PRIME
Protecting Irregular Migrants in Europe

Institutional contexts of the conditions of irregular migrants in Europe

A theoretical analysis

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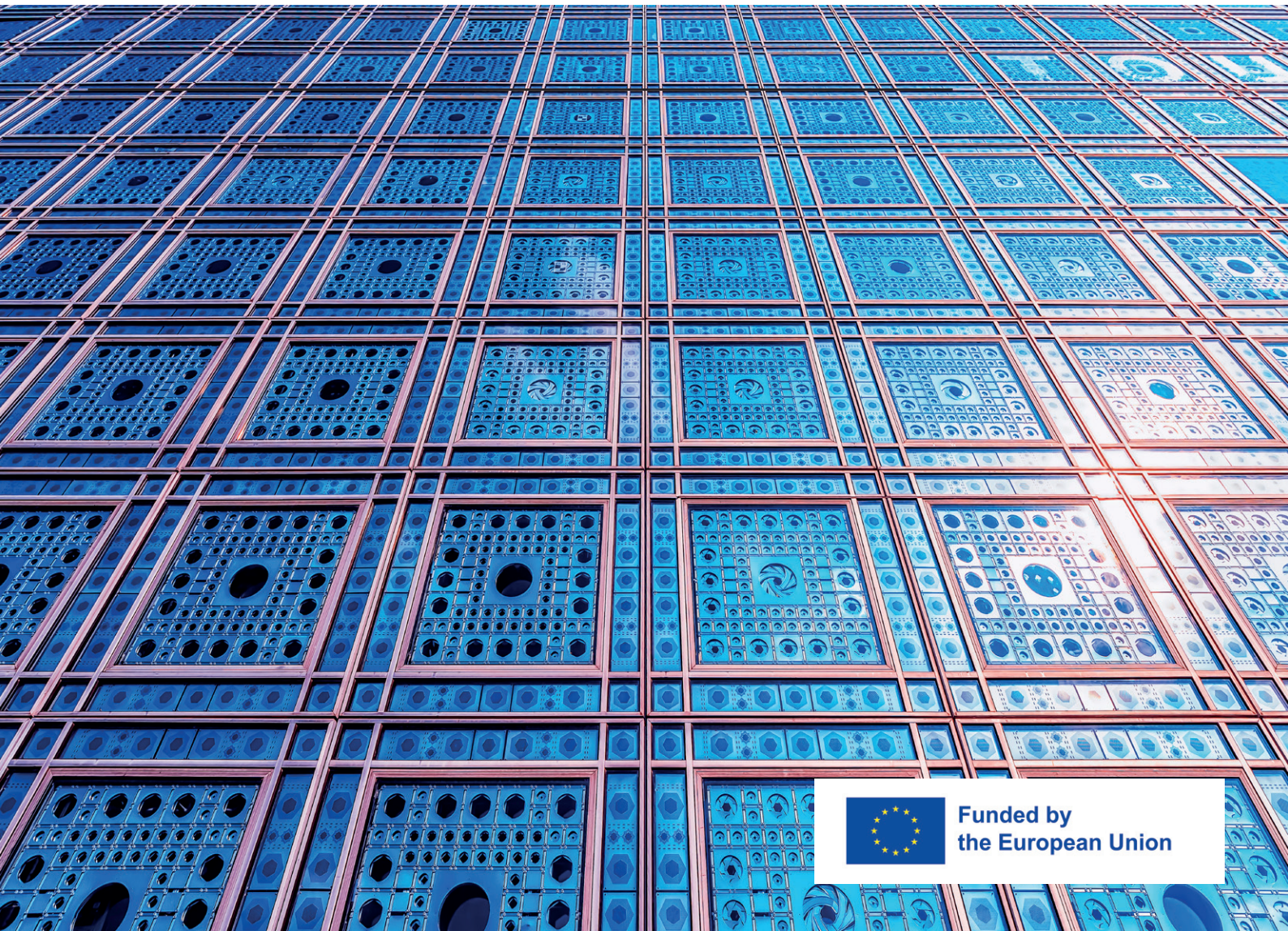

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Abstract

This paper provides a theoretical framework for an institutional approach to understanding the conditions of irregular migrants in Europe. Our starting point is that, in determining policy responses to irregular migration, European liberal democracies are conflicted between the goals of immigration control and fundamental rights protection for all people. These goals conflict at the level of both values and interests. Despite the urgency and high political salience of the issue in many European countries, however, there has been little analysis of how European governments manage this goal conflict in their policies vis-à-vis irregular migrants, of the national differences in responses, and of the consequences for migrants.

This paper argues and explains why the particular nature of this goal conflict and how it is managed in government policy responses can be expected to vary across European countries with different institutional contexts, with important consequences for the conditions of irregular migrants. We first theorise the links between institutions and the conditions of irregular migrants, and then use this framework to discuss why and how the 'settings' of key national institutions – legal institutions, political institutions, labour market institutions, and welfare state institutions – can 'weigh' in by favouring different sides of the goal conflict and thereby shape host country policies and outcomes for irregular migrants.

Key words: irregular migrants, goal conflict, national institutions, comparative analysis, Europe

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PRIME

Protecting Irregular Migrants in Europe (PRIME) is an international research and policy project that analyses the conditions and politics of irregular migrants in Europe. PRIME is run through a consortium of seven migration research institutions (pictured on the previous page). This Research Paper is a slightly revised version of PRIME Deliverable 1.1.

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1 Introduction

The presence of millions of irregular migrants (understood as people without the legal right to reside) in Europe raises an important social question and dilemma of our time. While some of the estimated 3-4 million irregular migrants in Europe (Pew Research Center 2019) integrate to a certain degree in labour markets and communities, they and others often suffer significant violations of their fundamental rights (Fox-Ruhs and Ruhs 2022; Fundamental Rights Agency 2021; PICUM 2020). There is an urgent need to address and reduce their multi-faceted vulnerabilities and experiences of exploitation. At the same time, all European countries are committed to controlling immigration and the employment of migrant workers from outside the European Union (EU). The high degree of politicisation of irregular migration in many countries has generated a range of policy efforts to reduce irregularity both at the border and in the residence and employment of migrants, including policies to detect and deport migrants without the right to reside.

From the perspective of European host countries and societies, the presence of irregular migrants prompts consideration of two conflicting goals: the commitment to protect the fundamental rights of all people, and the commitment and sovereign right to control immigration. This goal conflict is grounded in conflicts of both values and interests. The right and goal to control immigration stems directly from the nature of the nation state and its underlying values of democratic self-determination and rule of law. It is also supported by particular interests and the (real or perceived) effects of irregular migrants on different actors and groups in the host country. At the same time, the goal of protecting the fundamental rights of all people on a state's territory can be grounded in human rights and universal understandings of the values of freedom, dignity, equality, and rule of law. The goal of protecting fundamental rights, and its underpinning values, is embedded, at least minimally and to varying degrees across countries, in the national legal and political institutions of European liberal democracies. It is also supported by interests, e.g., the interests of some trade unions to ensure fundamental labour rights for irregular migrants to avoid undermining the rights and employment conditions of the citizens of the host country. As we argue and discuss in this paper, the national dynamics of, and host country policy responses to this goal conflict can have important consequences for the conditions of irregular migrants in practice and may help explain cross-national variation in such conditions across Europe.

