principles in every state, and such states are normally free to exercise their discretion in establishing the types of, and operational framework for, entry and residence permits. The policy in question is quite similar in many jurisdictions, and immigration law may exclude some categories from the requirements of visa acquisition or immigration control, subsequently distinguishing between different residence permit types, thus grounding these distinctions on the reasons for entry and stay.

At the same time, there are more elaborate and hidden agendas attached to the topic of administrative control over aliens' residence. Indeed, residence permits cannot be made entirely responsible for regulating this domain, since residence in itself concerns numerous spheres of life, including actual dwelling and freedom of movement inside the country, as well as interaction with various public services or state bodies. Here the states' responses are diverse in outlining the legal framework of these notions if, of course, there is any form of control in that sphere.

The British situation[35] which shapes control over the freedom of movement or residence of aliens could be characterised as possessing a degree of liberalism, since the only form of residence control in the UK refers to practices of leave extensions or police registration facilitated by the Home Office, whenever these apply to foreign individuals. As was mentioned above, the British system recognises and imposes only these conditions and limitations, which the foreigner has to acknowledge consciously and follow quite subjectively, without the basic freedoms being infringed, and with comparatively few administrative checks on the foreigners' activities being introduced. Although this immigration control system provides a degree of discretion in relation to individuals, the government and the public recently made moves towards switching to a tighter residential control, and enhancing the so-called ID culture. Because restrictions on the freedom of movement are alien to the British socio-legal tradition,

[35] 2.4.1 above.

its total absence obviously leads to an increasing neglect of the established rules by immigrants, such as non-observance of essential residence conditions or overstay.

The South African system[36] is becoming aware of in-country identification needs, but still operates without serious requirements on behalf of immigrants as to registration and control as far as dwelling and freedom of movement are concerned. However, as was revealed in the analysis of the South African situation, there may be considerable changes in the system, which might be returning the residence regimes towards the infamous pass laws of the Apartheid times. Because the Government attempts strategically to link the immigration service to the local community structure, the most obvious shifts in immigration control are expected to occur precisely at that level of organisation. Thus, it is only for a short period that administrative control still lacks precision in identifying immigrants. At the same time, considering the relative disorganisation in the largely impoverished communities, any idea of success is preliminary, and could instead provoke a rise in the sporadic xenophobia previously reported by many observers.[37]

The Russian system of administrative control over the position of foreigners[38] is probably the most elaborate, but also the most heavily bureaucratised. Logically, it is not improper to establish registration at the place of residence and thus facilitate control over population movements, but the system operates with the bias shifting towards very restrictive deterrence practices. On the surface, police registration in Britain resembles this Russian practice of residential control but, in practice, the British registration system hardly ever has an effect on access to the welfare state and neither does it limit the status of an alien to a particular place of residence. Russian registration rules themselves are full of tricky mechanisms deterring aliens by means of sanitary quotas, procedural constraints or limitations on the registration period. In fact, the interior authorities attempt to impose total control on the whereabouts of aliens and nationals, with a view to deploying these measures to limit the mobility of people and restrict access to some areas within the country. The success of such measures is also fragile, primarily since many migrants manage to avoid registration and actually form marginalized communities. It is possible to argue that mandatory registration at the place of residence could provide a legitimate measure of control, unless relied on fully as a means of deterrence. Rather, the measures introduced could

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[36] 4.5 and 4.6 .
[37] Hussein Solomon, supra, Chapter 4, n. 4.

be useful only for monitoring the status of immigrants in the country, and sometimes for determining the entitlement to public funds.

Enforcement of residence control brings about numerous abuses by the police, and fosters the practice of document forgery on a large scale. Another part of the problem in respect of residence control in Russia rests on its highly centralised modes of operation, since there is almost no place for local community involvement in the process. In Russia, as in the South African cases, communities could be xenophobic in some areas of the country, but in some huge and under-populated territories there is less antagonism, and a relatively tolerant attitude, while the centralised system is indeed prejudicial to foreigners everywhere and does not include reasonable constraints.

Upon considering the policies of all three states, it is possible to determine necessary measures of alien population control exactly, but only as long as these are a tool for the purpose of monitoring population and accessing the welfare system. So long as the system of immigration permits per se is insufficient for responding to the needs of monitoring and controlling aliens, aliens' registration at the place of residence jeopardises freedom of movement. Because both Britain and South Africa will inevitably follow practices of stringent checks on the residence and movements of aliens, the Russian experience could be essential for taking into account the shortcomings of the system in question.

Access to the welfare state could also be linked to the fact of registration, and indeed this plays a double role for the immigration policy agenda. This link should be established not for the sole purpose of deterring immigrants from coming into the country, but rather for making population movements controllable and access to the welfare state predictable for the state. To sum up, registration is a preventive and monitoring mechanism of administrative control, while deterrence should be based on internal control. Additionally, in order to make registration policy humane, there should be procedural fairness and considerable human rights guarantees in exercising this type of residential control, including effective judicial or administrative recourse.

[38] 3.4.1, 3.4.2 and 3.4.3 .

5.7 Immigration Law Enforcement and Internal Control Measures

An internal control system is essential for constructing obstacles to the illegal immigration process by means of detecting illegal immigrants' residence or employment, and impairing their safe interaction with public and private bodies. As was outlined in the theoretical and subsequent chapters of the thesis, the basic idea of internal control presupposes enforcement measures against immigrants, either by means of stringent checks on the immigrants' identity by state agencies and apparatuses directly responsible for immigration control, or via administrative collaboration between immigration authorities and all other institutions.

The most important element of an internal control system comprises the identity and status verification of immigrants, with a view to detecting, apprehending and virtually deterring from the society as many undocumented migrants as possible. In this regard, the British situation is characterised by the involvement of specialised government bodies (the primary agency is the Immigration Enforcement Directorate), albeit with certain police collaboration.[39] In Russia and South Africa, the formation process of immigration affairs' inspections has been initiated and accelerated over the last few years,[40] but the tradition persists in this sphere, with identification of irregular migrants remaining one of the primary tasks of the police force. At the same time, in all countries under consideration, individual status inquiries, and raids practised by police jointly or independently with immigration bodies, remain an integral part of immigration control, thus making it the main modus operandi. In this regard, in the jurisdictions of Britain, Russia and South Africa, police are authorised to undertake identity checks on the status of individuals. However, while in the UK routine checking is fulfilled reluctantly by the police force,[41] in Russia or South Africa,[42] this amounts to an everyday practice, infrequently characterised by numerous abuses.

There are reported cases of document destruction, physical violence or inhuman treatment in detention. The practice of destroying immigrants' documents in these states amounts to a violation of Article 21 of the Migrant Workers Convention, while the other grave forms of immigrants' maltreatment in identity checking or detention concern paragraphs 2, 3 and 4 of Convention Article 16. In these countries, the routine

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[39] 2.4.2 above.
[40] 3.2.1 and 4.2 above.
[41] 2.4.2.
[42] 3.5.4 and 4.5.

police function becomes dangerous for both legal and illegal immigrants. However, it is unlikely severely to constrain the identity-checking practices in Russia in light of ongoing terrorist activities, while in South Africa, close police involvement will render substantial backing to the community efforts much promulgated as a deterrence to irregular migration. Police abuse is a given structural problem in both jurisdictions and is not likely to be alleviated in the years to come. Therefore, it is probably important to prioritise the deployment of joint raids by police and immigration authorities, rather than routine and largely unaccountable measures by the police force alone.

