

Chapter 12

Irregular Migration



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Irregular migration is a multifaceted, dynamic phenomenon that has attracted disproportionate media and political attention since the early 2000s. It has been at the forefront of the political debate in most of the European Union's Member States since the outbreak of the so-called 'migration crisis' of 2015. Indeed, the political attention paid to irregular migration is disproportionate to its volume. Migrants are estimated to represent 3.3% of the world's population (IOM, 2017, from UNDESA, 2017) with migrants in an irregular situation between 15% and 20% of them. This is approximately 1% of the global population, some 30–40 million individuals worldwide (UN OHCHR, 2014; ILO, 2015). In the USA, the undocumented population was estimated in 2015 to be 11 million (Rosenblum & Ruiz Soto, 2015); while in Europe it was estimated to be 1.9–3.8 million in 2008 (Kovacheva & Vogel, 2009); and between 2.9 and 3.8 million in 2018 (Pew Research Centre, 2019).

This chapter starts with defining the variants of irregular status and the paths through which a migrant may become irregular, with a view to showing that this status is a continuum rather than a clear-cut distinction. We explore the links between irregular migration and irregular/informal work and how flows and stocks relate to segmented labour market dynamics. The chapter considers the lived realities of the daily lives of irregular migrants before turning to the universal human rights that migrants with irregular status should enjoy and reasons for their limitation in practice. We conclude by critically surveying recent policy trends on enforcement and criminalisation, as well as the counter trend of semi-inclusion at particularly local and regional levels.

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12.1 Definitions: What Is Irregular Migration Status?

Patterns of irregularity are diverse and can include people who crossed a border unlawfully as well as visa over-stayers, children born to undocumented parents, migrants who lost their regular status because of unemployment or non-compliance with certain requirements, and rejected asylum seekers.

Although the concept of irregular migration is often treated as self-evident by media and political discourses, it deserves careful reflection to avoid ambiguities and inconsistencies (Triandafyllidou, 2010). Several different terms are used for persons who enter a country illegally, overstay their terms of regular residence, live in a country without a residence permit, or break immigration rules in a way that makes them liable for expulsion. At the academic level—but also in the media and public discussion—terms like irregular, undocumented, or unauthorised have been preferred to the more discriminatory ‘clandestine’ or ‘illegal.’ Indeed, even though no human being is illegal (Ambrosini, 2013), specific practices and behaviours in breach of the law can be referred as ‘not legal’ (for example, illegal border crossing).

For a complete and dynamic picture (Kovacheva & Vogel, 2009), the distinction is made between irregular *residents*—foreigners without any legal residence status in the country and those who can be subject, if detected, to an order to leave (stocks)—and irregular *entrants* who cross an international border without the required valid documents (flows).

To clarify the various irregular statuses, below is a list (Triandafyllidou & Bartolini, 2020a, p. 16) of the forms of irregular stay that migrants may experience which serves the purpose of illustrating the complexity of intersecting entry, stay and work related status:

- Persons with forged papers or persons with real papers but assuming false identities;
- Persons with seemingly legal temporary residence status. The so-called working tourists (entered on a tourist visa and working irregularly) are assumed to be the majority of irregular migrants in some countries. Migrants with a temporary conditional permit such as seasonal and contract workers may likewise be liable for expulsion if they break their contract terms (e.g., if working for a longer period than permitted);
- Persons who lose their residence status because they no longer satisfy the conditions that initially granted the permit (unemployed, no longer able to demonstrate employment relationship to obtain a work permit, student whose course of study has ended, expiration of family permit for young adults coming of age, etc.);
- Persons who never had a regular status because they entered illegally and could not find a way of regularising their status;
- Persons who entered illegally but are registered with public authorities. E.g. they have been denied protection after lodging an asylum application;

- Tolerated persons without a regular status, with or without a document to prove the suspension of their removal and thus their semi-legal residence status: e.g. when return is not possible because there is no agreement with the country of origin or transit, or it is not possible to establish the nationality of the migrant;
- Children born to parents who are unlawfully residing and hence without fully-documented status.

Irregularity is not entirely of the migrant's making: it may result from delays and errors in the administration of red tape. It is moreover embedded in labour market dynamics that privilege irregular stay and irregular work. Irregularity is functional to labour market conditions in specific sectors such as construction, domestic work, agriculture and the food industry, irregular migrant workers providing a cheap and plentiful workforce (Jordan & Düvell, 2002; Van der Leun & Kloosterman, 2006; Cheliotis, 2017). By creating conditions of regular stay and work that are impossible to meet, states indirectly support the interests of unscrupulous employers and create ethnic segmentation and hierarchies in the labour market that are functional to the national economy.