While often sharing common or similar border policies, European states have very different responses to the residence and employment of irregular migrants on their territory. However, despite the urgency and high political and public salience of the issue in many European countries, there has been little analysis of how European states respond to the goal conflict associated with irregular migration, of the national differences in responses, and of the consequences for migrants. Most existing research on the conditions of irregular migrants has focused on the effects and interactions of (ir)regular migration status and the inherent characteristics of migrants especially their gender, age, and nationality (e.g. Schrover et al. 2008). At the same time, much of the research on the host country politics and politicisation of migration in general, and of irregular migration in particular, has been focused on the roles and interests of actors, especially anti-immigrant parties (e.g. Hadj-Abdou et al. 2022). What has been missing – and what we argue is critical to understanding efforts to manage the tensions and contradictions between the control of immigration and a commitment to universal fundamental rights and therefore also the conditions of irregular migrants – is a systematic analysis of the role and effects of national institutions such as national legal systems, political systems, labour market regulations, and welfare states.

The findings that European countries tend to cluster around various 'types' of institutional settings (e.g.,

Schröder 2009; Hall and Soskice 2001; Korpi and Palme 1998; Esping Andersen 1990) and that these different institutional models are associated with different economic and social outcomes for citizens and migrants (e.g. Sainsbury 2012; Borang 2019) is generating a growing body of research. What we do not yet know, however, is how these institutional variations, and the interests with which they are associated, have both direct and indirect effects on the conditions of irregular migrants. As we discuss later in this paper, we define "conditions" in a capability-inspired perspective that also includes the extent to which migrants can exercise their legal rights in practice. By direct institutional effects, we mean the ways in which irregular migrants' conditions are shaped by the national institutions that determine the legal, political, economic, and social rights of citizens and long-term legal residents, independent of any mediating effects of discrete national policies vis-à-vis irregular migrants. Indirect institutional effects, on the other hand, refer to the ways in which national institutional settings shape national government policy choices in relation to irregular migrants, and specifically how policy-makers evaluate associated goal conflicts, which, in turn, can affect irregular migrants' experiences. This paper, which is part of the larger EU-funded 'PRIME' project[1], begins to fill the gap in our understanding of these national institutional dynamics and their varying effects on the conditions of irregular migrants across European countries.

While this is a theoretical paper, it is important to acknowledge recent changes in many national governments' policy approaches vis-à-vis irregular migrants in Europe which have called into question these governments' commitments to protecting the fundamental rights of all people. Over the past 15 years or so, when Europe and other parts of the world were struck by a series of crises – including the economic crisis of 2008, the political crisis associated with large-scale inflows of asylum seekers and other migrants since 2015, and the Covid19 pandemic – there has been a clear hardening of many national governments' – and also the EU's – rhetoric and policies vis-à-vis irregular migrants. Consider for example some European governments' practices of "pushbacks" (i.e. the forced return of asylum seekers without first considering their claims for protection) and abandonment of people seeking to cross the Mediterranean as well as the current UK Government's apparent increasing enthusiasm for withdrawing from the European Convention on Human Rights. These changes in rhetoric and practices suggest that some national governments' commitments to liberal values such as individual rights, universality and equality are not as strong as they, arguably, were in the past. The securitisation of migration and asylum has been critical to the reduction of these government commitments. Governments argue that in order to protect citizens – whether from terrorism, welfare claims or unemployment – it is necessary to circumscribe the rights of non-citizens. At the same time, however, it is important to acknowledge that, as we discuss in this paper, national governments act within the context of national institutions with long and path dependent histories that embed particular values (including those favouring the protection of fundamental rights of all people) and that these institutions shape and constrain the policies of any given government of the day.

This paper aims to provide a conceptual and theoretical framework for an institutional approach to understanding the conditions of irregular migrants in Europe. While we consider both direct and indirect effects of national institutions on the conditions of irregular migrants, we focus particularly in this paper on indirect effects that are mediated by national policies vis-a-vis irregular migrants (which can and typically do include control policies that adversely affect the conditions of irregular migrants as well as rights-based policies that enhance those conditions, e.g. through specific migration laws and policies that explicitly deny or grant irregular migrants access to certain rights). Our rationale is based on the high salience and politicisation of irregular migration in recent years which has demanded increasing policy-making vis-à-vis irregular migrants on the part of national governments. Naturally, the more active and diffuse that national poli-

1 See www.protectingirregularmigrants.eu

cy-making on irregular migrants becomes, the more likely that the conditions of irregular migrants will be shaped by how such policies mediate institutional effects.

Our analysis of the indirect effects of institutions on migrants' conditions specifically explores how and why national institutions, and the interests with which they are associated, can affect the nature and management of goal conflicts in host country policy responses to irregular migrants. Our starting point is that all government policy responses to irregular migrants reflect a particular way of managing conflicting values and interests associated with the goals of controlling immigration and protecting fundamental rights. We argue, however, that the particular nature of this goal conflict and how it is managed in national government policy responses will vary across European countries with different institutional contexts. This is because, as we discuss in this paper, the 'settings' of key national institutions – legal institutions, political institutions, welfare state institutions, and labour market institutions – can weigh in by favouring different sides of the goal conflict. We suggest that institutions can play this role through three types of mechanisms: first, institutions (particularly but not only legal institutions) can *constrain* national policy actors and responses to irregular migrants, in particular with respect to the securitisation of migration; second, institutions (especially political, labour, and welfare institutions) can *shape the interests and distribution of power* among institutional and political actors within national polities and societies; and, third, institutions, such as particular types of welfare states, can act as a *resource* in terms of generating particular institutional capacities, functions and public expectations relating to policy administration, financing and implementation.

To discuss how national institutions can have such effects, we take a comparative approach. Our analysis begins, in Section 2, with an explanation of our theoretical framework for analysing the links between national institutions, goal conflicts, and the conditions of irregular migrants. Based on this conceptualisation, Sections 3-6 then discuss how and why variations in national legal systems, political systems, labour regulations, and welfare states can be expected to shape the management of goal conflicts in host country policy responses, and thus also the conditions of irregular migrants across European countries.

The paper contributes to research in political science, especially to comparative politics and institutional analysis, by providing a theoretical basis for what we consider to be an important new agenda for empirical research on the role of national institutions in shaping the conditions of, and host country politics about irregular migrants. We further add to the research literature on comparative political economy of European integration, especially on how common EU policy-making can be challenged by national institutions and 'idiosyncrasies' (e.g. Jones 2003). The paper also makes at least two contributions to research in the specific field of migration studies. First, while recent research on the conditions and rights of irregular migrants has focused heavily on the role of local (sub-national) actors and regulations (e.g. Kaufmann et al. 2021; Spencer and Triandafyllidou 2020; Spencer 2018), our analysis focuses on *national* institutions because we believe that they play a central role in shaping outcomes for both (irregular) migrants and citizens. Second, migration studies' 'reflexive turn' has engaged with how immigration and asylum laws contribute to creating 'migrants' by shaping economic and social relations (e.g. Anderson 2010). While the focus of the latter has been on immigration/asylum law and policy, our paper considers the role of other institutions, including the system of law itself. In so doing it also tests the current critique of 'methodological nationalism' by examining the role of national level institutions and the consequences of their variation.