At the same time, immigration enforcement, however elaborate the system of stringent document checking, needs to be linked to something more substantial than the will of enforcement agencies. In fact, it has to rely on the same relatively independent spheres of immigrants' lives in the country outlined in the theoretical model of this chapter, such as residence, the welfare state and employment control. In this regard, under the various premises available in each jurisdiction, the governments link immigration enforcement to many other administrative institutes. The abovementioned socio-legal model elaborates in detail every policy pursued, while from the presentation of all country-specific materials it becomes clear that states strive to achieve total control over the (illegal) alien population. In Britain and South Africa, internal control may be increasingly correlated with the operation of the welfare state or public bodies which are obliged to inform the immigration authorities and identify applicants for services as irregular migrants.[43]

In South Africa, employment, accommodation provision and other public or private services are being made available, only upon scrutiny, in accordance with the Immigration Act of 2002. The legal system, at least on the level of policy statements, advances in the direction of stringent control, considering the government's pledges of possible collaboration between immigration authorities and public or private organisations, as implicitly incorporated in the White Paper. In the UK,[44] there emerge new legislative possibilities envisaged by recent immigration statutes for conducting status verification by a range of public or private institutions. In this respect, British immigration control, being susceptible to changes in this sphere, simultaneously encompasses the obligation of reporting immigration offenders on a routine basis. While in Britain and South Africa the governments attempt to cultivate changes in

[43] 2.4.2, 2.5 and 4.6 above.
[44] Sections 2.4.2 and 2.5, ibid.

immigration legislation with the purpose of implementing an ID culture, Russia retained this as a legacy of the Soviet system, where (although not due to the immigration law) an individual may nevertheless not approach any public services or private institutions without identity and eligibility verifications. However, in comparison with the other two jurisdictions, there is instead a link to the residence registration system, whereby only permanent registration unavailable for migrants is a precondition for claiming social support. In Britain and South Africa this could constitute a prospective development. In South Africa, the government is already attempting to create and encourage community involvement with immigration affairs. In both countries the feature of reporting illegal immigrants to immigration authorities is imposed as an obligation on private and public institutions.

It is possible to say that with the internal control system in operation, the position of aliens becomes more precarious and detection possibilities increase. If these measures also ensure routine reporting by the local communities, the survival environment for irregular migrants will be very complicated, as was revealed by Jordan and Duvell in reference to the situation in Germany and Switzerland[45] and outlined in the theoretical chapter.[46] Therefore, close community involvement, in combination with stringent enforcement measures by immigration authorities, can contribute to the improvement of control over the alien population. However, the principles of its fulfilment have to be sound and humane, and not allow collective enforcement to develop into witch-hunts.

5.7.1 Internal Control and International Legal Protection of Migrant Workers

In its Article 68(1)(b), the Migrant Workers Convention permits State Parties to take action on detecting and eradicating illegal immigrant movements, which conforms to the idea of internal control measures exercisable to this end. Nevertheless, at the same time, the actual internal control measures should only be absolutely necessary for protecting essential social priorities. These include prevention of clandestine entry, overstaying, or violation of important residence conditions such as fighting crime perpetrated by immigrants or, on the other hand, protecting immigrants from trafficking and various abuses. While raids upon places of employment or residence are justifiable, random ID checking and even curfews in relation to immigrants have to

[45] Jordan and Duvell, supra, n. 9, pp. 101 and 104.
[46] 1.11.2.3 above.

be undertaken with caution. These measures, combined with the prospects of mass removals and the lack of regularisation opportunities, do not contribute to exercising of feasible control over the immigrant population. In fact, internal control should be a means of encouraging immigrants to achieve some degree of legalisation if, of course, these opportunities are available. Notable examples of these possibilities are the proposed 'earned regularisation' initiative in the UK,[47] or legalisation for the SADC nationals in the South African Republic.[48] According to Article 69 of the Migrant Workers Convention, the State Parties should take all necessary measures to ensure that the illegality of undocumented workers does not persist, which means the enhancement of irregular migrants' legalisation on behalf of the Convention. ILO Convention 143, in its Article 9(4), declares that the State Parties are not precluded from legalising the position of irregular migrants, although this is not an obligation. Currently, however, at the level of implementation, internal controls in all the states under scrutiny are designed only to constitute punitive consequences for non-compliance with the immigration law, namely removal or deportation.

5.7.2 Removal

In every jurisdiction scrutinised in the current thesis, enforcement operates on the basis of immigration powers to deport or to remove individuals. Traditionally, deportation was probably the main method of removal from many countries and carried with it judicial safeguards, as is obvious in the UK. At the same time, with the increase in the scale of irregular migratory movements administrative procedures have gradually been prioritised as a means of carrying out the enforcement and removal policy. Britain, Russia and South Africa have quite distinct policies in this regard. Britain, for instance, has recently brought changes to the law, and made all immigration offences subject to administrative removal.[49] Russia has taken a somewhat more moderate position, linking removal to multiple offences such as illegal entry, residence regime violations, undocumented employment and, finally, violation of asylum rules, but the country has still retained deportation as a punishment for overstaying.[50] South Africa has adhered to the system of deportation, with procedural guarantees afforded to foreigners.[51]

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[47] 2.4.2 above.
[48] 4.2 .
[49] 2.2.6.1 above.
[50] 3.3.2 .
[51] 4.5 and 4.3 above.

This leads to the assertion that expeditious removals are particularly inherent to the UK immigration control system, with the number of enforcements growing over the years. Notably, however, only the South African government has been capable of deporting the highest number of foreigners[52] in comparison with either Russia or the United Kingdom. At the same time, though, South Africa has been facing the acute challenge of massive re-offending on the part of many deported individuals. That is why the system imposes additional penalties for repeat offences. In Russia, although norms of administrative removal and deportation are present in the law, not many foreigners are subjected to the procedures, thus rendering such measures relatively unsuccessful.[53]

Deportation and removal rates in any of the states under scrutiny are proven to be seriously affected by political agendas and, in fact, are publicly invoked as indicators of the success of the entire immigration control process. However, despite being the main punitive elements of immigration law, their plausible effects should not be overestimated. Indeed, irregular migration is caused by pressures from both outside and inside the receiving society and requires an acknowledgement of the global and structural problems which enhance the supply of, and demand for, migrants. In this light, removals from the receiving country cannot be disproportionately emphasised as a universal deterrence mechanism, but may only be regarded as providing punishment in the immigrant's individual circumstances.