Irregular migrants are often not completely deprived of formal papers. They may possess legal social security numbers, work contracts, certificates of school enrolment or identity cards issued by municipalities, while having no permit to stay (Vasta, 2008; Chauvin & Garcés-Masareñas, 2014). Such documents testify to *de facto* inclusion in the labour market and social life and illustrate the dynamism and complexity of the irregular migration phenomenon as well as the fragmentation of its governance.

12.2 The Relationship Between Irregular Stay and Irregular Work

Irregular migration status is to a large extent a function of labour market dynamics. This is an issue that is often neglected in political and policy discourses. The availability of jobs in agriculture or construction or the demand for live-in care workers can act as a pole of attraction for migrant workers who may decide to enter a country unlawfully, overstay their visa or violate its conditions because of the availability of work opportunities. Alternatively, people may enter lawfully under a temporary migration scheme and then be unable to extend or renew their status and hence fall into irregularity. Employers often support such moves, either in the impossibility of fulfilling the legal policy requirements or because the undocumented newcomers become a plentiful and inexpensive labour force who incur no additional costs of firing or of paying for welfare or unemployment benefits.

Legally residing foreigners should, in contrast, be able to have jobs with proper contracts which respect labour laws and include welfare insurance. However, it is often the case that these workers are also employed in irregular ways: without being declared, having a proper contract, or with a contract that specifies conditions of

work and salary that are not respected. This is because migrants are often concentrated in sectors where there is a high incidence of informal work such as construction for men or cleaning and caring work for women, or catering, tourism, and agriculture for either. Those recently arrived have less bargaining power than settled migrants or natives as they may have only partial information about their rights, may not yet speak the local language or may not know where to seek redress if they suffer an injustice. They may be in absolute need of a job and a livelihood—even if this does not come with all the required conditions—as they may have no other source of income or social support networks to rely on. The importance of trade unions and labour market inspectors for protecting all workers cannot be overestimated (see also Triandafyllidou & Bartolini, 2020b).

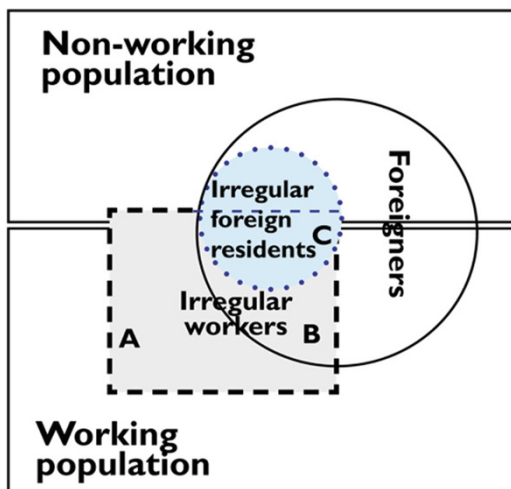
In addition to these socio-economic dynamics attracting unauthorised migrant workers to take up informal work or pushing legally staying migrants to accept irregular employment, it is important to consider how socio-economic exclusion interacts with symbolic inclusion/exclusion. As Ambrosini (2016) argues, we could conceptualise two levels of authorisation: one is that of regular versus irregular migration status, the other one of symbolic authorisation—in the sense of recognition that the migrant is filling a job vacancy and performing a job that is socially valuable. This distinction is gendered, as female care workers and cleaners are usually recognised as valuable and represented positively, while narratives of ‘clandestine’ migrant workers usually refer to male migrants. Asylum seekers, too, although temporarily authorised in the receiving country’s territory while their application is processed, are similarly stigmatised.

The realities of irregular residence and irregular work combine in multiple ways, preventing clear-cut definitions and requiring attention to single national practices and legal frameworks even within the European context. We should better speak of a continuum between regularity and irregularity, ranging from situations where one is a regular foreign resident allowed to work and with a formal employment contract, to cases in which one is an irregular foreign resident with an undeclared job.