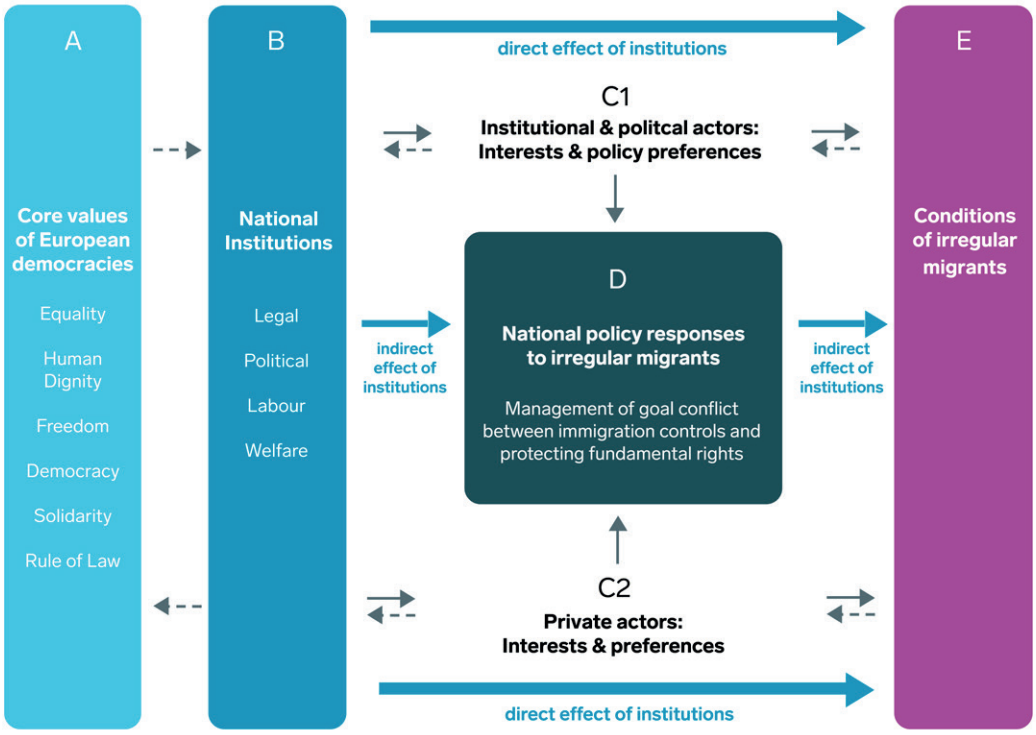
2 Theorising goal conflicts: institutions and the conditions of irregular migrants

As we have argued, national institutions can play a potentially powerful role in shaping the nature and management of goal conflicts and thus also the host country's policy responses to irregular migrants, with important consequences for the conditions of irregular migrants. Before discussing how and why particular institutional variations may have these effects (in sections 3-6 of the paper), we need to set out our conceptual approach. Figure 1 illustrates our theoretical understanding of the links between the core values of European liberal democracies (box 'A' in Figure 1), national institutions (box 'B'), actors and interests (space 'C'), the host country's (government's) management of goal conflicts (grounded in competing values and interests) and policy responses to irregular migrants (box 'D'), and the conditions of irregular migrants (box 'E'). The figure is meant to be illustrative of our approach and it does not aim to be comprehensive in indicating all potential inter-relationships. The solid arrows in indicate our conceptualisation of the direct and indirect effects of national institutions on the conditions of irregular migrants. The dotted arrows indicate relationships and feedback effects that are potentially important in the medium to long run.

We define and understand institutions as formal rules and policies that structure actors' behaviour and interactions (cf. Streeck and Thelen 2005). These formal institutions – and the values, normative principles and societal norms associated with them – are typically historically grown and, at least to a degree, are part of the 'DNA' of national societies and economies (Scharpf 2010). Institutions may embody both value-based elements and interests, and different ideas and interests make imprints on the same set of institutions (cf. Lepsius' 2017 work on democratisation and, more generally, institutionalisation). As a consequence of this 'societal embeddedness', institutions tend to be characterised by path dependencies and relative stability in the short run, meaning they provide the 'structural framework' within which actors develop their preferences and pursue their interests. In the medium to long term, actors can influence/change institutions.

As shown in Figure 1, we concentrate on four types of national institutions (shown in box 'B'): national legal systems, political systems, labour market regulations, and welfare states. These national institutions reflect and 'embed', in different ways and to different degrees across countries, the basic values of European liberal democracies (shown in box 'A'). The national institutions also structure the behaviour and interactions of actors in the host country (shown in space 'C'), influencing – at least to a degree – their interests and policy preferences. We conceive of actors broadly to include 'institutional actors' (e.g. trade unions, employer associations, NGOs), 'political actors' (such as political parties), and 'private actors' (individuals including employers). The actors also include migrants' organisations and migrants themselves. The interactions of actors and interests within the prevailing institutional framework then shape the host country's management of the inevitable goal conflicts (competing values and interests) that arise in policy responses to irregular migrants (box 'D') which, we argue, is a critical determinant of the conditions of irregular migrants (box 'E'). This is because the host country's policy responses influence in important ways the degree to which irregular migrants can live, work and access rights without fear of deportation.

Figure 1: Overview of conceptual approach



2.1 Irregular migrants and value conflicts

There are certain values and modes of governance that we have come to associate with 'liberal democracies' and which exist deep in the experiences and traditions of (the majority of) European countries. Based on principles of democratic representation, and the separation of powers, the common good and human dignity, states strive to develop and uphold the rule of law consistent with the personal freedoms of individuals to live, work and conduct their personal and family affairs in line with their own conscience and beliefs. Alongside a market economy, European countries developed social safety nets and employment supports to mediate the effects of unbridled market forces. In recognition of the inequalities of birth and/or situation, the same countries promote social mobility through equal opportunities for increasing human capital through state investments in education, skills training, and social services.

The six core values shown in box 'A' of Figure 1 (human dignity, freedom, equality, democracy, rule of law, and solidarity) are enshrined in Article 2 of the Treaty of the European Union[2] and the Charter of Fundamental Rights of the European Union (first proclaimed in 2000 and enforced through the EU's Treaty of Lisbon in 2009)[3]. European countries' commitments to these basic values of liberal and social democracy are further grounded by their membership in international human rights agreements (as discussed in more detail later in the paper). Data from the Eurobarometer surveys and European Values Survey indicate considerable societal (public) support for these basic values and principles across European countries.[4]

2 See https://eur-lex.europa.eu/eli/treaty/teu_2012/art_2/oj

3 See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT

4 See https://data.europa.eu/data/datasets/s2230-94-1-508-eng?locale=en and https://openpresstiu.pubpub.org/pub/atlasevs/release/5

These liberal and social democratic values evolved within imperial states or nascent nation states but have been applied primarily (though not exclusively) within the paradigm of the nation state and often find expression in national constitutions. A combination of post-colonial commitments and the growth of transnational governance – in the European context principally under the auspices of the European Union – has prompted states to extend public duties and public policy-making beyond the constructs of nation states and to guarantee, on a reciprocal basis, a range of protections and freedoms to those other than their own (national) citizens. International human rights principles and standards, such as those of the United Nations, push states further still by causing them to consider the extension of their duties and protections to individuals without any direct legal or political attachment to the given nation state but who may nonetheless construe a claim to that state's support based on need, circumstance, personhood and solidarity. In other words, the basic values of European liberal democracies shown in box 'A' of Figure 1 do not imply/necessitate a purely 'national' reading or conception as they can – and frequently are – interpreted and conceived, at least to a degree, in a universal way that can ground protections for all people on the country's territory, not just citizens of the host country.

The values that we associate with liberal democracies are not without contestation (e.g. Fukuyama 2022; Levitsky and Ziblatt 2018). The core values of (European and other) liberal democracies can be – and frequently are – in conflict with each other. For example, there may be perceived conflicts between individuals' 'freedom' and 'solidarity' (e.g. as played out through national debates about the design of tax and welfare systems) and/or between 'freedom 'and 'human dignity' (e.g. as played out in national debates about whether and how to regulate labour markets). Particularly relevant for this paper, conflicts also emerge between national and universal conceptions of basic values, e.g. the extent to which equal treatment of all people affects solidarity (as played out, for example, in debates about the alleged tensions between unrestricted immigration and national welfare states).

