Fixing, Adjusting, Regulating, Protecting Human Rights – The Shifting Uses of Regularisations in the European Union

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Abstract
Almost all Member States in the European Union currently make use, or in the past have made use of some form of regularisation of irregular immigrants, although to greatly varying degrees, in different ways and as a rule only reluctantly. A distinct feature of recent regularisations has been the shift towards a humanitarian justification of regularisation measures. In this context, regularisation has become reframed as an issue of the protection of irregular migrants’ human rights. As a result, regularisation has to some extent also been turned from a political tool in managing migration into an issue of international, European and national human rights law. While a human rights framework indeed offers a powerful rationale and at times compelling reasons why states ought to afford a legal status to irregular migrants, I argue that a human rights based approach must always be complemented by pragmatic considerations, as a human rights based justification of regularisation alone will be insufficient to find adequate responses to the changing presence of irregular migrants in the EU, not all of which can invoke human rights based claims to residence.

Keywords
irregular migration; regularisation; human rights; European Union; ECHR

1. Introduction

Almost all Member States in the European Union currently, or in the past, have made use of some form of regularisation of irregular immigrants, although to greatly varying degrees, in different ways and as a rule only reluctantly. Paradoxically, despite the increasing opposition of governments to regularisation, the use of regularisation as a policy tool has actually increased since the 1990s, and in particular in the late 1990s, both in terms of irregular migrants involved and in

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1 I follow the definition of regularisation as proposed by the REGINE study, namely as ‘any state procedure by which third country nationals who are illegally residing, or who are otherwise in breach of national immigration rules, in their current country of residence are granted a legal status.’ See Baldwin-Edwards, M. and A. Kraler (2009). ‘Study on practices in the area of regularisation of illegally staying third-country nationals in the Member States of the EU’, in: M. Baldwin-Edwards and A. Kraler (eds.), REGINE. Regularisations in Europe, Amsterdam: Pallas Publications, pp. 3–171, p. 9.
terms of the number of measures adopted. While forms and contexts of irregular migration differ greatly across the European Union, a common reason for regularisations is the mismatch between migration policies and states’ capacities to enforce these – be it for administrative, financial, social or political reasons. As a result, most states tacitly acknowledge the need for some limited form of regularisation, albeit rarely in public and seldom explicitly referring to regularisation of irregular immigrants. At the same time, regularisation remains a highly controversial topic and is likely to remain so in the future.

While EU policies on legal migration have been, although to varying degrees, informed by an at least in principle – liberal agenda, policies on irregular migration are heavily shaped by a security driven agenda focused on prevention and law enforcement. On the European level, a securitized view of irregular migration is increasingly also shared by countries with traditionally more liberal – or perhaps more accurately termed ‘laissez-faire’ approaches towards irregular migration such as Italy or Spain. In the context of the increasing consensus at the European level that irregular migration is indeed something to be ‘fought’, primarily by means of border management and return policies rather than addressed by mix of measures also including alternative solutions, there is an increasing opposition against regularisation on principled grounds.

Opponents of regularisations arguing from such a principled position claim that regularisations reward law-bending and –breaking and thus effectively work to undermine the rule of law. In addition, regularisations are also argued to reward ‘queue-jumping’, thus not only discriminating against law-abiding migrants but effectively also undermining effective management of migration at large. Proponents of regularisations, on the other hand, increasingly draw on human rights based arguments to counter such views.

Indeed, a distinct feature of recent regularisations has been the shift towards a humanitarian justification of regularisation measures starting in the 1990s. In this context, regularisation has become reframed as an issue of the protection of irregular migrants’ human rights (or more recently in EU terminology, of fundamental rights) and more precisely, as an issue of protection. As a result, regularisation has to some extent also been turned from a political tool in managing migration into an issue of international, European and national human rights law. While a human rights framework indeed offers a powerful rationale and at times compelling reasons why states ought to afford a legal status to individuals

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in order to protect their fundamental rights, I argue that the human rights frame has its own limitations. In particular, the humanitarian frame tends to portray beneficiaries of humanitarian regularisations as vulnerable and in need of protection, while prioritising the most vulnerable, to some extent mirroring the imagination of refugees as helpless victims. As a corollary, the humanitarian frame has little to offer for situations where individuals cannot be reasonable framed as utterly vulnerable or in risk of becoming so if a right to remain is not granted. What is more, the humanitarian frame fails to acknowledge regularisation as a policy tool in the management of migration that may be used for pragmatic reasons even if there is no obvious humanitarian rationale to do so.

It appears, however, that a human rights perspective is actually complementary to a pragmatic view of regularisation. A humanitarian perspective extends a protection logic, originally developed for refugees in the meaning of the Geneva convention and more recently extended to conflict refugees or other potential victims of serious harm in their country of origin (subsidiary and temporary protection) as well as victims of trafficking to otherwise vulnerable irregular migrants with humanitarian needs. A human rights based justification of regularisation thus argues that there are superior goods – the protection of the fundamental rights of individuals – that justify the extraordinary award of a legal status. But it does not rule out that there are other – more practical – reasons why a legal status should be granted.

The aim of this paper is twofold. First, the paper reviews recent shifts in regularisation policies of European Union Member States, including the Europeanization of regularisation policies – or at least debates on regularisation policy. Secondly, the paper critically reviews the humanitarian logic increasingly underpinning regularisation practices and sets out alternative justifications why regularisations should remain part of the toolbox in managing migration for pragmatic reasons.