As far as the modes and character of removals are concerned, there has to be state discretion in selecting forms for making it operable, and even for accumulating enforcement efforts. However, administrative sanctions are less likely to carry humanitarian awareness of the immigrants' problems. Indeed, foreigners are removed at very short notice, with what to do with their belongings or financial matters remaining unsettled. There is also an indication that aliens cannot claim remuneration or compensation from the former employer before, or even after, their enforced departure. These practices contradict the provision of Article 22(6) of the Migrant Workers Convention, specifically providing guarantees at the stage of removal. Therefore, the humane character of proceedings constitutes the most important requirement for this central sanction of immigration control.

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[52] 4.1 .
[53] 3.5.4 above.

5.8 Labour Relations between Irregular Migrants and Indigenous Employers

A very complicated agenda in the discourse surrounding irregular migration concerns undocumented workers' participation in labour relations. Although the states normally exercise an explicit prohibition of aliens' undocumented employment outside the permitted schemes, employment relations of this type have been very widespread, and constitute a prevalent violation of immigration rules. There are various socio-economic factors encouraging the employment of undocumented workers. Among these are the need to reduce costs, and to sustain the profitability of businesses in the environment of stiff global competition which is confronting certain industries. The available informal economic or ethnic Diaspora niches are also contributing factors—all demonstrated in Britain, and underpinning the entire agenda of immigration control in other states.

One of the most complicated and, in fact, widespread situations concerns categories of persons who legally engage in employment, but who somehow violate the conditions governing such engagement, such as in many cases of overworking students, or seasonal workers and other legal employees who switch to a different employer. These behavioural patterns could be considered to be abusive and deceptive as far as reasons for entry or residence are concerned, but such legal breaches could be regarded as being predictable in light of strong economic incentives on the part of immigrants on the one hand, and inflexible rules on the other. Indeed, as was argued above, regulation of these patterns should not be subject only to restrictive and downright punitive rules, but rather to the economic methods briefly outlined in the theoretical chapter. The negative social effects of such violations are somewhat minor in comparison with the ones committed by clandestine entrants or overstayers, who commit double or triple offences in this regard.

Offenders in relation to employment conditions deserve more lenient treatment in administrative terms, but probably also stricter economic responsibilities in this regard. The argument in favour of such an approach to the issue is that despite narrow margins of possibilities, undocumented workers, including a wide stratum of individuals violating their employment terms, may be singled out as the most numerous group in the structure of labour migrants of almost every jurisdiction. The already available informal economic climate provides for a sponge-like accommodation of irregular migrants.

As a response to these and other challenges, governments adopt extensive strategies for combating undocumented employment, first of all by way of its explicit prohibition, supported by the punishment of undocumented workers and, secondly, by means of sanctions on the employers hiring irregular migrants. The first type of punishable offences, i.e. deliberate engagement in employment on the part of aliens, has been envisaged by the immigration laws of Britain and Russia, albeit as an activity prohibited either as an administrative violation (in Russia) or as a criminal one (in Britain). In South Africa, however, the immigration system does not embrace the explicit penalisation of alien workers without sanctions being imposed on them. Hypothetically, as to the legal level in every state, detection of unauthorised workers will lead to their removal from the country: nevertheless, in practice, immigration systems propose different responses.

In Russia, for instance, administrative fines or removals are infrequent regarding undocumented workers, even if such workers are detected by the police or the immigration inspectorate. In Britain or South Africa, however, they could be subject to expeditious removal from the territory. Generally, instruments penalising undocumented workers are older than those punishing employers. Employer sanctions complement penalties on irregular migrants, and thus additionally determine relationships between irregular migrants and their employers. This overall trend reflects public policy attitudes in relation to the employment of illegal aliens.

5.8.1 Legislative Norms and Enforcement of Employer Sanctions in Britain, Russia and South Africa

Hiring of irregular migrants in avoidance of legal requirements is subject to explicit sanctions in British, Russian and, finally, South African laws. In Britain and South Africa, this is subject to general immigration statutes envisaging administrative and criminal punishments for this violation, while in Russia it is regulated by the provisions in the Administrative Code. There are certain trends in this regard. First of all, immigration legislation in Britain[54] and South Africa[55] contains significantly similar provisions which explicitly require checks on the employee's immigration status, and which outline presumptions against employers if undocumented foreign workers are found at the employers' premises, or are identified as being employed there. Secondly, of paramount importance is the issue of employers' defence in such

[54] Section 8 of the Immigration and Asylum Act 1996; in Section 2.3.2 above.
[55] Section 38(2) of the Immigration Act 2002; in Section4.4.2 above.

situations, whereby fulfilment of the proper document-checking procedures can nevertheless alleviate employers' responsibilities. In Britain particularly, specific attention is directed to the employer's defence, and to document lists that are capable of proving employer's genuine intentions.

As opposed to legislation in Britain and South Africa, Russian law,[56] by virtue of the legislated Administrative Code, only provides a framework definition and a corresponding sanction in relation to aliens' illegal employment, with no legal technique specified to that end. This created a dearth of legal details in relation to the facilitation of employers' sanctions, and involved a non-transparent mechanism putting constraints on the policy's effectiveness. Its implementation constitutes an issue, especially considering possible legal presumptions in concrete cases. This example highlights the fact that policy precision is essential for the possible success of employers' sanctions.

At the same time, although legal techniques are important for the policy in question, another fundamental difficulty in the mechanism of employers' sanctions that needs to be resolved reflects the problem of employers' intentions (temptations); i.e. since employers possess clear incentives to hire undocumented migrants, they are under an obligation to turn such persons down in terms of employment applications in each and every state. This dichotomy in the employers' role places them in the situation of having to make an uneasy choice, and almost certainly predisposes them in favour of hiring an illegal immigrant. Therefore, there has to be a solution as to the dilemmas surrounding an employer's choice, a solution which, by and large, has to incorporate the principle that employers need to have positive, rather than negative, incentives not to hire undocumented workers.

This principle is linked to the availability of feasible labour force alternatives, and more extensive labour migration schemes could possibly discourage the employer from hiring irregular migrants. However, in addition to changing labour migration policy, the receiving societies should address other labour and macro-economic factors (which are largely outside the scope of this thesis) responsible for the emergence of the informal economy, and accommodating the interests of undocumented workers in turn. Only after introducing necessary socio-economic adjustments to the legal policy, will the employer find it more natural to fulfil the public functions of checking and taking necessary precautions as far as the immigration status of employees is concerned. Only

then, would the employer's attempts to hire undocumented migrants constitute contemptible abuse, and possibly become more easily identifiable. Currently, as was argued by Melossi, when the working class is not unionised, and the economy runs on post-industrial grounds, and when the core local community loses the function of mutual support between its members, there exists a great possibility for breeding the social diseases associated with moonlighting in the sphere of employment.[57]

Meanwhile, the success of employers' sanctions has indeed been limited enough in all the states under scrutiny as to constitute a relative enforcement failure. Most recently, in Britain, the mechanism of employers' responsibility has been unwinding and gradually being made a priority after relatively unsuccessful enforcement during the period immediately after 1996, notably along with the widening of migration channels.[58] In South Africa, enforcements were rather designed to implant intimidation among employers by carrying out expository measures, but played no really significant role in shaping a sound regime for immigration and employment control. In Russia, despite making control over employment dependent on stringent residential control measures, employers' sanctions have not been successful and, in this study, no traces of enforcement elements were revealed.