European states vary in their beliefs and strategies for how to interpret and give effect to their liberal and social democratic commitments and ideals and their particular form emerges, among other things, from social conflicts and battles of ideas and interests (cf. Esping-Andersen 1990; Hall and Soskice 2001). As governance is however liable to change, the legitimacy and authority of existing domestic policy approaches may be challenged internally by political movements or by 'external' forces such as global economic crises, climate change and war. When states are under pressure they may contract inwards, drawing the net of protection more tightly around 'core' groups to whom they consider that they owe primary protection. Conversely, there are times when the nature of the problem or crisis may demand (in the interests of both efficiency and morality) maintaining a wider net of protection to those beyond the 'core concerns' of the nation state – such as we have recently witnessed, for example, in the context of vaccination programmes associated with the Covid-19 pandemic.

Immigration, and especially *irregular* immigration whereby individuals enter, reside and/or work in a host country in breach of that country's immigration laws and regulations, is one of a number of pressing contemporary forces that can be understood as challenging the liberal and social democratic 'orders' of European nations because it raises fundamental questions about migrants' access to citizenship rights, i.e. the rights and protections granted to citizens based on the basic values discussed above (see e.g. Benhabib 2004). All states, including all European liberal democracies, assert and exercise their right to control the admission, residence and employment of migrants as well as migrants' access to citizenship rights in the host country. While the right of states to control immigration can be and has been contested in normative debates about the governance of international migration (e.g. Carens 2013), it has become a fundamental principle across all states in the world. In normative debates, the right of states to control immigration and

migrants is typically grounded on the fundamental values of democratic self-determination and rule of law, and on the idea of state sovereignty vis-à-vis other countries and non-citizens (e.g. Bauböck 2020; Song 2018; Christiano 2017). From a normative perspective, this right is not without exceptions (e.g. there is a widespread recognition in normative analyses that states have special moral duties to refugees) and, in practice, some countries may decide not to exercise their right to control the immigration of citizens of particular countries (e.g.., countries that are part of agreed areas of 'free movement' such as the European Union). Still, even countries that have decided to join free movement areas typically retain the right to control the immigration of citizens from outside the free movement area. In the case of the EU, all Member States have the right (and legal 'competence' within the EU) to control the immigration, residence and employment of migrants from outside the European Economic Area (EEA).

Given that liberal democratic states have both the right to uphold and enforce national immigration laws and also commitments to guarantee fundamental rights laws and minimum standards, state actors (and street level bureaucrats) can be conflicted in how they can equitably and lawfully discharge their respective duties to irregular migrants, to citizens and authorised immigrants, and to 'the state' itself. Guaranteeing the rights of migrants who violate immigration laws might not only be regarded as condoning or rewarding rule-breaking behaviour but as undermining the state's sovereign right and duty to *deter* irregular migration. It can also be seen as threatening the security of citizens. On the other hand however, rule-breaking behaviour is not of itself a ground for denying fundamental rights to irregular migrants – the protection of which serves other important policy goals consistent with the core values of liberal democracies (discussed above). Indeed, elements of this principle are already familiar and reflected in longstanding tort laws of liberal democracies where, despite the high priority afforded to the sovereign right to private property, owner occupiers nonetheless owe a duty of care to 'trespassers' – a duty whose parameters increase depending on the circumstances of the trespass (e.g. whether it is 'tolerated' by the property owner) and on the characteristics of the trespasser (e.g. whether the individual trespassed knowingly, was a child or had particular vulnerabilities).

The presence of irregular migrants thus creates a fundamental 'value conflict' in liberal democracies, between upholding immigration controls and associated values that exclude irregular migrants from certain state protections and benefits/privileges and, on the other hand, ensuring fundamental rights protections for all people (including irregular migrants) on their territory in line with their commitments to basic human dignity, equality, solidarity (that are enshrined in national legal and policy instruments). The objectives, logics and underpinning value conceptions of immigration controls are 'nationalising' (in the sense that they favour citizens over non-citizens), 'differentiating' (in the sense that they create different groups of people with different rights, across citizens and non-citizens and also within non-citizens), and 'illegalising' (because they create irregularity in migration, residence and employment of non-citizens). In contrast, the objective, logic and underpinning value conceptions of fundamental rights protections are universal (in the sense that they apply to everybody regardless of citizenship and legal status) and 'equalising' (in the sense that they reject differentiation and nationalisation).

2.2 Irregular migrants and interest conflicts

The goal conflict between controlling immigration and protecting fundamental rights is not only grounded in conflicting values but also in conflicting interests. Irregular migration creates a range of costs and benefits, not only for different groups of migrants but also for different groups of citizens in the host country. These perceived effects can be expected to shape actors' preferences for particular types of policy responses to the presence of irregular migrants. Most obviously, some employers may benefit from employing mi-

grants illegally and therefore lobby their government to minimise enforcement activities. Irregular migrant workers employed at restricted rights can undermine the wages and employment conditions of other workers, especially in certain institutional settings (e.g. in labour markets with low degrees of regulation and few protections of employment rights). Trade unions may thus support measures that reduce irregular labour immigration but, at the same time, help protect the rights of irregular migrant workers (cf. Marino et al 2015). Where alternatives to using irregular migrant workers would lead to higher prices of products and services, consumers may favour the toleration of certain types of irregularity in migrant labour markets. Governments sometimes tolerate irregular migration to manage competing economic pressures for better access to migrant labour and political concerns about immigration (Joppke 1998).

Conflicts of interests vis-a-vis irregular migrants can aggravate or alleviate value conflicts. Value conflicts could be aggravated, for example, by perceptions that a state's duty to guarantee the rights of its citizens and authorised immigrants (whom, it is often argued, have a prior or more immediate claim on the state) is somehow *compromised* by upholding its duties to irregular migrants. On the other hand, where it is thought that irregular migrants have shared interests with regular migrants and with citizens, and that punitive measures introduced to deal with irregularity may have negative consequences for citizens (e.g. Anderson 2013), fundamental value conflicts may be reduced, at least temporarily and for certain groups of migrants. For example, during the Covid-19 pandemic, various European countries temporarily regularised the legal status of irregular migrants working in essential services (e.g. Anderson et al 2021) though this did not prevent the scapegoating of migrants in some other contexts.

Fundamental goal conflicts are not easily settled as a matter either of law or politics. When making public policies, states must necessarily negotiate the conflicting values and interests, and *justify* their decisions about what principles, which duties and whose rights and interests they will prioritise, as well as how they can implement these priorities in practice. As we argue in this paper, all host country policy responses to irregular migrants have to consider and 'manage', in one way or another, the conflicting interests and values associated with immigration controls and fundamental rights protections. How states manage and respond to this conflict, through their policy responses to irregular migrants, will have important and differentiated consequences for the experiences and conditions of irregular migrants in and across European countries.

2.3 Policy responses to irregular migrants: managing goal conflicts

As discussed above, all policy responses to irregular migrants reflect a particular way of managing the conflicting values and interests associated with of immigration controls and fundamental rights protections. No policy response can completely and permanently eliminate the fundamental goal conflict; rather, each approach serves only to ease the tension in certain limited circumstances (cf. the discussion of the ethics of migration policy dilemmas in Bauböck et al. 2022; and Bauböck and Permoser 2023).

Regularisation policies

Just as the rule of law and sovereign authority has been construed as requiring nation states to regulate and enforce its national borders, the same principles enable governments to set the conditions under which they are willing to authorise the immigration status of those individuals who have entered or remained in the host country in breach of national immigration laws. In theory, 'regularisation' policies can help protect the rights of irregular migrants by lifting them out of 'irregularity', thus eliminating (at least temporarily) tensions between immigration controls and rights protections. Given however the selective and, to many minds, arbitrary nature of regularisation policies in practice, this marks an end to the underlying value and

interest conflicts in very limited circumstances only (cf. Song and Bloemraad 2022). The regularisation policies that some European countries have implemented over the last few decades have all been conditional on meeting certain criteria such as length of stay and/or employment in the host country. This means that regularisation policies always leave out some migrants whose status remains irregular. Governments must therefore re-engage with the same tensions in respect of the irregular migrants who have not been regularised as well as any new irregular migrants (i.e. new irregular arrivals or migrants newly transitioned into irregular status).