2. The Politics of Regularisation on the European Level

Like almost all admission policy, regularisation policy is in principle still an exclusively national prerogative and has not – as yet – been communitarised on the European Union level. Despite this, regularisation has increasingly become a

52 Until recently, family reunification and asylum policy – both human rights based admission channels with a strong rooting in international human rights law – were the only forms of admission regulated on the European level. With the Researchers Directive (Directive 2005/71/EC) and the Blue Card Directive (Directive 2009/50/EC), however, the role of the European Union has been expanded to include limited aspects of labour migration. Nevertheless, on the whole the role of the European Union will remain limited, even if additional instruments regarding labour migration (e.g. the planned seasonal workers directive) will be adopted.
53 See Baldwin-Edwards and Kraler, supra note 1, in particular chapter 7.
European issue. This has occurred not just within the European Union framework, but importantly also in the framework of the Council of Europe and more precisely the European Convention of Human Rights (ECHR), whose impact on both European Union policies and policies of individual Member States can be expected to grow post-Lisbon. Both frameworks have facilitated the shift towards a humanitarian framing of regularisation.

In the European Union context, the Europeanization of the issue of regularisation is driven both from ‘below’ by certain EU Member States and top-down by the European Commission. Thus, certain Northern European Union Member States have repeatedly criticised Southern European Member States for their extensive regularisation programmes in the past, generally out of concern of an impact of regularisations in individual EU Member States on their own countries. Conversely, the Commission has taken up the issue of regularisation on various occasions since the very beginning of a common migration policy following the Amsterdam Treaty and the adoption of the Tampere agenda. Thus, in 1999 the European Commission commissioned a first comparative European study on regularisation practices in selected EU Member State and various subsequent communications by the Commission addressed regularisation, although very cautiously. Following criticism of the Spanish regularisation of 2005 by some Member States, the policy plan on ‘priorities in the fight against illegal immigration’ adopted in 2006\(^8\) put regularisation once more on the agenda and planned for a study on regularisation practices to be conducted, which was eventually published in early 2009. In the context of the French sponsored European Pact on Immigration and Asylum\(^9\) regularisation also featured prominently, although the final version of the text adopted did not have much concrete to say. Finally, the Return Directive explicitly states Member States’ principle right to regularise an unlawfully staying persons.\(^10\)

Not unsurprisingly Member States are extremely reluctant to communitarise any aspect of regularisation policy. In addition, the issue remains highly contested, reflected, amongst others, in the vagueness of the statement on regularisation in the pact or the failure of the Commission to insert a few minor suggestions it took up from the REGINE study into the Stockholm programme.\(^11\) Apart from

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the fundamental question of whether regularisation should remain a nationally decided policy or not, the perhaps even more important issue is in which direction such a policy should go: whether there should be limits to regularisation set by the EU (as initially proposed by the European Pact) or by contrast, whether there should be rules that oblige or at least strongly encourage Member States to use regularisation in certain cases (as proposed by the REGINE study).

One of the problem areas identified by the REGINE study is the category of persons who cannot or have *de facto* not been removed, despite a return decision issued by a Member States. In their regard, the main question is whether states can in fact legitimately deny residence rights and rights that are derived from these irrespective of the feasibility of return. The proposal of the REGINE study – a graded mechanism of ‘legal integration’ over time, which would establish a maximum deadline until which a return decision can be effected (5 years after the return decision according to the REGINE study)\(^\text{12}\) – however, is not likely to find any support by Member States in the current context, as it would significantly limit Member States’ discretionary powers. Not unsurprisingly therefore, even the more limited recommendation which the Commission took up from the REGINE study – to study practices regarding non-removable migrants\(^\text{13}\) with a view to establishing common basic standards how they should be dealt with\(^\text{14}\) – was dropped from the final version of the Stockholm programme.\(^\text{15}\) Indeed, Member States seem to prefer leaving this question outside public scrutiny and not subject to clearly defined rules, let alone rules set on the European level. At the same time, non-removable persons have clearly become one of the main target groups of regularisation measures and programmes in a number of Northern European states, as a rule using mainly humanitarian criteria, while effective duration of residence has always been and will remain an important criterion in cases – despite the rhetorical reluctance of EU MS to accept duration of residence as a decisive criterion for regularisation.

2.1. Patterns of Regularisation in the European Union

The question of rights has increasingly become important in terms of how regularisation is framed and implemented across Europe. While the majority of irregular migrants benefiting from regularisation are still regularised on the basis of

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\(^{13}\) The REGINE study itself used the term ‘non-deportable’ migrants to denote this particular category of irregular migrants. The term non-removable or non-removed migrants (or ‘non-removables) has become more common since and is, for example used by the European Agency for Fundamental Rights (FRA) in Vienna.

\(^{14}\) See *supra* note 11.

a de facto situation and employment, an increasing number of countries have incorporated humanitarian and human rights concerns in their legal frameworks on residence and stay and aliens and have regularised irregular migrants, notably persons who cannot be removed on these grounds. Jurisprudence based on article 8 (right to private and family life) of the European Convention of Human Rights (ECHR) by the European Court of Human Rights in Strasbourg as well as the interpretation of article 8 by national courts (and national policy makers) have been important drivers of this shift towards a human rights logic in the regularisation of irregular migrants. More recently, case law by the Court of Justice of the European Union (CJEU) involving third country nationals with family ties to European Union citizens has established Freedom of movement legislation as an important source of legality for some migrants in an irregular situation, similarly based on human rights considerations, notably the right to private and family life as well as children’s rights.