The area of enforcement definitely indicates several features, such as difficulty in imposing the employer's choice, frequent political reluctance of the governments to apply greater efforts or resources, or just structural problems concerning the limits of the penalties. Indeed, stringent measures can over-penalise entrepreneurs, economic middle and upper classes, i.e. the potential electorate and actual economic lobbyists, while the presence of irregular migrants contributes to the establishment of a relative balance in the economic structure of the society, even if the future social costs of this solution might be substantial. One could foster a legitimate expectation that the government or the public will act against this immigration issue, only if the social problems affiliated with illegal residence or employment start affecting the economic interests of the majority in the receiving society.

Enforcement problematics arose not only in Britain, Russia and South Africa, but also in a number of other states. Consequently, as was reported by Mark Miller in the

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[56] 3.5.4.
[57] Melossi, supra, Chapter 1, n. 18.
[58] Section 2.3.2.

case of France,[59] stringent implementation of the law did not bring sufficient success for the complete elimination of illegal employment practices. An increase in the penalty levels facilitated by the state was conducted together with an amplification of enforcement activities, but was also subject to reluctance on the part of some state bodies to implement sanctions. In Singapore,[60] where employers are penalised both by very high fines and sometimes also by caning, success of these measures bears more potential, but nevertheless this is a small and more controllable country, with distinct socio-legal traditions.

Caning as an immigration penalty would be quite effective in spreading physical fears among the employer strata, but is hardly a practicable legal solution anywhere else. The overall tendency in almost every state is such that even if where there is a will on the part of the government to 'put an end' to undocumented employment, enforcement agents, and even courts, may still dilute and divert that political will. This was clearly revealed by Mark Miller with regard to some cases in France. Once again, this leads to the assertion that a better degree of success for employer sanctions would be achieved only in circumstances where employers are provided with sufficient sources of legal labour.

Meanwhile, it is possible to argue that the state apparatuses in Britain, Russia and South Africa are gradually getting ready to accumulate enforcement efforts, as soon as political opportunities arise. Indeed, employer sanctions carry plausible elements of psychological intimidation, and cannot, in principle, be underestimated as influencing the entire legal climate around undocumented employment. First of all, as was outlined in the theoretical chapter of the thesis, punishments against the employer at least increase the time that migrants spend searching for jobs, because employers are still more wary about undocumented workers than in circumstances when hiring them is no offence.[61] Secondly, not least because of employer sanctions, employment contracts with irregular migrants would probably be deemed illegal and unenforceable, since the legal system does not recognise the terms and conditions of such hiring deals. The verbal character of such contracts does not contribute to their recognition either. This all places undocumented workers in a challenging and stressful labour environment of

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[59] Miller, M.J. "Towards Understanding State Capacity to prevent Unwanted Migration: Employer Sanctions Enforcement in France, 1975-1990", 17(2) (1994) *West European Politics* (Special Issue on the Politics of Immigration in Western Europe).
[60] Chandran, R. "Illegal Immigrant Workers: The Singapore Solution", 11 (1997) *International Contract and Commercial Law Review*, p. 394.
[61] Boeri, supra, Chapter 1, n. 82.

survival needs and exploitation, but at the same time it can hardly be characterised as a workable measure of deterrence.

5.8.2 Enforceability of Employment Contracts

A generalisation could be drawn that legal systems in the three jurisdictions regard such contracts as being contrary to public policy and fulfilment of legal terms, and as being fraught with commission of a legal wrong, i.e. the criminal act of employing an illegal alien. At the same time, the role of the judiciary should not be underestimated, since they could prospectively either interfere with these legal principles or, instead, endorse them. The more plausible development, however, is that courts will make efforts to afford limited enforceability to such employment contracts, which would be indispensable for improving the humanitarian situation of undocumented workers. The move in this direction has been demonstrated in the UK by virtue of the judicial decision in the case of *Sharma v. the Hindu Temple.*[62] In the Russian legal system, this would invoke the question of law and its interpretation, generally demanding a Constitutional Court decision—an impractical solution to the expeditious improvement of the plight of migrants in the countries of employment. In South Africa, no judicial precedents have been reported in this sphere.

If the cases demanding certain recognition of the status of undocumented migrants start going through the courts, the judiciary will have to carry out a balancing exercise between considerations of public policy and a necessity for humanitarian concessions. In this regard, the existing prohibition of undocumented workers' employment, combined with sanctions of employers, competes with the humanitarian needs of migrants. So what would be a possible way to realistically resolve this dilemma? Perhaps, the courts may choose to establish criteria for destitution or other aggravating circumstances of irregular migrants, thus allowing them to claim remuneration retrospectively, or other forms of compensation from the employer. At the same time, it is hardly realistic to expect a judicial 'revolution', unconditionally bestowing a complete set of labour rights to irregular migrant workers.

Meanwhile, as a result of the marginalised status created by the legal environment around them, irregular migrants are susceptible to all types of exploitation, not least because the domestic legal systems do not embrace humanitarian notions. As was argued above in the course of this thesis, this creates a 'black hole' in the entire sphere

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[62] 2.3.2.

of social relations, with thousands of undocumented workers-- human beings-- being awkwardly dragged into a shadowy economic environment, further fostering marginalisation and criminal incidence on their part. The approximate popular logic behind the immigrants' treatment reflects the notion that these uninvited illegal guests have to remain responsible for the consequences of their personal decisions. In this respect, circumstances surrounding undocumented workers are not regarded as a public matter, but rather as personally concerning irregular migrants' issues only. This public attitude prevails, despite the fact that the more numerous this group becomes, the more likely their life situation is set to arise out of the domain of the immigrants' personal problems. Additionally, a deterioration of labour standards follows such employment relations, and affects the entire labour market.

5.8.3 Employment Conditions of Irregular Migrants

All country-specific materials invoked in this thesis prove the persistence of a connection between irregularity and exploitative conditions in employment. Existence of this link is not implied only by measurements of absolute standards, such as the exact remuneration rate or number of working hours, but rather by means of general comparative characteristics and tendencies underpinning undocumented migrants' employment.

On the one hand, illegal immigrants in many countries, including Britain, South Africa and Russia are severely overworking, and being underpaid in comparison with other categories of the workforce.[63] On the other hand, the notion of being underpaid and overworked, still implies a reality which differs in every state, because fundamental economic and social standards vary. In this regard, the agricultural or catering sector workers in the UK are in a better welfare and consumer position than the ones in South Africa or in Russia. The substance of the matter, however, concerns the fact that over time, (and this is what the British experience demonstrates), standards of life or employment are subject to reduction in even the most developed states. The cases of agricultural workers in the UK heavily exploited by subcontractors prove the negative dynamics in this regard.[64]

The points of vulnerability extend even further, and reach their extremity, again regardless of the country's development level, whereby undocumented workers are either being subjected to degrading health and safety employment conditions, or being

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[63] 2.3.3, 3.5.4 and 4.4.3 above.

dragged into forced labour or the criminal underworld. As for health and safety concerns, the Morecambe Bay tragedy, which cost several lives,[65] or the numerous accidents at Moscow construction sites[66] (shamefully, these mostly happen during the construction of elite apartment blocks or luxury offices) represent compelling issues. Indeed, Chinese and Ukrainians in London, as well as Moldavians or Tadjiks in Moscow, are legal outcasts, susceptible to abuse only because they happen to be in need of providing for their families who are living in harrowing economic circumstances. In this regard, Britain, Russia or South Africa could demonstrate the full scope of these problems.