Firewalls

In relieving public service providers from the duty to report the irregular immigration status of migrants accessing such services as healthcare, social assistance, accommodation or education, the use of 'firewalls' might well compartmentalise the states' duties to uphold the basic social rights of migrants and to enforce immigration controls such that, irregular migrants may, in theory, enjoy minimum rights standards (see the broader research on 'firewalls' as one way of managing goal conflicts in public policy; Thacher and Rein 2004). Firewalls reach their limits however where the duties of state providers are not so easily divvied up – that is, where the duties both to uphold fundamental rights *and* immigration controls are integral to the mandates of officials. Such is the case for many national labour inspectorates whose duty to control and regulate illegal work/employment prevents them from overlooking immigration irregularities which, in most cases, are a primary cause of national labour law violations.

Granting legal rights

To help protect irregular migrants' human dignity and fundamental rights, states may – and many do – grant legal rights protections to irregular migrants. For example, in most but not all European countries, all migrants (including those with irregular status) are given legal access to certain aspects of healthcare (mostly focusing on emergency healthcare but also going beyond that in some countries, see Fox-Ruhs and Ruhs 2022; Fundamental Rights Agency 2021; EMN 2021). Arguably, the provision of this legal right to irregular migrants is, at least in part, a reflection of a perceived interest among host country actors that providing access to (emergency) healthcare has positive consequences for citizens and regular migrants. Where such rights have been granted, it has been done in a highly selective and often conditional way, precisely because the perceived demands of immigration control (and the host country actors supporting it) push against granting irregular migrants a wide range of legal rights to welfare support in the host country.

This is also evidenced in approaches to managing the goal conflicts in policies vis-a-vis irregular migrants that combine the provision of certain legal rights to irregular migrants with increased measures to facilitate migrants' 'return' to their countries of origin – what Dewhurst (2013, p.99) has euphemistically called the "protection with consequences" approach. Under these policies, irregular migrants can access certain rights but, to do so, they must 'come forward' and make themselves known to the authorities and available for return. This approach is evident, for example, in the EU's Returns Directive, the Employer Sanctions Directive as well as in national policies which respond to those who, for administrative reasons, cannot be promptly returned to their countries of origin (Fox-Ruhs and Ruhs 2022). Arguably, anti-trafficking measures also fall within this same category of policy responses to irregular migrants that combine a degree of protection with immigration controls. Anti-trafficking laws and policies posit immigration controls and enforcement as a response to human rights violations. While anti-trafficking laws are often hailed as being based on a human rights approach, the Palermo Protocol is not a human rights instrument. It is primarily an instrument designed to facilitate cooperation between states to combat organised crime, not an instru-

ment designed to protect or give restitution to the victims of crime. Rescued victims of trafficking are often returned to their home countries.

Arguably the greatest limitation of this approach is that, to be even partially effective in practice, it depends on the co-operation of irregular migrants. While the same is of course true of the previous three policy approaches discussed, the more proximate the link between the enjoyment of rights and deportation, the less likely that irregular migrants will seek to claim their rights. In the absence of rights claims by irregular migrants, liberal democratic values cannot flourish in practice regardless of 'de jure' rights. Migrants' agency thus becomes an important factor in assessing the likely viability and effectiveness of any national government response to managing the goal conflicts arising from irregular migration.

State toleration

Governments may, and sometimes do, tolerate (or 'turn a blind eye to') certain types of irregularity in migration, residence and employment, as a way of managing perceived economic pressures (e.g. a perceived need for migrant labour in particular sectors of the economy) with political concerns about immigration in general, and irregular migration in particular (Joppke 1998). Such toleration is typically highly contingent and selective, and it is often limited to certain sectors or migrants with particular types of irregular migration status. For example, in their study of the 'functions' of different types of irregularity in the UK's migrant labour markets, Ruhs and Anderson (2010a) found that the UK Government prioritises enforcement against irregular migrants based on certain criteria and migrants with semi-compliant status, i.e. residing legally but working in violation of the employment restrictions attached to their immigration status, were a relatively tolerated group (partly because migrant students working more than the allowed 20 hours per week were, at the time of the study [2004], considered an important pool of migrant labour in certain sectors, especially the hospitality industry). Because of their selective and limited nature, such 'toleration' responses to the presence of migrants constitute a way of addressing – but not resolving – the underlying goal conflict.

State enforcement against migrants and their employers.

Although enforcement capacities and activities vary considerably across countries, most European countries take a range of measures to enforce immigration laws and policies vis-à-vis irregular migrants and their employers. This includes a range of detection and surveillance measures and attempts of removal from the country. In practice, such efforts are constrained, at least to a degree, by fundamental rights protections in place. For example, basic protections of fundamental freedoms and privacy laws do not allow the use of certain technologies in surveillance and detection of irregularity in migrant labour markets.

As our list of policy response has focused on national policies to irregular migrants, we have not included sanctuary policies, which create spaces within nation states (in cities, provinces or within the 'territories' of non-state actors) where irregular migrants can enjoy certain fundamental rights without the risk of apprehension and potential deportation by immigration authorities. Such sanctuary policies are arguably less about 'managing' the goal conflict than about attempting to settle the conflict in favour of fundamental rights and against national immigration controls. Whilst it is undoubtedly part of a thriving liberal democracy to challenge the authority of central government and sovereign powers – particularly where the exercise of those powers is considered unjust or an irreconcilable constraint on the duties of regional, municipal and non-state actors – 'renegade' behaviour is nonetheless liable to be sanctioned and overruled by higher state powers. The effect, in goal conflict terms, is to return to square one.

The foregoing discussion indicates that the generic tensions and goal conflicts arising from the presence of irregular migrants is the same for all European nations in the liberal democratic tradition and are unlikely ever to be entirely resolved (cf. Bauböck et al. 2022). We argue, however, that the particular nature of the goal conflict and how it is managed in policy responses will vary across European countries with different institutional contexts, with important consequences for the conditions of irregular migrants in those countries.

2.4 Migrants' conditions in a capability-inspired perspective

Migrants, including those with irregular migration status, have varying degrees of agency and typically use a range of strategies to 'navigate' and engage with host country institutions and interests to improve their conditions. This is why it is helpful to elaborate and conceptualise migrants' conditions in terms of their capabilities in the host country. Inspired by Amartya Sen (e.g. Sen 1980, 1985, 2005), and how the capability approach has become an increasingly common framework for studying migrants' conditions (see e.g. UNDP 2009; Ruhs 2010, 2013; de Haas 2014, 2021), we define irregular migrants' conditions in multidimensional terms and with an emphasis on their agency. The conditions of irregular migrants are multi-dimensional in the sense that they include not only economic aspects and outcomes but also a range of other resources and facets of their lives relating to health, education, housing, social relations, and security. Migrants' agency is important in terms of the possibility to influence their multi-faceted conditions as well as their 'room for manoeuvre' more generally.

Our understanding and definition of irregular migrants' conditions also includes the extent to which migrants (feel they) can exercise in practice any legal rights that they may have 'on paper' and, at the same time, their ability to access services or benefits despite the absence of a legal right to do so. The access to rights and services that irregular migrants have in practice is likely to be an important dimension with direct consequences for the whole range of outcomes and opportunities mentioned above. Lack of or limits to access to rights, for example to health care, is one important factor affecting individuals' capabilities and contributing to the vulnerabilities of irregular migrants.