According to the main recent comparative study of regularisation practices in the EU, the REGINE study all but seven EU Member States had some form of permanent regularisation mechanism through which irregular migrants could obtain a legal status in 2008, while two more only had some form of ‘toleration status’ providing limited residence and other rights to persons who could not be removed. While 35 out of a total of 68 regularisation programmes conducted between 1973 and 2008 targeted undocumented migrants in general or as workers, involving some 5.3 million applicants or more than 87% of applicants for regularisation in the period from 1973 to 2008, a growing number of regularisation programmes, have targeted family cases, persons involved in the asylum procedure (‘backlog clearing programmes’) and rejected asylum seekers, war refugees or other humanitarian cases, notably after 2000. Given that Southern EU Member States whose regularisation programmes have so far targeted largely undocumented migrants or migrant workers in general account for more than 85% of all applications for regularisation programmes and thus for the bulk of ‘employment based’ programmes, programmes following a human rights based logic are largely a Northern European phenomenon. Nevertheless, also Southern

16) See Kraler, supra note 2.
17) For example, the judgment of the Court in the case Sisojeva et al. v Latvia, ECtHR No. 60654/00, 16.6.2005 was interpreted by several German administrative courts as an obligation to regularise irregular migrants in what they interpreted as similar cases. See Thym, D. (2008). ‘Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?’, International and Comparative Law Quarterly 57(1), pp. 87–112, in particular pp. 105 ff.
18) Baldwin-Edwards and Kraler, supra note 1. The quantitative data are taken from a paper based on the REGINE study, for which more extensive data was collected going back to the 1970s. See Kraler, supra note 2, pp. 24 ff. See also EMN (2010) The different national practices concerning granting of non-EU harmonised protection statuses, available online at http://emn.intrasoft-intl.com/Downloads/download.do; jsessionid=31DAC9729E4B00A1D2698D5A4BE7D1F3?fileID=1187. This study covers a broader array of statuses granted under national law, including non-harmonised refugee statuses, toleration and statuses equivalent to statuses defined under the EU acquis, but in general shows quite similar results.
European EU Member States have introduced humanitarian regularisation mechanisms in recent years and as for example Greece also ran programmes dealing with specific groups of vulnerable persons. It appears therefore that the shift towards human rights based regularisations is indeed a pan European trend. What is particularly remarkable is that the number of regularisation programmes as well as the number of persons regularised has actually progressively increased over the past three decades, while regularisation schemes have also geographically spread to ever more EU countries. This suggests that regularisation has actually become part and parcel of the contemporary toolbox of migration management and a way to adjust and fix unwanted outcomes of overly restrictive legal frameworks for migration.

3. The Shifting Framing of Regularisation

As argued above, a distinct trend in the past one and a half decades or so has been the shift towards a humanitarian (re-)framing of regularisation. This said, a human rights perspective has never been entirely absent in debates on irregular migration and regularisation, notably on the international level. Indeed, different policy initiatives on irregular migration emanating from international bodies such as resolutions by the UN General Assembly adopted in the early 1970s, ILO studies conducted in the late 1970s and a resolution of the parliamentary assembly of the Council of Europe (CoE) of 1984 all were strongly embedded in a human rights framework. In a similar vein, an early (abortive) proposal by the European Commission on a ‘Council directive on the harmonization of laws in the Member States to combat illegal migration and illegal employment’ of November 1976 contained strong references to human rights and justified the need to harmonise Member States’ legislation in terms of combating abusive employment relationships, protecting the rights of workers and moving forward the general social aims of the then European Community. Nevertheless, in framing irregular migration and regularisation as a human rights issues, these early policy initiatives focused on irregular migrants as workers. As such, they emphasized irregular migrants as

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24) European Commission (1976.) Proposal for a council directive to on the harmonization of laws in the Member States to combat illegal migration and illegal employment, COM(76) 331 final of 3 November 1976, preamble.
victims of labour exploitation and inadequate legal frameworks protecting migrant workers rather than as individuals in need of protection of core fundamental social and civic rights and individual’s physical and mental integrity.

The more recent humanitarian discourse about regularisation by contrast de-emphasizes regularisation as a means to protect labour rights – indeed humanitarian regularisations tend to be strictly distinguished from employment-based regularisations, which are increasingly rejected even in countries with a recent track record of employment regularisations. Instead, the focus of recent debates on and practices in regard to regularisation is on non-economic rights, notably the right to family and private life (article 8, ECHR) or individuals’ protection from ‘torture or inhumane or degrading treatment or punishment’ (article 3, ECHR) or related provisions under national or European law. In addition, humanitarian regularisations cover a variety of other specific humanitarian situations, including protracted limbo situations involving migrants who cannot be removed or persons who are seriously ill.25

Measures addressing such situations are often also discursively distinguished from regularisation through terms like ‘humanitarian stay’,26 ‘complementary protection’27 or ‘non-harmonised protection statuses’,28 implicitly suggesting that regularisation on humanitarian grounds are of an altogether different kind than regularisations based on employment or residence, or a combination of these – and that they perhaps do not constitute regularisation at all.29 Indeed, much of the disputes between Northern and Southern European Union Member States regarding the permissibility of regularisation that followed in particular after the 2005 Spanish regularisation programme were very much rooted in Northern European governments’ self-perception of not undertaking any kind of regularisation as well as the (misconceived) association of regularisation with recurrent, and allegedly indiscriminate large-scale regularisation programmes in Southern EU Member States perceived as blunt amnesties by Northern European states.