The general tendency is that workers are often placed within the same premises for both work and residence, immobilised by being deprived of their personal possessions or documents and finally being cheated by receiving little or no remuneration at all. In the Russian reality, for example, harrowing cases of confinement and forced labour, were officially reported, thus reflecting the lowest degree of public control to that end.[67] South Africa is probably not far from being confronted by compelling challenges either, especially considering the vulnerability of women and children in undocumented employment.[68] Cases of exploitation of children reported in South Africa contradict the UN Migrant Workers Convention Article 25(1(b)) prescribing the minimum employment age, and also conflict with a few other international legal instruments, such as Article 32 of the Convention on the Rights of the Child, and Article 15 of the African Charter on the Rights and Welfare of the Child, all calling against the labour exploitation of children, especially against hazardous working conditions.

Although, some years ago, all these negative cases were not so numerous and the problems so acute, today this reaches and affects even British shores, with the gang masters' operations booming in a much more orderly society than that of Russia or South Africa. The gang masters are probably a relatively novel type of criminal subcontractors, abusing immigrants by severe underpayment and inhuman standards of treatment, as was revealed in the general account of British immigration control. This frequently amounts to forced labour practices, because of the complete vulnerability of migrants before the British legal system and society. Currently, the situation with

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[64] 2.3.3 above.
[65] Ibid.
[66] Numerous instances reported in www.newsru.com and www.gazeta.ru .
[67] 3.5.4.

forced labour in each of the states tends to contradict the UN Migrant Workers Convention which, by virtue of its Article 11, prohibits slavery, servitude and other compulsory forms of work. This practice also amounts to an essential contradiction of Article 4 of the ECHR in the cases of Britain and Russia, and Article 5 of the African Charter on Human and Peoples' Rights in the case of South Africa. Although this problem involves the non-state actors in every jurisdiction, the states' inaction can result in non-compliance with the basic international norms to this end.

Policy-makers in any state should consider that migrants surviving without rights in the receiving society are susceptible to harmful bondage with their employers or subcontractors, which later mean the corruption of any proper relations in the single enterprise, locality or economic sector. As was argued in the chapter on the UK, asylum seekers, migrants without knowledge of the native language, and people with no initial ethnic community links may be presumed to be particularly vulnerable.[69]

The same trend applies to the situation in Russia and South Africa. Although it is possible to count in reverse and argue that the more connected immigrants with the receiving country are, the better their conditions of life and employment become, this optimism is at odds with prospects for future developments. In Russia and South Africa, for instance, even affiliation with ethnic diasporas, being rather a matter of bare necessity, does not eliminate risks of severe maltreatment in labour or other relations. Most importantly, in light of some dynamic structural developments outlined by Albrecht in the theoretical analysis on irregular migration, ghettoisation and marginalisation processes accelerate, thus rendering migrants' efforts to achieve a better future undermined in many receiving societies. This supports the conclusion that there are reasons to expect further intensification in the occurrence of forced labour and general criminal incidence in each state, although with certain distinctions as to the degree of development or legal order.

In this regard, it is the norms of international legal instruments which are noteworthy in establishing basic labour standards, and thus a limited juridical personality for illegal immigrants. Thus, the ILO Convention No. 143, in its Article 9(1), extends protection to undocumented workers in the areas of remuneration, social security or benefit policies, while Article 25 of the UN Migrant Workers Convention provides for concrete entitlements to irregular migrants, including basic labour standards such as

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[68] 4.4.3 above.
[69] 2.3.3.

adequate remuneration, holidays, working hours, safety, health, principles of employment contract termination, and others. International law is much more progressive in relation to undocumented migrants' protection, by substantively equating the employment position of undocumented workers to those of legal migrants or nationals.

This line of reasoning actually involves not only a humanitarian solution, but also a utilitarian one, as far as the situation with regard to feasible immigration control is concerned. Any limited legal status and enforceability of employment contracts with irregular migrants would indeed assist in facilitating the prohibition of undocumented employment and the enforcement of employer's sanctions respectively. Irregular migrants are in a complete limbo in the legal environment, while the employer is better protected by the system. Any extension of irregular migrants' status in this regard could impose a relative *status quo,* and assist in penalising unscrupulous employers, but only on a rational basis, when the state simultaneously and creatively, by means of a sound policy, introduces substitutes for the supply of undocumented migrants.

5.9 Comparative sketch on the access of irregular migrants to the welfare state

One of the most important spheres of immigrants' lives in the countries of residence concerns their access to the social welfare state, which includes public services and welfare support. Indeed, education, housing and medical treatment and other emergency services constitute an important part of every immigrant's life in the modern community. Precisely for this reason, issues of immigrants' access to these essential spheres are being politicised and made a central legislative measure in establishing the immigrants' residential status in several states.[70]

The governments have realised that unwanted irregular migrants could somehow be alienated from the society by virtue of numerous obstacles to their access to social support. Therefore, lack of access to the welfare state often constitutes an element of pressure from the point of view of immigration control administration, but whether this is a workable deterrence mechanism is still a matter of controversy. Although, on the one hand, any state attempts to restrict the access to welfare, there are also present

[70] One of the outside examples of this emerged in the Netherlands as is evident from the Article: Pluymen, M., Minderhoud, P. "Access to Public Services as an Instrument of Migration Policy in the Netherlands", 16(4) (2002), *Immigration, Asylum and Nationality Law*, pp. 208-223.

contravening forces undermining these efforts. Even in a highly bureaucratised environment, the presence of irregular migrants has proven to be constant and to have a serious impact on affairs. However, the central issue in welfare discourse in relation to irregular migrants would be to define and position the welfare state from the perspective of the irregular migrants, by highlighting differences between public funds, such as pensions or benefits, and public services, which, inter alia, include medical care or education. The existing tendency in every state is that principles of access to either of the two welfare spheres actually vary.

As far as the structure of immigration legislation in each of the states is concerned, only Britain has explicitly incorporated legal norms regarding access to certain public funds or services into its immigration law, particularly by means of the 1999 Immigration and Asylum Act, and the Immigration Rules defining public funds and limiting their availability only to nationals, or to designated categories of aliens.[71] In Russia and South Africa, access to the welfare state has been placed outside the immigration control system, and made subject to institutionalisation at the level of particular agencies responsible for handling public funds or services.[72] At the same time, as an important function of immigration law in each country, the entry of many categories of persons is conditioned by the availability of financial means to support themselves on residence in the receiving society, which also often includes these essential public services. This highlights a conflict between state efforts and the resulting reality. The fundamental comparative feature concerns the fact that in Britain, Russia or South Africa, there are basic similarities in the position of immigrants in terms of all essential welfare spheres, although details and social realities could be at slight variance in each state.