People's decisions to cross borders and work abroad, regularly or irregularly, may involve trade-offs between what they know about different conditions. Depending on their individual situations and circumstances, different groups of migrants may evaluate these trade-offs and make decisions in different ways (and migrants' perceptions and ways of dealing with these trade-offs may change over time). For example, in certain cases migrants may temporarily 'sacrifice' their security of residence and access to some rights for the opportunity to improve their economic situation through irregular residence and employment (Fox-Ruhs and Ruhs 2022). Others may feel they have little choice but cross borders to escape violence and find that, having entered Europe, there are multiple obstacles to regularising their status. Subsequent decisions, to move within Europe or stay put, to work or apply for asylum, are taken within this context.

At any given time, the conditions of irregular migrants will have impacts on all people in the host country, including citizens and regular migrants – hence the dotted arrow from box 'E' (conditions of irregular migrants) to space 'C' (interests and policy preferences of host country actors) in Figure 1 – and this may result in (further) changes in policies vis-a-vis irregular migrants and/or, in the longer run, potentially also to the national institutions.

2.5 How institutions may shape the management of goal conflicts, policy responses, and the conditions of irregular migrants: Hypothetical mechanisms

We argue that the settings of key national institutions – legal institutions, political institutions, labour market institutions, and welfare state institutions – are critical to shaping the national politics and management of the conflict between immigration controls and fundamental rights protections because they weigh in by favouring different sides of the conflict or by fostering more of a balance between the competing goals. The settings of national institutions affect how states perceive and respond to the core goal conflict in two main ways: they contribute to establishing the normative boundaries or 'red lines' which ought to be respected when considering and addressing the conflict; and they often (but not always) generate distinct sets of rights and standards for citizens and legal residents, the protection of which may, as an empirical reality, dictate and vary states' responses to the goal conflict. Within these normative and empirical dynamics or influences, there are then several mechanisms which explain *how* national institutions shape and differentiate the particulars of states' responses.

Most commonly, we think of institutions as a (feasibility) *constraint* on policy-making or, more specifically, as a force which defines the normative, political and practical limits of state action. Research has long established the stability bias of institutions and resistance to change but institutions also focus the lens or establish the paradigm through which policy actors perceive realities and possibilities. The more deeply embedded the institution, the more likely that it will constitute the frame of reference within which problem-solving (of which the tensions associated with irregular migration is an example) takes place. Institutions may be particularly 'locked-in' as a result of longevity and/or when, for example, they form part of the national 'conscience', they are reinforced and perpetuated by powerful interest groups, or they have established interdependencies and complementarities with other sets of rules/institutions (typically welfare, labour market and fiscal regulations).

The ability of institutions to *shape the interests and distribution of power* among institutional and political actors within national polities and societies is a second important mechanism which explains the differentiated effects of national institutions on the management of goal conflicts and policy responses to irregular migrants. Typically, we think of the important role of political institutions in providing opportunities for representation of political and societal groups and for degrees of deliberative democracy. However, labour market and welfare state institutions are each importantly associated to different degrees with the privileging of particular interest groups, such as political parties, trade unions, businesses or favoured sectors of industry. Legal institutional settings may, via strategic and incisive advocacy opportunities and public interest litigation, open channels of political influence for social groups who are otherwise on the fringes of the political process and without the power resources of more traditional organised interests. In all cases, the groups that are empowered by such institutions are liable to significant cross-national variation while the weight of political influence that each group carries is likely to depend, among other things, on the balance of powers in national governance structures.

Third, institutions as a *resource* may also shape the dynamics of goal conflicts and policy-making vis-à-vis irregular migrants. Institutional capacity in terms of administration, financing and 'quality control' or regulation may alter conceptions of state duties, the scope of rights of individuals and affect matters of value prioritisation. Countries with more developed institutional capacity may be in a better position to absorb risks giving them greater policy leeway or scope for creativity. Countries with 'quality' institutions may of course also have most to lose.

Direct and indirect effects of institutions

Most of our discussion so far has focused on what we believe is an important and understudied 'indirect' effect of national institutions on the conditions of irregular migrants, via the host country's management of the fundamental goal conflict and policy responses to irregular migrants. As mentioned at the beginning of this section, some national institutions may also have direct impacts on migrants' conditions and capabilities. For example, if access to a particular right for all people is protected in a country's constitution, this will have direct effects on migrants as well as indirect effects (via constraining host country politics and policy responses to irregular migrants). Taking another example, different types and qualities of national institutions (e.g. different types and qualities of health systems or employment protections) will naturally imply cross-country differences in the 'quality' of the rights that irregular migrants (as well as regular migrants and citizens) may potentially have.

The direct and indirect (mediated) effects of national institutions on the conditions of irregular migrants may go in different directions. For example, a particular national institution, such as a means-tested social protection programme, may imply the inclusion of some irregular migrants (the direct effect) but specific government laws and policies vis-à-vis irregular migrants may explicitly restrict irregular migrants' access to this programme (the indirect effect). The opposite scenario is also possible, i.e. a particular type of national institution may imply exclusion of irregular migrants (e.g. a social protection programme requiring prior contribution through formal employment and tax payments) while government policy may grant irregular migrants access to this programme despite the lack of formal prior contributions.

Based on this conceptual framework and reflections, Sections 3-6 provide a theoretical discussion of why and how variations in national legal systems, political systems, labour regulations, and welfare states may shape the management of the core goal conflict in national government responses to irregular migrants by 'weighing in' to favour (or, in some cases, foster more of a balance between) different sides of the conflict. Where relevant, we also consider how institutional variations may affect migrants' conditions 'directly'.

3 Legal institutional settings

In view of the converging forces of European Union law and international human rights treaties, we might have a certain expectation of uniformity in the way in which the legal systems of European states shape their respective nations' policies vis-à-vis irregular migrants and, in particular, how they set the parameters within which the conflicting demands of immigration controls and fundamental rights protections must be settled. Judiciaries of all European countries will have experienced the influence, for example, of the jurisprudence of the European Court of Human Rights – and specifically its tests of 'proportionality' and 'necessity' for the arbitration of conflicts of laws and rights in democratic societies. Despite these assimilatory trends, variations across European legal systems are nonetheless considered to be significant with a classic source of difference attributed to the particular traditions of the common law and civil law legal systems and their subdivisions (Legrand 1996, Merryman and Pérez-Perdomo 2019, Rehling Larsen 2021).

Our analysis here will focus on variations in constitutional law settings of national legal systems. This structural institutionalist comparative lens is well suited and highly pertinent to our analysis of how legal systems shape and differentiate national policy-making processes on irregular migration. The comparative constitutional law lens speaks directly to the core elements of the goal conflicts associated with the presence of irregular migrants; namely, it places analytic attention on fundamental rights norms and protections, on

the nature of state sovereignty, and on the distribution of power between the three main branches of government (the legislature, the executive and the judiciary). Moreover, the constitutional comparative lens is naturally inclusive of variations in legal traditions, and therefore enables us to consider how such variations might form part of an explanation for the particulars of national constitutional law settings.