Moreover, status is not fixed. Changes—of residence, of permission to work, and of employment conditions—are frequent and not necessarily in the direction of progressive improvement and stability (EMN, 2016). “Spaces of” and “pathways to” illegality (Ruhs & Anderson, 2006; Düvell, 2011) are thus found within the triangle of migration policies, labour market dynamics, and the individual choices of social actors. Different types and degrees of irregularity can be produced and negotiated among all actors involved and semi-compliance to (some) rules might be a frequent case (Ruhs & Anderson, 2006).

Figure 12.1 summarises the possible intersections of citizenship, residence, and work status: irregular employment can be found among (a) the native labour force; (b) foreigners with a regular residence status; and (c) foreigners who are irregularly residing in the country.

Fig. 12.1 Total resident population by work status, citizenship, and residence status. (Source: Triandafyllidou & Bartolini, 2020a, p. 19)



12.3 Living with Irregular Status

People with irregular status may support themselves through work and be active agents in shaping their own lives within the constraints imposed by their status (Bloch & McKay, 2016). Many are nevertheless disproportionately exposed to discrimination, exclusion, abuse and exploitation; and to denial of access to health care, adequate accommodation and the documentation needed for daily life such as a driving licence (UN, 2014). They feel unable to inform the police if the victim of crime because of their fear of detection (Delvino, 2020): that ‘palpable sense of deportability’ which reproduces the physical borders of nation-states in everyday life (De Genova, 2002, p. 439). This can induce high levels of stress, with implications for self-esteem and mental health (Gonzales & Raphael, 2017). For young people in particular, living with irregular status can shape personal identity, social relations and all aspects of their lives and decision making (Bloch et al., 2014).

Where enforcement measures limit the scope for supporting themselves in legitimate ways and participating in the mainstream institutions of society, irregular migrants may adopt alternative strategies to survive: shifting from formal to informal work; from legitimate to criminal behaviour (such as subsistence theft); and avoiding being identified by concealing their status, using false documents, and destroying original ID papers to obstruct deportation (Engbersen & Broeders, 2009).

Exclusion from (authorised) work and services create a greater reliance on ‘intermediaries’ to access what they need. Their actions may be lawful, unlawful or, in stretching the rules, somewhere in between. They include friends and family; people sympathetic to their situation, such as lawyers, NGOs and service providers; and people who facilitate access to accommodation or jobs for profit: the “foggy structures” which enable irregular migrants to maintain a camouflaged existence and sustain the continuity of new arrivals (Bommes & Sciortino, 2011). The presence of

legal compatriots from whom resources such as work and information can be mobilised, and among whom they are inconspicuous, together with the availability of cheap accommodation, have been found to be among the structural determinants that make irregular migrants a permanent feature of some city neighbourhoods (Engbersen et al., 2006).

Intermediaries contribute in five ways: *connection* (providing information and recommendation); *provision of services* (from forged documentation to health care); immediate *help* (such as food); *tolerance* (overlooking rules); and *political pressure* (to change policies and practices). The governance of irregular migration will not be effective if it fails to take into account the role intermediaries are playing and their motivations (Ambrosini, 2018, pp. 19, 36–38).

Some irregular migrants are known to the immigration authorities but for legal, humanitarian, or practical reasons have not been removed. Others may be known to one or more public services. Some municipalities provide access to some services, as a matter of national or local policy; directly or through NGOs (Delvino & Spencer, 2019). Where they do not, individual service providers may nevertheless use their discretion to provide access (Van der Leun, 2006). Members of the public also contribute when they see the human costs of enforcement measures, providing practical assistance and solidarity to resist deportations (Ellermann, 2006).

12.4 Human Rights: Universality and Reality

International human rights standards are universal: “without distinction of any kind, such as race, colour, sex. . . national or social origin. . . birth of other status” (Universal Declaration of Human Rights, 1948). That universality is the source of their normative power. “Irregular migrants are human beings”, the UN High Commissioner for Human Rights confirms, “and as human beings they are protected by international human rights law” (UN, 2014, p. 1).

The universality principle is found in UN conventions and regional human rights law such as the European Convention on Human Rights (ECHR), and is binding on states that have ratified them. The UN Committees on Economic, Social, and Cultural Rights and on the Rights of the Child, among others, have explicitly stated that the rights which they oversee apply to everyone regardless of legal status (UN, 2014, pp. 25–28).