5.9.1 Medical care

The popular opinion that illegal immigrants are completely barred from access to the health care system cannot be regarded as entirely true. Emergency care is probably available to irregular migrants if their irregularity is brought about by a violation of the conditions of stay, since their immigration status could be ascertained, or even if their irregularity is a result of overstaying. The more difficult situation arises in relation to clandestine entrants who, at the point of entry, do not hold any appropriate status

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[71] 2.5 above.
[72] 3.4.1and 4.6.

whatsoever. At the same time, the hospital personnel of any of the states forming part of this research would be reluctant to refuse emergency treatment to most vulnerable individuals. However, a different agenda relates to the quality of such treatment, since in Russia or South Africa the attitude of personnel and basic standards could be unacceptably low. Additionally, access to medical treatment could be restricted to a situation where there is a serious need for treatment, since both public and private hospitals may attempt to reduce expenditure.

Generally, the situation where there is a discretionally benevolent provision of medical care remains uncertain for individual immigrants in the light of fixed legal guarantees, and may have future implications, as every state connected with this research continuously attempts to bar irregular migrants from this essential sphere of life. Policy-makers should recognise as an underlying issue the fact that emergency medical care cannot be placed at the core of the welfare 'bargaining' between the state and the immigrants. Moreover, international law, by virtue of Article 28 of the UN Migrant Workers Convention, urges states not to deny access to medical care for undocumented workers and their family members, which is possibly the most sound attitude to this issue.

5.9.2 Housing

Availability of housing to irregular migrants forms a distinct feature of their access to social welfare. As a rule, illegal immigrants mostly rent private accommodation without relying on public assistance in this regard. Nevertheless, applications for public housing are submitted by irregular migrants on attempting intentional fraud, on encountering health problems, or in other grave circumstances which make their lives impossible in the receiving society. Such circumstances have to be properly distinguished by policy-makers, since health or other hazards are aggravating enough to give rise to humanitarian attitudes. However, be that as it may, these three countries face different realities as far as housing problems are concerned. First of all, the level of possible social-economic protection in every case differs. Indeed, Russia, for example, may not provide accommodation even to all needy nationals, not least because of a combination of severe climatic conditions and a reduction of social programmes. Irregular migrants are completely cut off from housing support programmes, due to the highest degree of administrative checks on the identity and circumstances of applicants. Housing support programmes are desperately in need of

boosting in South Africa, where several million of its nationals live in tin or wooden shacks, and where even the distant visual image portrays the harrowing conditions of life. Illegal immigrants cannot be said to be excluded completely from such support in South Africa, probably because of documented fraud, and flaws in handling administrative control over housing distribution.[73] The government has indeed contended that irregular migrants could be blamed for acquiring access to housing support at the expense of disadvantaged citizens. At the same time, there is no clarity as to the precise level of immigrants' impact on the housing system.

Britain represents a substantially different situation from the ones in Russia and South Africa, inasmuch as it possesses more housing and financial resources to pour into social support schemes.[74] While the housing authorities have received sufficient powers to investigate the immigration status of applicants and to exclude destitute immigrants on a legitimate basis, the system has been open to judicial review on humanitarian grounds. Indeed, in some judicial cases, the courts have been reluctant to completely eliminate opportunities for irregular migrants to enjoy public housing. Its provision is possible not solely on the basis of destitution, but rather on the grounds of the grave personal circumstances which arise for certain illegal immigrants. The main desirable principle in this area would be to establish a balance between the goals of public policy as far as the deterrence of illegal immigrants is concerned, and humanitarian considerations in relation to immigrants.

Irregular migrants are a very vulnerable category of individuals, susceptible to great challenges and, despite persisting socio-economic problems, authorities could at least make every effort not to impose obstacles on residence in private housing, when grave circumstances arise. In the Russian legal practice, for example, irregular migrants may be detected and punished by means of residence registration. This may happen not only in the "saturated" Russian cities, but also in tiny dilapidated villages, where space and infrastructure often allows for peaceful, albeit somewhat impoverished, living. In the same vein as in the Russian system, the South African government currently proposes an upsurge in community efforts (where this actually concerns the poorest areas of the country) to curb the presence of irregular migrants. Public efforts are being made to reduce pressures on society by means of more stringent enforcement. This overall trend takes place despite the fact that not all irregular immigrants demanding

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[73] 4.4.3.2.
[74] 2.5 above.

accommodation from the public are fraudsters, and needs arise for a wider scope of judicial and public scrutiny into every case of compelling need.

5.9.3 Education

The matter of education in relation to the position of irregular migrants mostly concerns their children, and the school education available to them. Immigrants' children may not be considered to be explicitly guaranteed primary and secondary education. The education of immigrants' children in every country could be regarded as a controversial topic, where irregularity adds to a sense of unpredictability as far as this problematic agenda is concerned. The problem is complex, because the receiving states tend to deny the access of migrant children to education, and little scope for benevolent or discretionary possibilities is provided. As far as Russia is concerned, public educational facilities have to conduct checking not so much on immigration status, but rather on residence registration. Indeed, the availability of registration at the place of residence may serve as a legal ground for providing educational services. Irregular migrants' children are *de jure* precluded from enjoying educational guarantees, but on the de facto level, many of them, being overstayers and violators of the conditions of stay, can still have access to educational facilities. In South Africa, documentation checking at public schools is still being introduced, and this per se may prospectively preclude such children from attending schools. In the UK, immigration status checking in schools would definitely take place, but there is also some possibility for the discretionary behaviour of education authorities.

The situation with regard to education of immigrants' children generally contradicts the UN Migrant Workers Convention, its Article 30 guaranteeing equality of treatment for *all* migrants' children and those of nationals or legal migrant workers. This is a serious and justifiable humanitarian concession, ensuring the possible future integration of such children into any society, be it in the receiving state or in the home country.

5.9.4 Access to Public Services and Funds: a Combinatory Approach

As was mentioned above, access to public funds for irregular migrants should not be equated with those of public services. Pensions and social support are definitely legally unavailable to irregular migrants in any country even at the de facto level. Benefits and pensions can hardly be accessed by irregular immigrants in any state under scrutiny,

apart from South Africa, where, by means of fraud or administrative neglect, many immigrants claim pensions and allowances from the public service. Needy immigrants may only rely on charity donations and private gratuities from compassionate individuals or organisations, because on the legal level their integration into the welfare state cannot be possible, unless for certain designated categories.

In Britain, most benefits have been placed in the realm of public funds by virtue of the aforementioned 1999 Asylum and Immigration Act, restricting them only to aliens with established legal residence rights, including European Union nationals. In Russia and South Africa, however, social welfare provision is subject to scrutiny by specialised agencies, although recently the South African government has, in its policy statement, spoken about imposing a stricter immigration control element over the availability of public funds to immigrant communities.