We argue that the primary effect of constitutional arrangements on national policy-making processes, and specifically those related to irregular migrants, is one of constraint. In theory, constitutional rights protections – being located at the pinnacle of national legal hierarchies – impose the highest form of constraint on the law and policy functions of national governments. The constraint has two dimensions: (a) the informal or 'soft law' constraint where constitutional rights create norms which regulate behaviour 'internally' by generating compliance according to a 'logic of appropriateness' (c/f. March and Olsen 1998) or based on a rational calculation of material interests; and (b) the formal or 'hard law' constraint which generates compliance by the exercise of legal authority in accordance with constitutional settlements on the separation of powers. The nature of the constitutional constraint varies across countries and, as we discuss below, depends on three particular national institutional settings: (1) the status and scope of fundamental rights protections within national legal systems; (2) the scope of judicial powers to promote and enforce fundamental rights vis-à-vis the executive and the legislature; and (3) the effects of competing laws in the adjudication of rights disputes between private individuals in the contractual contexts of work and service provision. The second setting analyses the effect of constitutional and fundamental rights on the exercise of power by the executive and legislative branches of government, while the third setting prompts consideration of how the judiciary is itself bound by the constitution in the context of its general law-adjudicating or law-making duties in arbitrating fundamental rights disputes between private individuals.

3.1 Status and scope of fundamental rights protections within national legal systems

The nature of the constitutional law constraint depends, in the first instance, on the status and scope of fundamental rights protections; namely, on the constitutional *standing* of fundamental rights protections, on the *types* of rights that are afforded constitutional protection, and the *classes of individuals* protected by such rights. In the context of national policy-making on irregular migration, three distinct forms of fundamental rights protections emerge from the constitutional legal orders of European states.

The strongest form of fundamental rights protection is that contained in a written constitution or bill of rights where, either in the express constitutional text itself and/or in accordance with the jurisprudence of national higher level or constitutional courts, such rights are not limited exclusively to citizens. What we might call 'universal constitutional rights' can vary from a narrow range of classic civil and political rights to a broader spectrum of social and economic rights.[5] Where universalism is not expressed, national courts have typically determined universal application based on whether the constitutional right in question is central to human dignity or core to human personality/personhood. According to such reasoning, courts in Italy, Ireland, and Spain have, respectively, recognised the universality of constitutional rights to healthcare (Pannia 2022) to work (Irish Human Rights and Equality Commission 2022), and to join a trade union (Rodriguez and Rubio Marín 2011). Constitutions which provide for 'unenumerated rights' or allow rights to be inferred from the spirit and purpose of the Constitution (such as in Ireland) enhance the interpretative and 'law-making' powers of national higher level or constitutional courts which may resolve in favour of generous universal rights protections.

5 Wiklund (2008) notes, for example, that the Swedish constitution or "*regeringsformen*", as amended in 1976, provided "aliens" with protection equal to that of citizens for a narrow list of civil rights but the subsequent ratification in the early 1990s of the European Convention on Human Rights had the effect of expanding universal rights protection under the Swedish constitutional legal order.

A more diluted variant of a universal constitutional right, is what we term the 'implied universal constitutional right'. This is where the constitutional text and the jurisprudence of the national higher level courts are silent on, or ambiguous about, the scope of constitutional rights protections to non-citizens (including irregular migrants) but where a universal reading of such constitutional rights can be implied due to the constitutional status of countries' commitments to international human rights treaties, such as the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights (for discussion see e.g. Moyn 2010 and McCrudden 2015). This is notably the case for countries with monist legal systems in which international treaties are directly incorporated in the domestic constitutional legal order upon treaty ratification (Dürr 2014). Hence the constitutions of many former communist countries of Eastern Europe which were already modelled on the ECHR, guaranteed the universality of those constitutional provisions by Convention ratification. Of course, the range of Convention rights is, in certain cases, lower than the universal rights protections offered in national constitutions as discussed above.

A third form of fundamental rights protection is the 'sub-constitutional variety', of which the United Kingdom is the archetype (Besson 2008). The United Kingdom stands out as the sole instance of a European country which, in keeping with the principle of parliamentary supremacy, is without a written constitution. Since the incorporation of the ECHR into UK domestic law via the Human Rights Act 1998, the UK has created a new source of fundamental rights law which although not of the order of a constitutional bill of rights nonetheless commands a unique position vis-à-vis 'ordinary' statutory legislation in the sense that the Human Rights Act operates as a standard with which such ordinary legislation should comply. Such rights are universal in application but bear the limitations (in terms of breadth) of the Convention.

What then are the potential consequences of these different constitutional rights arrangements for nation states policy-making vis-à-vis irregular migrants? We argue simply that the more that states bind themselves in constitutional law to protect universal fundamental rights (i.e. bind themselves at the peak of the national legal pyramid), and the wider the scope of these rights protections, the greater the *prima facie* rights constraint (of both the formal and informal variety) in national policy-making on irregular migration. Moreover, the more 'fundamental' the constitutional right, the harder it will be for states to justify interference with those rights on grounds of immigration controls other than where such controls are argued to be necessary and proportionate measures to uphold the rights of others and the 'public good'.[6] Thus, while the recognition of a constitutional or sub-constitutional fundamental right of an individual with irregular migrant status does not necessarily (although it may) 'trump' the demands of immigration laws – it arguably increases the imperative on national governments to 'take rights seriously' (cf. Dworkin 1978).

3.2 Scope of judicial powers to enforce rights and provide remedies

The extent to which constitutional and fundamental human rights laws constrain the policy-making functions of governments depends not only on their form – in terms of the norms and standards that they set – but also on the nature of legal institutional mechanisms of enforcement. This is notwithstanding the fact that, even without credible mechanisms of legal enforcement, norms can exercise a 'soft' constraint in the sense that they can help generate cultures of fundamental rights which could have important national policy-making significance. In reality however, most informal or 'soft' constraints evolve in the context of simultaneous formal constraints for enforcing norms (cf. Hart 1994). Indeed, all European legal systems have powers to enforce fundamental rights norms, but national systems vary on the types of legal authori-

6 We naturally exclude here "non-derogable" ECHR rights such as the right to life, (A.1.) to freedom from torture (A.2), freedom from slavery (A.4) and retrospective criminal penalties (A.7).

ties who can exercise such powers and, more significantly, on the nature and associated effects of the powers.

In practice, the main way in which national courts enforce fundamental rights is through the adjudication of individual complaints in cases either where primary legislation itself is alleged to infringe fundamental rights or where the operationalisation of particular laws by agents of the state is claimed to have resulted in a rights violation.[7] Beginning first with complaints of the second kind, these give rise to what is known as judicial review of executive or administrative action. Following the widespread ratification and/or incorporation of the ECHR by European states, this type of review has become a mainstay of the constitutional rights order and, despite some ongoing controversy (Dyson 2015, Wind 2010), is largely considered to be both a fitting and proper exercise of national judicial authority in keeping with principles of democracy and governance. Judicial review of executive action in the implementation of immigration laws has been an increasing trend across European states and has, for example, accounted for the exponential increase in such judicial review actions in the UK over the years 2000-2011 (Ministry of Justice 2012).

Although the constraint associated with judicial review of executive action is primarily concerned with adjudicating and (where appropriate) remedying unconstitutional or human rights infringements in individual cases, such review mechanisms may also lead to broad law or policy change in cases where the law/policy itself cannot be implemented in a way which is consistent with rights protections. Importantly, judicial review of executive action also *indirectly* generates a broad constraint based on the associated *costs* of such review for national governments - both in public expenditure and political/reputational terms. As testament to the strength of these interest-based constraints, there has been a notable shift in certain European countries, and particularly in the UK, towards tightening the grounds on which such review action is permissible and restricting the eligibility criteria for legal aid for these types of action (Organ and Sigafoos 2018).

Arguably more significant in terms of the policy-making constraint of judicial review powers is the scope and effects of national judicial powers in adjudicating individual complaints of the first type (above) – namely, complaints that challenge the constitutionality of laws themselves. The adjudication of these types of complaints is a more contentious and delicate matter because it goes to the heart of normative questions about the separation of powers and the meaning of a liberal democracy (Waldron 2006, Hirschl 2004, Tushnet 2008). In particular it begs the question of who – amongst the judiciary, the parliament and the executive – should bear ultimate responsibility for final decision-making in terms of the scope and effects on national laws and policy of constitutional and sub-constitutional fundamental rights norms?