25) See EMN, supra note 18.
26) An expression used in several EU Member States, including Austria and Germany.
27) The term ‘complementary protection’ has been used by ECRE to refer to ‘any status, other than Convention refugee status, which is afforded to persons who may/can not [sic] be returned to their country of origin.’ See ECRE (2009) Complementary Protection in Europe, available online at http://www.ecre.org/files/ECRE_Complementary_Protection_July_2009.pdf.
28) This is the terminology used in a recent study by the European Migration Network. See EMN supra note 18.
29) For example, in response to a questionnaire sent to EU Member States in the course of the REGINE study the Austrian Ministry of the Interior stated that ‘regularisation for the purpose of legalizing illegally staying third country nationals [was] unknown in the Austrian legal order’. After laying out several reasons why regulation would be contrary to the Austrian legal order and the constitution, the Ministry went on to explain that in case of grants of residence permits for humanitarian reasons ‘legalisation was merely a possible side-effect’, thus distinguishing this form of status grant from regularisation proper. See MoI Austria, Response to the REGINE MS Questionnaire, 13 March 2008. Similarly, in its response to the REGINE questionnaire the German government distinguished the mechanisms and programmes for tolerated persons in Germany from regularisation, arguing that ‘tolerated persons were not paperless’.
As I will argue in the below, however, any serious consideration of regularisation needs to be anchored in a systematic understanding of regularisation as a transition from irregularity to regularity. While there are indeed important differences in different pathways from an irregular to a regular status, notably in regard the extent to which states ought to grant a legal status on grounds of national, European or international law, to what extent a particular pathway to a regular legal status forms part of the general framework for legal entry and residence or to what extent regularisation is an intentional outcome or a mere accidental effect of certain policies, only a systematic appraisal of status transitions renders visible the various shifts in regularisation practices that have occurred over the past three or four decades as well as the enormous diversity of status transitions. This diversity of status transition in turn shows that the binary logic dominating both debates on irregular migration as such and possibly policy responses to it (‘expel or regularise’) is inherently limited in helping to understand the presence of irregular migrants as well as identifying adequate policy responses.

In order to understand why regularisations have increased since the turn of the millennium and why there is an increasing shift to humanitarian regularisations the next section traces major shifts in the meaning of irregularity over time.

4. Changing Patterns of Migration Control, the Shifting Meaning of Irregularity and Regularisation

Regularisation directly relates to irregular migration. Irregular migration in turn cannot be understood outside the context of state regulation of migration. Indeed, it is state regulations that give illegal migration its specific meaning and which creates the category illegal migrant as a category of exclusion. To rephrase an observation Christian Joppke made in relation to migration in general, only in a world neatly divided into nation-states which define explicit rules on legal (and hence illegal) entry and stay of immigrants, is there ‘illegal migration.’ In historical perspective, the fact that states define such rules is a relatively recent phenomenon. Thus, ‘illegality’ is not a static given – not only has something like ‘illegal migration’ and ‘illegal migrants’ as objects of a set of distinct state policies emerged only in the latter half of the 19th century, in tandem with the birth of modern migration policies, but the understanding of what constituted ‘illegal migration’, ‘illegal residence’, ‘illegal work’ or ‘illegal border crossing’ has been

subject to great variation, both historically and geographically ever since.33 While this may appear to be a moot point, understanding the shifting modes of regulation of migration and hence the shifting meaning of irregularity are key to understanding why states regularise, how they do it and how regularisation is justified. Thus, during much of the guest worker period, spontaneous inflows of migrants, although at times considered irregular, did not prompt major regularisation programmes. Rather, most migrants entering as tourists or illegally managed to be regularized ex post by relevant authorities, which in some countries, most famously France, was widely seen as the regular way of doing things.34

It is no surprise then that the first major regularisation programmes were conducted only around or after the recruitment stop, although numbers remained fairly small.35 However, even after the recruitment stop, loopholes that allowed migrants to regularise their stay after entry remained in many Northern European States. At the same time, freedom of movement within the European Communities, initially largely confined to workers, had already brought about a significant shift of the meaning of irregularity, as gainfully employed migrants from Southern EU Member States increasingly enjoyed protection from expulsion and hence were increasingly less at risk to become irregular. However, the scope of freedom of movement rights of citizens of the European Communities remained contested well into the 1990s. After the recruitment stop, irregular migration increasingly became an issue, although it remained relatively marginal throughout the 1970s. Various developments in the 1980s, however, changed this, notably the rise of asylum related migration.