The issues of access to public funds arise in principle, however, if, within the structure of undocumented work, illegal immigrants pay taxes or social contributions to the receiving states. Although clandestine employment adheres to the underground or 'moonlighting' economy, presupposing concealment of taxes or contributions, there may be cases when such payments nevertheless come through. In situations when the government receives taxes or contributions from the (irregular) migrants, it is almost impossible to argue that these immigrants abuse the system by accessing the welfare state. The UN Migrant Workers Convention, by virtue of Article 27, provides a discretionary authority to the state to deal with the problem, not least by means of envisaging reimbursement of all contributions paid by the migrants.

In addition, the governments could potentially deploy contributions or tax payments for a relaxation of irregular migrants' treatment, including the conduct of legalisations based on such payments. Diligent financial payments facilitated by irregular migrants to the state could reverse the trend of illegal immigrants' penalisation and, in fact, release currently growing pressure on the social welfare system dealing with immigrants. At the same time, it is possibly justifiable to divert efforts beyond the alien's control by concentrating them onto one specific area, i.e. protection of pensions and payable benefits, while public services can be made available for emergency purposes. Legal access to public services for everyone, regardless of illegality, could become a trade-off for enhancing humanitarian considerations in the policy, while this also allows for avoiding direct cash payments to aliens.

The general meaning of international law in this respect is rather declaratory, as becomes obvious from Article 9(1) of the ILO Convention No. 143, and Article 27 of the UN instrument on migrant workers. The proposed approach per se towards distinctions between public funds and services, as well as its link to regularisation possibilities, may not be excluded. Be that as it may, however, the social costs of providing at least essential public services to migrant workers are negligible in comparison with the social costs of not affording them.

5.10 Comparative Asylum Seekers' Protection Issues in Regard to Irregular Migration

Being an integral part of the worldwide migration process, asylum flows have generated controversy as far as immigrants' irregularity is concerned. First of all, governments are committed to limiting official Refugee Convention recognition only to a narrow scale of applicants, whereby this policy indeed illegalises bona fide refugees, who lose prospects of success in the asylum determination process. Secondly, upon entry, during residence or at the departure stages, illegal immigrants may commit possible breaches of immigration regimes constituting deportable offences, and illegalising their further presence in the receiving state. On the other level of in-country treatment, a lot depends, not only on the intention of asylum claimants, but also on the official policy applicable to all asylum categories. At the same time, it is possible to argue that the in-country treatment of asylum seekers is a more extensive reality in some countries than in the others, and this is the case in Britain and Russia in particular.

As for the determination of refugee status, a difficulty arises in distinguishing between genuine and bogus asylum seekers, not least because the decision-making criteria are being shifted towards political motivation and necessities. There is an indication in all chapters of the thesis that the British, South African and Russian governments have made every possible effort to limit numbers of recognised refugees, with the purpose of minimising the scale of immigration and, in particular, financial and social protection commitments following recognition of individuals as refugees. Therefore, with the current legal mechanism of asylum protection in place, protection becomes illusory in a variety of circumstances, and refugee movements constitute an integral part of overall irregular migration.

Many states actually have their distinct refugee reception strategies. In Britain, for instance, not only stringent criteria for the refugee status grant exist, but also substantial limitations on the asylum seeker's status during the application process.[75] In South Africa, many desperate asylum claimants are illiterate, poor and devastated African people who do not even know about asylum possibilities and the nature of such protection, with the government exploiting this ignorance for constraining status availability.[76] In the Russian reality, the policy in question has been evolving so as to drastically revert the scale of recognition towards very insubstantial levels.[77]

Such practices transfer the tide of asylum seekers into the realm of illegal immigrants, but they contribute only partially to the problem. As was mentioned above, the governments also adopt policies which place constraints on asylum claimants by means of limiting their residential or welfare position. This includes many procedural forms of control, such as dispersal, restrictions on employment, and conditional social welfare provision. In-country status usually represents the whole 'matrix' of regulations, where the control over asylum seekers is largely based on the "carrot and stick" principle, with the welfare support rules becoming even more elaborate in the states with better financial opportunities. In this regard, only the United Kingdom possesses sufficient means for supporting resident applicants for asylum adequately, thus rendering asylum support of paramount juridical importance for aliens.

As was demonstrated above, first of all, the British government introduced substantial constraints on asylum seekers' employment— by authorising a complete prohibition to engage in any forms of employment for the first year of asylum determination. The British system of asylum support has fully enshrined the notions of restricting the activities of asylum seekers, who could be excluded from financial or material assistance upon their non-compliance with such rules which may render them illegalised. The most compelling situation exists in relation to in-country asylum applicants and failed asylum seekers, many of whom seem to have no recourse to welfare entitlements in the current system.

Asylum system abuse has been fairly widespread, but the general idea of conditional, or even unavailable, support has indeed complicated the situation. Especially compelling circumstances may arise in relation to those who were refused support, but

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[75] 2.6.1, 2.6.2 and 2.6.3 above.
[76] 4.7 above.

simultaneously banned from employment, thus making violations inevitable. Somewhat similar circumstances arise for applicants at the appeal stages. Most of such practices originate by virtue of the 1999 Asylum and Immigration Act, incorporating the idea of discretionary assistance on behalf of the government, so as to give a significant message to foreigners about the restrictive asylum policy.

In Russia, the position of migrants may be distinguished on the basis of whether or not the asylum claim was registered, since in the two-tier, highly bureaucratised asylum application process, many potential asylum seekers may be excessively constrained in their initial recognition. What contributes to the illegality of irregular migrants are the residential rules, construed in such a fashion that even registered asylum claimants, let alone those who did not submit applications, face acute challenges in the residential sphere. The entire internal control mechanism represses both registered and unregistered asylum seekers, and makes their situations intolerable. The miserable welfare assistance to which asylum seekers are entitled in Russia cannot possibly constitute a further incentive for the government to establish seriously regulated welfare relationships, similar to the ones in the UK. The only exception concerns the reception centres specially created for asylum seekers and internally displaced people: here there could be compliance conditions as to shelter or food support. In the Russian situation, illegalisation of the entire strata of potential and actual refugees takes place both by means of limited status availability and actual residence rules applicable to both foreign and Russian nationals, but particularly affecting the refugees.

South Africa, being home to a few legal asylum seekers, cannot be regarded as an extreme case where issues of asylum seekers' residence would arise, as opposed to matters of initial recognition. However, the state has a tendency to impose additional residential constraints on all foreigners which will inevitably result in restrictions upon the refugee population. It is possible to derive three main principles from the presentation of the thesis in relation to the protection of asylum seekers or refugees. First of all, there is too little scope for the governments apart from achieving the balancing and fair exercise of the determination process and actually attaining considerable recognition rates in relation to asylum claimants. At least the cost of the pursuit of constraints may be too high for the receiving society, due to the consequent illegality of potential asylum claimants. Secondly, the states should be careful in

[77] 3.6.1.

introducing residential constraints and practising very stringent internal enforcement towards asylum claimants, especially like the ones in operation in Russia. Thirdly, as was argued above, the states may chose to heavily regulate or constrain the asylum claimants' position, but in so doing there are two considerations of paramount importance.