Universal protection is, however, diluted: in the law itself, and in political reality. Few rights are absolute (such as freedom from slavery) but can be curtailed if objectively justifiable for a legitimate objective and proportional. Courts have regularly deemed restrictions on the rights of irregular migrants to be a proportionate means of achieving the legitimate aim of controlling immigration. The law, moreover, is better developed in relation to civil and political rights than socio-economic rights. Thus, the extent to which a particular service should be provided is not always clear, or whether exclusion breaches international law. Third, few provisions specify that the rights must apply without discrimination on grounds of migrant status; while

some specify that they only apply to those who are lawfully resident. These limitations constrain the impact of the law and its “bite” as a tool for contesting exclusion (O’Cinneide, 2020).

Enforcement mechanisms can, moreover, be too weak for states to feel constrained. Some may nevertheless be sensitive to criticism on human rights grounds—“if rights are ignored or trampled upon, then the liberal state risks undermining its own legitimacy” (Hollifield, 2004, p. 901). They may also, however, be under political pressure to prioritise nationals and be tough on ‘illegal immigration’: hence Guiraudon’s finding on the high visibility, “sunshine politics” of enforcement measures relative to the low visibility, “shadow politics”, of migrants’ rights (2004).

National laws do not accord non-nationals equal rights. There is a hierarchy, with irregular migrants regularly accorded the fewest rights; especially economic and social rights such as the right to work, healthcare, and shelter. Mapping of national legal frameworks reveals a highly uneven geography of entitlements (FRA, 2011), not least in relation to healthcare and school education (Spencer & Hughes, 2015). Children with irregular status are considered to be more deserving of inclusion in services than adults (Spencer, 2016). Governments should justify the proportionality of restrictions on rights (Bosniak, 2006) but regularly fail to do so (Pobjoy & Spencer, 2012). Regardless of entitlements, services can only be accessed where there is a “firewall” preventing transfer of personal information on service users to immigration enforcers (Crépeau & Hastie, 2015, p. 158).

Human rights standards are, nevertheless, continually open to interpretation by the courts and thus provide scope to expand the extent of protection. They are regularly used in political argument and litigation as a means to challenge exclusionary practices, and to underpin soft law such as the Global Compact on Migration (United Nations, 2018). Non-governmental organisations (NGOs) have successfully challenged restrictive practices, e.g. under the European Charter for Social Rights. Municipalities have also invoked human rights to challenge national restrictions. This “legalisation from below” (Oomen & Baumgärtel, 2018), a “new frontier” in the development of a multi-layered system of rights protection, is particularly evident in the USA, protecting ‘undocumented’ migrants from federal immigration controls but increasingly also in Europe, leading to tensions in the multi-level governance on this issue (Spencer, 2018).

12.5 Policy Trends

National governments are responsible for enforcement of migration controls and set the legal framework governing access to services. Their mandate overlaps with that of state/regional and local authorities which (to differing degrees) have delegated responsibilities for service provision, and for policies impacted by migration such as local economic development, public health, and social cohesion. As the impact of exclusion is most keenly felt at the local level, some sub-state tiers take a more

inclusive approach, which can lead to tensions in multi-level governance relationships (Ambrosini, 2018; Spencer, 2018, 2020; Gen², 2018).

Governments have reinforced enforcement measures in an effort to control irregular migration, and to be seen to do so: strengthening pre-entry, entry and internal controls. A review of 6500 migration policy changes in 45 countries since 1900 found “Irregular migrants are the only category for which policies have almost consistently moved into a more restrictive direction over the entire post-WWII period” (de Haas et al., 2018, p. 348). There is however a gap between declared policies and those that are implemented, leading to an over estimation of policy failure (Czaika & de Haas, 2013; Ataç & Schütze, 2020); and the law is enforced selectively: “migration is not always as ‘unwanted’ as is made out”, not least by employers who benefit from cheap workers (Castles et al., 2014, p. 324). Selective enforcement by the police in the USA and Europe has been found to be influenced by the interests and values of key actors: the police, local residents, and city governments (Leerkes et al., 2012).

Those enforcement measures that are implemented can be counterproductive, and are not notably effective (Engbersen & Broeders, 2009; Massey et al., 2016). Comparative studies reveal enforcement is beset by administrative, political, legal, and economic difficulties; routinely contested by competing interests (Hollifield et al., 2014, p. 4). Practical challenges include the embeddedness of irregular migrants within local communities; use of false identities and destruction of documents linking the individual to their country of origin; lack of cooperation by sending countries, the cost of forced removals, and human rights obligations and norms that limit the extent to which punitive measures can be used (Guiraudon & Lahav, 2000; Hollifield et al., 2014, p. 4; Andersson, 2016).