Indeed, in the course of the late 1970s and 1980s asylum applications in Western Europe had considerably increased, from some 20,000 in 1976 to 158,000 in 1980 and 200,000 in 1986, with almost two thirds of asylum applications received by only two Member States – France and Germany.36 In this context, immigration – through asylum – became increasingly politicised across Europe and asylum presented as an alternative (and unwanted) route to immigration.37

With the collapse of communism, the number of asylum applications in EC and

35 In the European context, the largest post-recruitment stop regularisation was carried out in France in 1973 involving some 40,000 persons. Belgium regularised close to 8,000 persons between 1973 and 1975. A much more limited number of persons were regularised by the UK in the course of the 1970s. See Kraler, supra note 2, op. cit., pp. 37 ff.
EFTA countries soared to 314,000 in 1989 and 417,000 in 1990.\textsuperscript{38} From about the late 1980s onwards, asylum became increasingly been treated as an issue of irregular migration and several new principles – the safe country of and origin safe third country principles, the concept of manifestly unfounded cases and the concept of first country of asylum (laid down in the Dublin rules) implemented subsequently in asylum laws of EU Member States and other European countries were primarily measures to combat what was perceived as irregular migration.

In a sense, there has not only been a ‘securitization of migration’, as a result of which migration and asylum policy were subsumed under overarching security concerns and more diffuse security fears, but there has also been a closely related process of ‘irregularisation’ of migration. This not only contributed to the rise of irregular immigration to European Union countries since the mid-1980, but also consisted of a re-framing of certain types of migration and above all asylum related migration as ‘irregular’ migration. Yet the ‘asylum crisis’ also led to the emergence of new forms of protection and mechanisms to deal with migrants who might not be eligible for a refugee status under the Geneva convention but who nevertheless were in need of protection. Thus, war refugees fleeing from the disintegrating Yugoslavia were widely accommodated under different forms of largely ad-hoc-ish temporary protection schemes,\textsuperscript{39} while individuals from other countries who could not be returned for similar reasons were usually accommodated through similar mechanisms or, as in Germany, through a formal suspension of their stay called ‘Duldung’ (‘toleration status’). Subsequently, these practices became formalised on the European level in the form of temporary protection\textsuperscript{40} and subsidiary protection.\textsuperscript{41} While the EU temporary protection mechanism has so far never been activated and most other persons potentially facing serious harm in the event of a return to their home country or a country of transit\textsuperscript{42} are accommodated under subsidiary protection, a variety of EU Member States still use different forms of legal accommodation under national law – the ‘non-harmonised’ or ‘complementary’ protection statuses referred to in the above.

While the ‘irregularisation of migration’ arguably has been a major tenet of migration policy in the 1990s and 2000s, there has also been a contrasting trend of a ‘de-irregularisation’ through the enlargement of the European Union, the

\textsuperscript{38} ICMPD [International Centre for Migration Policy Development] (1994) The Key to Europe. A comparative analysis of entry and asylum policies in Europe, Stockholm: ICMPD.
\textsuperscript{40} Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.
\textsuperscript{41} Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.
\textsuperscript{42} Article 15, Council Directive 2004/83/EC.
related extension of freedom of movement rights to citizens of countries that used
to be major countries of origin of irregular migrants in the EU and their re-
definition as ‘mobile EU-citizens’, if at times unwanted. A second dimensions of
this ‘de-irregularisation’ and in actually preceding it is the considerably expansion
of freedom of movement rights of EU citizens to non-economically active per-
sons, notably family members, as a result of which EU as well as EEA citizens can
almost by definition no longer be in an irregular situation. This, however, at the
same time also has led to the deepening of the gap between nationals and EEA
citizens and their family members, on the one hand, and third country nationals
and their family members, on the other. Yet even the latter benefited from an
expansion of protection from expulsion on family and other grounds, while the
expansion of the right to family reunification has equally strengthened pathways
to a legal status on the basis of family ties, if highly contested ones.43 In sum, the
boundaries of legality have been subject to frequent shifts in recent decades.

5. The Meaning of Irregularity and Rights as a Source of Legality

As has become clear in the above, to a large extent, ‘illegal entry and stay’ is
defined by its opposite, it is what constitutes legal entry and stay.44 It is not sur-
prising then, that legal definitions of irregular entry and stay are tautological and
self-referential – and subject to change. At the European Union level, the Return
Directive provides such a definition of irregular entry and stay. Thus, the Return
Directive stipulates in article 3(2):

‘[I]llegal stay’ means the presence on the territory of a Member State, of a third-country national
who does not fulfill, or no longer fulfills the conditions of entry as set out in Article 5 of the Schen-
gen Borders Code [specifying conditions for legal entry, AK] or other conditions for entry, stay or
residence in that Member State.45

The cautious wording of the definition – the directive does not simply define
illegal stay as any stay not authorized, for example, but instead refers to condi-
tions of entry of stay – recognizes and well captures the legal complexity of the
notion of ‘illegal stay’. Indeed, a major reason for the complexity of the definition
of irregular migration stems from the heterogeneity of conditions tied to legal
residence. In addition, not all breaches of conditions of legal entry or residence
have the same weight and may turn a person into an unlawfully staying person.

44) See also Düvell, F. (2011). ‘Paths into irregularity: The legal and political construction of irregular
2008 on common standards and procedures in Member States for returning illegally staying third-
country nationals.
Finally, the weight of any breaches of entry or residence conditions may considerably differ for different categories of persons and depends very much on the precise situation of the individual, in other words whether the individual in question has superior claims to residence based on any rights he or she may have. Whether an individual is able to make such a claim can depend on his or her degree of ‘legal integration’ if the individual has been resident in the country of residence before no longer meeting the conditions of entry or stay, on family ties to a legal resident, on claims to international protection or on various other conditions available in a particular country that may become a source of legality.\footnote{See on conditions for regularisations Baldwin-Edwards and Kraler, \textit{supra} note 1, chapter 3. Claims to international protection obviously are dealt with under asylum legislation and are not subject to regularisations proper.} In addition to the legal complexity of irregularity inherent in the contemporary immigration law there is a considerable variation of administrative practice as a result of which individuals in seemingly very similar situations may find themselves classified as belonging to quite different legal status categories and as result may be able to obtain a legal status or not. While this itself is often a result of the margin of appreciation left to immigration officers or judges by immigration law, it often is simply also a result of varying and differential practices of law enforcement as a result of which there are uneven risks of detection and initiation of law enforcement procedures for different types of persons.