Firstly, the states have to be realistic about their support level and not over-restrict asylum claimants in cases of low asylum support. Secondly, even if the states are capable of providing decent support, the degree of illegalisation in respect of limiting the asylum support schemes may be substantial, and finally render asylum seekers illegalised, as was demonstrated in the case of Britain. In this regard, it is essential for the states to waive practices of singling out some asylum-seeking categories for inferior treatment, thereby fostering their disadvantaged status.

5.11 Conclusion

The essence of the central hypothesis arguing that policy responses to irregular migration are shaped not only by genuine policy needs, but also by excessive constraints, was demonstrated throughout the thesis, primarily by all country-specific materials. A related issue in this regard was represented by the very fact that current restrictive policies do not constitute effective immigration control, since none of the states can meaningfully reverse the trends connected with the irregularity of aliens. Both notions have been well demonstrated in each jurisdiction of Britain, Russia and South Africa, and could be characteristic of tendencies in several fundamental spheres, embraced by the conditions within both admission and internal control.

Centrally, as was revealed in the theoretical chapter, the economic effects of migration differ from social issues arising in this regard. Irregular migration responses should encompass the notion of distinguishing between both types of consequences, which means that deployment of immigration control should effectively embrace all mechanisms available within the structure of internal control. Additionally, within immigration law, clandestine entry and other grave (multiple) offences should receive priority in immigration policy response designed to curb the irregular migration process. Nevertheless, liberal and humanitarian considerations should also be invoked to render immigration control humane and, simultaneously, effective. The entire comparative analysis of Chapter 5 deals with every policy issue in detail, and it is

possible to propose the following summary in respect of the most essential policy elements.

First of all, it has already become a commonplace idea relevant for every jurisdiction that to extend temporary migration channels, and to potentially regularise the position of many migrants, is the central element in success of any immigration policy, and would therefore render it indispensable for the structural effectiveness of the entire process of immigration law.

As regards other features of immigration control, the overall message to policy-makers is not to over-penalise immigrants and, if possible, to modernise the entire system of immigration law, especially those aspects pertaining to penalties and conditions of residence. The need for such a solution was proven through a demonstration of the problems arising in this respect in every jurisdiction under scrutiny. The model proposed in the concluding analysis also signifies the fragile correlation between regular and irregular types of migration. Immigration law and policy should enhance manageable migration, rather than its overtly restrictive forms.

Secondly, as far as the general legal framework of illegality is concerned, there are probably uniform instruments and details engaged in immigration affairs, such as illegal or clandestine entry criteria, general residence, internal control or social welfare. The two possible recommendations in this regard would be to improve and codify the structure of immigration legislation, and simultaneously to provide legally detailed and comprehensive definitions for every issue in question and also for the general meaning of irregularity in this regard. In the process of writing this thesis, it struck me how elaborate, casuistic and intricate elements (groups of norms) of the law are shaping the position of aliens and, correspondingly, the main immigration enforcement mechanisms. Clarity and relative logical simplicity, primarily in relation to immigrants themselves, are indispensable for healthy and transparent circumstances to prevail around immigration affairs, and are the major preconditions for the observance of human rights and humanitarian standards.

Thirdly, this thesis has demonstrated in detail the weaknesses of a system which actually over-restricts and over-penalises foreigners subject to immigration control. Indeed, the thesis, particularly in this chapter, has elaborated on the issues of immigration penalty reform so as to prioritise the prosecution of the gravest offences, while offering relative relief in respect of the administrative consequences for minor

offences. This will also demand reconsidering the nature of offences as well, and indeed link them to the financial responsibility of individual immigrants.

Fourthly, as far as the residential and internal controls are concerned, strengthening of these forms will eventually constitute an unavoidable reality for immigration law universally. None of the systems, including those in Britain or South Africa, will be able to emphasise admission policy elements against considerations of internal control just to avoid certain control measures, such as the registration of aliens linked either to their places of residence or simply to their localities. The sophistication and intensification of internal control mechanisms is the most likely trend universally, as becomes evident from multiple policy statements. This tendency towards a tightening of internal controls is infrequently caused by the adverse social impact of (irregular) migration and, in fact, by the need to monitor immigration movements, but it is utterly important for policy-makers to ground such controls on humanitarian notions in relation to the position of irregular migrants. Indeed, in the residence control agenda some negative lessons of Russian residential control are to be learnt in constructing the legal response to irregular migration.

Fifthly, in actually looking at the position of irregular migrants in the receiving states, i.e. how they operate in the environment of legal constraints on their status, it is important to argue about the level of exploitation and sheer penalisation, or at best uncertainty, in regard to their situation. Immigrant workers are penalised regardless of their character or contributions to national economies, be it in Britain, Russia or South Africa. As such, their welfare position is impermissibly fragile. From this point of view it is of utmost importance for these particular states and many others to ratify the UN Migrant Workers Convention to improve the lot of irregular migrants. This measure would assist in improving, not only the humanitarian side of the irregular migration problem, but also its enforcement and prevention of many negative consequences. In this regard, some form of basic or even limited legal status should be provided to illegal immigrants and, as was argued above, this principle has to be applied to the fundamental areas of labour relations or social welfare.

In assessing the substantive socio-economic position of illegal immigrants, labour relations between indigenous employers and irregular migrants should be prioritised for building a healthier immigration system. On the one hand, employer sanctions reflect a potentially functional mechanism, although having its limits in terms of implementation and success. On the other hand, even with the general penalisation of

migrants' involvement in labour relations, the functionality of restrictions should not be seriously relied on, or linked to a complete lack of access to judicial or administrative recourse as far as the claims of immigrants in the sphere of labour rights are concerned. Recognition of employment contracts, at least in terms of the immigrants' ability to claim remuneration or compensation from employers or other institutions, has to become inherent in any legal system. Liberal principles should be applicable to the area of social welfare as well, since a complete lack of rights would constitute impaired and even inhuman modes of deterrence of (irregular) migrants from the receiving society.

The final overall conclusion of this thesis may be clearly derived from the comparative and international legal agenda. Irregular migration is a complex social reality embedded in many social factors, but states should determine their approaches to the matter more flexibly and actually build up management of, rather than adamant opposition to, any migratory movements. So, what should be the overall system of immigration control in relation to all the main instruments of immigration law? In this regard, as was argued above, facilitation of liberal economic migration is indispensable, so long as there are mechanisms of ensuring its temporary character, such as special bonds or forced savings. Legalisation of as many irregular migrants as possible would be another requirement. At the same time, the current thesis by no means argues against the internal control or enforcement of immigration law, inasmuch as they are necessary to ensure the monitoring of population movements and to track grave immigration offenders, particularly traffickers and smugglers. Indeed, no society can afford to tolerate 'Bacchanalia' and permissiveness in relation to certain forms of immigrants' behaviour, including multiple and wilful immigration offences and/or fraud, infrequently enshrined in, and combined with, clandestine entry or overstaying. Nevertheless, on the way to improved immigration control, policies have to respond to the criteria of a balancing exercise, encompassing possible humanitarian concessions and restraint regarding the excessive over-penalisation of (irregular) migrants.

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