Governments have increasingly outsourced aspects of border enforcement to private actors, such as airlines (Guiraudon, 2006); while domestically relying on employers and service providers such as hospitals to check the immigration status of service users (Guiraudon & Lahav, 2000; Aliverti, 2015). The police are increasingly expected to work closely with immigration authorities, leading to resistance from those who prefer to prioritise “real criminality” and build trust with minority communities (Aliverti, 2019; Leerkes et al., 2012). Scholars refer to the intersection between crime control and migration control as “crimmigration” (Guia et al., 2013).

Under international law, irregular entry and stay are considered administrative rather than criminal offences, unless accompanied by other crimes (UN 2014, p. 13), but there has been a tendency to criminalise those offences, to penalise those who assist irregular migrants, and in some cases to require service providers to report them (Provera, 2015).

The limits of enforcement have led governments to adopt supplementary measures including regularisation, through time limited amnesties or pathways for individuals who fulfil certain criteria (Ambrosini, 2018; Baldwin-Edwards & Kraler, 2009) and voluntary return programmes, in some cases assisted by the International Organisation for Migration, with a level of support for re-integration (IOM, 2020).

While internal controls routinely exclude irregular migrants from most services, welfare support and documentation, there has been a simultaneous trend towards semi-inclusion, a paradox which scholars have sought to explain (Chauvin & Garcés-Masareñas, 2012). Providing access can provide a means to monitor and share data on migrants between agencies (Morris, 2001) and right of access can be conditional on a duty to cooperate with removal (Rosenberger & Koppes, 2018). Like the earlier poor-laws, provision of services alleviates the risks associated with poverty (Leerkes, 2016) and more broadly strengthens governability: the need to regulate and predict the behaviour of the actual population is greater than the need to deport (Chauvin & Garcés-Masareñas, 2020). For municipalities, inclusion in services addresses threats which exclusion poses to their capacity to fulfil their economic and social policy objectives (Spencer & Delvino, 2019). Pressure from civil society (in the US, ‘non-profits’) can be a factor in municipal adoption of inclusive policies (De Graauw, 2016).

12.6 Conclusion

This chapter has introduced key concepts and literature relating to the definition and terminology on migrants with irregular status; to the relationship between irregularity, the labour market and irregular work; the social embeddedness of these residents; the limits on the universality of human rights, and policy trends, including the paradox of semi-inclusion.

We have seen that perceiving immigration status as either ‘legal’ or ‘illegal’ is a false dichotomy: that there are multiple forms of irregularity, reached through differing paths, and that the status of individuals is often fluid along a regular-irregular continuum. The demands of sectors of labour markets for cheap, flexible, labour is a major factor leading individuals to enter, or remain, without authorisation, as is the need for sanctuary from persecution and conflict.

In everyday life, excluded from regular employment and most essential services, we see the reliance that irregular migrants can have on intermediaries: family and social networks, NGOs, service providers, and others motivated by profit; “foggy social structures” that enable these residents to maintain a camouflaged existence. Universal human rights should ensure greater protection but are diluted in form and political reality. Irregular migrants are at the bottom of a hierarchy of rights in national laws and vulnerable to exclusion and exploitation.

While there is a trend to reinforce pre-entry, entry, and internal controls, they are enforced selectively, are not notably effective in curtailing irregular migration, and can prove counterproductive. Alternative measures include regularisation and voluntary return. Paradoxically, there is a simultaneous trend towards limited access to services, formal inclusion alongside formal exclusion, particularly at the local level, for which various explanations were given.

In recent years there has been an increasing understanding that irregularity in migration is not a black and white status but rather a continuum and also that while migration stocks and flows are a domain regulated at the national level, cities have an important role to play as providers of basic services for shelter, food, health and education. There is scope for further research on the multi-level governance of irregular migration and the interaction among the local, national and transnational level in dealing with populations with irregular status. In addition, the current pandemic emergency has pointed to the extreme vulnerability of irregular migrants and at the same time the need to guarantee for those residents their fundamental rights such as access to health services or to vaccines. There is scope for understanding how such crisis situations can shape our understandings of irregular status particularly when it turns out that migrant residents with irregular status provide essential services whether in agriculture, food processing or the care industry.

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