Irregularity thus defies a simple binary logic in the sense of having or not having an authorization to stay. From the perspective of individuals, employers and other actors involved in irregular migration, irregularity is therefore better conceptualised as a spectrum of compliance with immigration and other relevant laws circumscribing the conditions that have to be met to be regarded as legally staying.\footnote{Ruhs, M. and B. Anderson (2008). \textit{The origins and functions of illegality in migrant labour markets: An analysis of migrants, employers and the state in the UK}, Working Paper 06–301, Oxford: Centre on Migration, Policy and Society (COMPAS).} From the perspective of the state, irregularity in turn is not something self-evident and easily ‘legible’\footnote{See on the notion of legibility Scott, J. (1998). \textit{Seeing Like a State. How Certain Schemes to Improve the Human Condition Have Failed}, New Haven: Yale University Press.} but a condition that has to be established through various legal and administrative procedures. In the context of an increasingly complex legal framework governing entry and residence of non-nationals this has arguably been one of the main drivers for the judicialisation of immigration control. In respect to regularisation I argue that the judicialisation of immigration control has contributed to the shift from what can be termed ‘managerial’ regularisations focused on undocumented migrant workers to regularisations based on a complex range of humanitarian considerations targeting specific individuals in a vulnerable situation.

In addition, however, because individuals in an irregular situation may have a claim to a legal status on the basis the regular framework for legal immigration,
their claims may therefore not necessarily be dealt with under specific regularisation mechanisms or programmes but rather under standard procedures for admission and residence of third-country nationals—or indeed under asylum procedures, if they have a claim to international protection. The scope of regularisation thus very much depends on other routes to legality available in a particular country and any changes thereof over time. Regularisation in a narrow sense—‘any procedures by which third-country nationals who are illegally residing, or who are otherwise in breach of national immigration rules (. . .) are granted a legal status’—can thus be defined as an exceptional and residual measure if no other standard provisions of national migration law through which irregular migrants can claim legal residence can be invoked. Not only is the meaning of regularisation over time thus subject to considerable change as the overall legal framework for admission and residence changes, but also the dividing line between regularisation and other mechanisms through which a legal status can be obtained is inherently blurred. In a sense, the distinction between regularisation and other channels for admission is an artificial distinction and very much in the eye of the beholder, in particular as ongoing, permanently available regularisation mechanisms is concerned.

5.1. European Union Legislation and the European Convention of Human Rights as Sources for Legality

The expansion of rights for long-term residents and the consolidation of the right to family reunification, both under national law and, more recently, under European law is a case in point, both in regard to the shifting boundaries of legality and in regard to regular provisions of immigration law becoming a source of legality for irregular migrants.

Thus, long-term residents, once they have a secure residence status, have to be treated almost like EU nationals and can lose their residence rights only on exceptional grounds. Similarly, family members of citizens or third country nationals may have strong claims for residence rights, even if conditions are not met, on grounds of article 8 ECHR, while family members of EEA nationals, as the Court of Justice of the European Union (CJEU) has recently clarified, do have settlement rights and may not be considered unlawful staying, even if they have entered their current country of residence in an irregular manner and if the family tie has been established only after entry. A legal status thus can only be denied if there are major security or public order grounds.

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The potentially far-reaching implications of the citizens’ directive have been shown also in the recent Zambrano case.\(^{51}\) In what is one of the most controversial recent CJEU judgments the court ruled that parents of an undocumented child who had been granted nationality in Belgium under a provision of the Belgium nationality law allowing to naturalise undocumented children if they would otherwise be stateless had a right to residence and immediate access to employment under the Citizens’ Directive, yet again enhancing freedom of movement legislation as a source of legality for third country nationals. While the broader implications of this judgment still have to be seen, it nevertheless clearly shows that the boundary-making between legality and irregularity is increasingly subject to European policy making and the power of states to determine rules of admission (and exclusion) are increasingly circumscribed – not only by national laws and national courts, but by European legislation and its evolving interpretation by the CJEU.

At the same time, the European Union context is not the only relevant supra-national legal context for regularisation, but is to a great extent influenced by the European Convention of Human Rights (ECHR) and its evolving interpretation by the European Court of Human Rights (ECtHR) as well as national courts. Indeed, the safeguards foreseen by the Citizens Directive in regard to termination of residence and removal European Union law generally closely follows the interpretation of article 8 ECHR by the ECtHR and relevant case law. Already in early case law of the 1980s, the ECtHR has established the right of family members to live together as a fundamental dimension of the right to respect for family and private life, although this right is by no means absolute and thus not necessarily overrides states’ sovereign right to allow or deny entry and residence to aliens.\(^{52}\) In considering claims to a residence status and/or protection from expulsion, states need to weigh in each case public interests against the personal interests of migrants. In the Boultif case, the ECtHR has developed a set of criteria to be used to assess what constitutes a fair balance between the two,\(^{53}\) which almost literally have been taken up by the European Commissions in its recent guidelines on the transposition and application of the Citizens Directive.\(^{54}\)

As has recently been shown by Betty de Hart, however, it is primarily ‘insiders’, i.e. foreigners who had been legally resident at one time but who lost their right to stay subsequently whom the court has tended to protect from expulsion or

\(^{51}\) See CJEU, Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEM) of 8 March 2011.

\(^{52}\) ECtHR, Abdulaziz, Caballes and Balkandali v. the United Kingdom, No. 9214/80; No. 9473/81; and No. 9474/81, 28.5.1985, para. 62, second indent.

\(^{53}\) ECtHR, Boultif v. Switzerland, No. 54273/00, 2 August 2001, para. 48.

award a right to residence. 55 In three recent judgments, 56 however, the ECtHR has extended the protective reach of Article 8, in particular by expanding the notion of ‘private life to cover the ‘network of personal, social and economic relations that make up the private life of every human being’. 57 In the last of these cases – Rodrigues Da Silva & Hoogkamer v. the Netherlands 58 – the Court effectively granted a right to stay to an immigrant in the Netherlands who never had an authorisation to stay. While the circumstances of the case leading to the judgement are quite specific, the argumentation of the court clearly has broader ramifications. In particular, and departing from previous jurisdiction the Court clarified that irregular entry or stay is only one factor to be taken into account and that, particularly in case of long de facto residence, the weighing of different factors may establish a right to residence despite irregular entry or stay. The possible broader implications of this case notwithstanding it is safe to say that the number of cases in which states ought to grant a legal status on grounds of the European Convention of Human Rights is likely to remain limited.

Nevertheless, the discussion in the above clearly shows that supranational sources of legality anchored in a human rights framework have become considerably more important in recent years, notably as expulsion cases (mostly dealt with under the ECHR) and third-country national family members of EU citizens are concerned. While the role of national courts’ own interpretation of the ECHR as well as their interpretation of jurisprudence emanating from the ECtHR have already been pointed at, relevant articles of the ECHR – notably article 3 and article 8 – have also shaped national policy making and informed the design of regularisation mechanisms. Thus, according to a recent EMN study 59 five EU Member States have what the study frames as ‘non-harmonised protection statuses’ for family cases explicitly referring to article 8 ECHR (AT, DE, GR, SK and SE), while Belgium explicitly justifies its practices to offer regularisation to persons who are seriously ill with a reference to article 3, ECHR. 60 Direct references to the ECHR incorporated in the legislation or in commentaries to legislative proposals is only the most obvious reflection of the impact of supranational human rights law on national policy making in regard to regularisation, but it is safe to conclude that also in other countries considering family related reasons for regularising or ‘tolerating’ irregular migrants or considering the health status of individuals policy makers will have been apprehensive to the relevant

59) EMN, supra note 18, p. 46.
60) Ibid., footnote 101 (p. 43).
international and European human rights framework, even if not explicitly referring to it.

While the CJEU has so far been most active in cases on the basis of the Citizens Directive, the evolving legal framework for third country nationals too has a potential to become more relevant in cases involving migrants in an irregular situation, although this remains to be seen. In any case, the incorporation of the fundamental rights charter into the EU acquis with the Lisbon Treaty and the pending accession of the European Union to the ECHR, also made possible by the Lisbon Treaty is likely to have an impact in the medium and long run and in particular can be expected to increase the role of human rights considerations in regard to regularisation.

6. The Limits of the Humanitarian Logic

As put forward in the introduction to this paper, a human rights based justification for regularisation offers a powerful, but at the same time inherently limited rationale for regularisation.

A human rights based framing of regularisation is limited in at least three respects. First, it reinforces the dichotomy between the ‘vulnerable’ on the one hand and the ‘deserving’ on the other. Arguably, by various authors, the shift towards managed migration across Europe has entailed a much more pronounced distinction between the ‘wanted’ and the ‘unwanted’ – or in Nicolas Sarkozy’s words between ‘migration choisie’ and ‘migration subie’.61 The ‘wanted’ – because they have the characteristics needed in flexible, highly competitive labour markets – focused on the human capital of individual market participants are those who are seen as deserving admission which is increasingly phrased as a privilege only the most deserving should benefit from. Indeed as Catherine Dauvergne has remarked, the ‘criteria that immigration laws enshrine read as a code of national values, determining who some “we” group will accept as potential member’.62

The ‘unwanted’ – family members, the low skilled, and asylum seekers – by contrast need to show that they meet increasingly stringent admission criteria to gain entry and to show that they too ‘deserve’ admission. The admission of those in need of international protection then is an exception, requiring those seeking asylum to show that they are vulnerable and indeed in need of protection. A human rights based rationale for regularisation in a sense extends the logic of


protection to irregular migrants claiming residence in order to protect their fundamental rights. As such, it also extends the logic of vulnerability to irregular migrants. While certain individuals may indeed benefit from regularisation because they are seen as vulnerable in practice regularisation practices are a lot messier than the already complex procedures of status determination under the asylum framework. Paradoxically, balancing individuals’ claims to regularisation on human rights grounds and their individual vulnerability with contrasting interests of the state, and the ensuing test of the proportionality of the main alternative to regularisation – removal – may often tip the balance in favour of the latter even if the individual in principle has a strong claim to admission, for example on grounds of family ties. One of the perverse effects of making regularisation dependent on the ‘vulnerability’ of individuals seeking regularisation thus is to increase the vulnerability of those who cannot reasonably be regarded as vulnerable as a result of a denial of regularisation.

Second, humanitarian regularisations remain deeply caught in an individualistic logic. It is the individual who has to successfully make a human rights based claim to legal residence before relevant administrative authorities or national and supranational courts and who has to show that his or her human rights can be protected only, or most reasonably so by giving him or her access to a legal status. Not unsurprisingly, there is a great variation in the way immigration officials implementing regularisation mechanisms as well as national or supranational courts recognise human rights based claims to residence, resulting in a great variation of outcomes of regularisation procedures, notably in more restrictive contexts. Apart from the fairly wide room left for administrative discretion as well as the partly related big variations in different authorities’, individual migration officers’ and judges’ micro-policies towards regularisation claims of irregular migrants one major reason for differential outcomes lies in the fact that assessing

63) The two main reasons why this is the case are (1) the principle of applying for family reunification from abroad and (2) a principled policy to enforce return decisions and related residence bans some EU Member States have even if individuals enjoy a principle right to family reunification on the basis of their ties to legal residents. The ensuing separation in turn in some cases may risk the very entitlement to family reunification. See for a case in France Sohler, K. and F. Lévy, (2009). Civic stratification, gender and family migration in France: Analysis of interviews with migrants and their family members, Vienna: BMWF/ ICMPD, available at http://research.icmpd.org/fileadmin/Research-Website/Project_material/NODE/FR_Interview_Analysis.pdf, p. 18.

individuals’ claims to residence almost inevitably will involve a detailed examination of the merits of the case in terms of the human rights grounds invoked as well as a proportionality test as regards possible solutions. As a result of the casuistic nature of most human rights based regularisations miniscule details of a case is bound to make a massive difference.

Third, a human rights based logic is unlikely to unmake the crucial distinction between ‘insiders’ and ‘outsiders’, i.e. migrants who have had a legal residence status in the past or, alternatively enjoy (family) links to ‘insiders’, be they citizens, EU nationals or third-country nationals, which is such a fundamental distinction in the architecture of the European Convention of Human Rights, and arguably also the European Union legal framework, with the exception of claims to residence based on article 3, ECHR. A human rights based logic thus leaves out a considerable number of irregular migrants who cannot invoke an insider status or links to insiders.

This said, the increasing importance of human rights considerations in return and regularisation procedures clearly a positive development and has opened a route to legality for a considerable number of persons. Nevertheless, the human rights frame offers only limited solutions for a – presumably – large share of migrants in an irregular situation, as evaluations of regularisation practices in a number of European countries have shown. A purely human rights based argumentation has so far also been clearly insufficient to deal with the implementation gap between return decisions issued and decisions actually effected. Thus, according to the European Commission, only some 50% of all return decisions in the period between 2005 and 2007 have been enforced, leading to a considerable number of persons who are not removed, are technically unlawfully staying and are de facto or formally tolerated. While there is a great variation within the European Union in regard to the share of effected returns in all return decisions and the share of effected returns has recently been growing, the major gap between the number of persons in principle liable to leave on the one hand, and the number of persons effectively removed is likely to remain in the future, not least given the prohibitively high costs that would be involved would all irregular migrants be removed. While regularisations – both programmes and mechanisms – have also targeted persons with a return decisions who had been effectively resident for longer periods of time, the main response of European governments has been to

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65) See De Hart, supra note 55.
66) See references in supra note 64.
simply postpone enforcement to some point in the future, thus leaving such persons in a legal limbo over protracted periods of time.

7. Conclusion

As I have shown, there has been a distinct shift to human rights based regularisation practices in the European Union Member States in the past one or two decades and a related reframing of regularisation as an issue of national, European and international human rights law. This has also entailed a judicialisation of regularisation as well as to some extent a de-politicisation of regularisation, which, as an instrument of protection of human rights seems to generate much less opposition and greater support from policy makers and the wider public alike. At the same time, as I hope to have shown, a purely humanitarian argumentation in favour of regularisation is inherently limited and is unable to provide compelling reasons why regularisations should be granted in cases where individuals’ fundamental rights are not disproportionally put at risk by removal or who cannot in any meaningful sense be conceptualised as vulnerable.

The arguments for regularisation thus need to be complemented by considerations of a pragmatic nature as well as empirical arguments regarding major reasons traditionally invoked against implementing regularisation measures. Such pragmatic considerations may, and perhaps, should involve a number of principles in deciding the case against or in favour of regularisation measures. This may include considering the de facto duration of residence since a return decision has been issued in the case of persons who have not been returned or an expanded notion of proportionality regarding exceptions from standard admission procedures in cases where re-entry under a legal residence title is highly likely to be granted anyway in the future, for example in cases of failed family based admissions. However, even if at times risky, the issue of regularisation also needs to remain open for an articulation as a political issue. While the judicialisation of regularisation and the shift towards a human rights based rationale may indeed help reduce public scrutiny and thus evade anti-immigrant and pro-enforcement mobilisation legal reasoning and reference to human rights cannot be a substitute for political debate and policymaking intent to address concrete challenges in managing migration.