European countries have responded differently to these questions in their constitutional designs (Sweet 2003, 2011) with discrete consequences, among other things, for policy-making on irregular migration and, in particular, for balancing the goals of safeguarding rights and enforcing immigration controls. In leading comparative constitutional research, Tushnet (2008) has distinguished between "strong-form" and "weak-form" review powers. According to this distinction, strong-form review is that which allows courts, upon a finding of unconstitutionality, to not only set aside the application of infringing laws to individuals cases but also to strike down and thereby invalidate laws with general effect. In attempts to ensure the integrity of these strong powers and impose limits on their use, many European countries (e.g. Austria, Germany, Spain, Portugal and many post-communist Eastern European states) have assigned this review power to specially designated constitutional courts or bodies. National legal systems have, both separately and simul-

7 Abstract review (i.e. unmotivated by individual complaints) of laws (both drafted and enacted) is also permitted by many European constitutional laws. While such review is also an important constraint on the policy-making functions of the legislature, review powers go beyond the courts and in many countries the constitutional and/or human rights compatibility of laws is conducted by designed parliamentary committees or bodies of legal and political specialists.

taneously, also developed rules around legal standing, referral, or evidential thresholds which regulate the individual complaints that are permitted for adjudication. Some courts with strong-form review powers have the discretion to suspend the invalidating effect of their judgments in order to provide parliaments and governments with reasonable time to amend or substitute the impugned laws. Disputes over immigration laws have resulted in courts exercising such suspension powers in order to enhance the democratic process and encourage stable policy solutions based on deliberation and problem-solving at the level of the legislature (Carolan 2011).[8]

At the other end of the scale, there are national constitutional systems that permit, what Tushnet (2008) describes as weak-form review, although the relative 'weakness' of the powers has been disputed (Waldron 2006, Kavanagh 2016). Weak-form review is characterised by judicial findings of unconstitutionality or human rights incompatibility that are not technically legally binding or enforceable against the government. Such powers (of which the UK is the classic case, but which also more accurately reflects the situation in Sweden, Finland, Denmark and the Netherlands) are consistent with models of governance that recognise parliamentary supremacy, or which speak to traditions of judicial deference to parliament (Dürr 2014; Wiklund 2008, Rehling Larsen 2021). These models have developed their own distinctive approaches to enforcing compliance with human rights/constitutional rights norms. Some provide a greater supervisory role for the implementation of judgments (and indeed for avoiding judgments in the first instance) within the mechanisms of parliament and government. The UK Human Rights Act 1998 has additionally encouraged courts, where possible, to interpret national laws in conformity with human rights standards. This presumption of constitutionality has resulted in quite significant judicial interventionism where, for example, the court's reading of the law has had the effect of substantially altering the statutory meaning intended by parliament (Kavanagh 2016).

The actual and perceived effects of these different powers of judicial enforcement of constitutional/human rights undoubtedly have important bearings on how national governments elaborate policy vis-a-vis irregular migrants. Such powers affect the scale of judicial resistance or conflict foreseen by policy-makers, and they ultimately affect how policy-makers calculate the costs and benefits of their favoured policy positions. Part of this assessment will be based not only on the *de jure* powers of courts just discussed but also on knowledge of how these powers are used in practice by national courts. To that extent, cultures of judicial interventionism which are also understood to be distinct across European legal systems (Calabresi 2021a, 2021b; Hirschl 2011; Tuori 2011; Bruzelius 2014; Rehling Larsen 2021; Sweet 2011), will be an important consideration for policy-makers in facing goal conflicts associated with irregular migration.

On the face of it, we might say that strong-form judicial review powers (particularly when accompanied by wide-ranging universal constitutional rights) impose the greatest constraint on national policy-makers. The constitutional rigidity of these arrangements has the effect that, in developing policy on irregular migration, national governments will need to be attentive to the high demands of constitutional and human rights standards. On the reverse, tension between immigration controls and fundamental human rights norms has the potential to be greater in countries with weak-form review where, even in the presence of judicial interventionism, the ultimate supremacy of the legislature reduces the 'hard law' constraint of constitutional rights protections. The recent example of the UK Government's policy to process and resettle asylum seekers and irregular migrants in Rwanda (i.e. The Migration and Economic Development Partnership) is a case in point. Following the UK Supreme Court's ruling against the Secretary of State for the Home

8 For example, in ruling that the Irish Refugee Act 1996 was unconstitutional for breaching asylum-seekers' constitutional right to work, the Irish Supreme Court in NHV v Minister for Justice and Equality [2017] IESC 35, suspended the nullifying effect of its judgment for a period of 6 months.

Department on grounds of the incompatibility of the government's 'Rwanda policy' with the ECHR (Supreme Court 2023),[9] debate continues to rage between the judiciary, the legislature and the government on how attempts to control irregular migration can be compatible with fundamental rights guarantees under the Human Rights Act 1998. In an assertion of parliamentary sovereignty and the defence of democracy, the UK Government has threatened to repeal the Human Rights Act 1998 and withdraw from the ECHR.

It is however far from inevitable that tension in policy-making will arise in countries with weak-form judicial review. The history and politics of some countries may mean that the branches of government are less inclined to conflict. In settings where, notwithstanding universal constitutional/fundamental rights norms, courts traditionally play a relatively back-seat role and are typically deferential to the legislature on matters of public policy, the management of goal conflicts in policy-making vis-à-vis irregular migrants will be determined largely by parliamentary politics. Institutional settings in the political sphere (discussed in Section 4) may therefore carry greater significance than those at the level of legal and constitutional settings.

3.3 Effects of competing laws in the adjudication of rights disputes between private individuals

Goal conflicts associated with policies on the treatment of irregular migrants can, in one sense, be understood as a matter simply of settling rights: there is, on the one hand, the sovereign right of the state to control immigration and to defend its conception of 'the public good'; and on the other hand, the human rights of irregular migrants to claim and receive fundamental protections from the host state. We have, thus far, considered how constitutional rights, depending on their form and associated powers, operate as a variable constraint on the legislative and executive branches of government in terms of how the latter approach and settle such goal conflicts. What we have not yet considered is how those guardians of the constitution – the courts themselves – must *directly* confront the same goal conflicts when adjudicating individual cases of alleged rights violations between irregular migrants and private individuals in the *contractual contexts* of work and service provision. We argue that, in adjudicating private party rights disputes, the goal conflict comes to a head for courts to the extent that they are exposed to three potentially competing sources of rights-related national laws: namely, horizontal-effect constitutional rights; common law principles of illegality; and statutory laws and regulations. How courts resolve these conflicts will be shaped by the relative priority, within the national legal system, of each of these three types of rights-related laws.

In many European states, constitutional rights are not only enforceable vertically between the individual and the state but can also be enforced *horizontally*, in the sense that the rights govern the actions between two private parties. In the important comparative work of Stephen Gardbaum (2003), the European country with the most legally explicit and established practice of horizontal constitutional rights is Ireland, with landmark cases relating to the defence of constitutional rights to freedom of association between individuals and trade unions. Noteworthy cases of horizontal-effect rights also mark out German constitutional law (Gardbaum 2003), while Sunstein (1996) has written about the implied horizontal effects of the constitutions of post-communist Eastern Europe. In the absence of a written constitution, the status of horizontal rights effects in the UK is more ambiguous. Although there is no consensus on the matter, it has been argued that UK courts, as public authorities, are under a duty when applying common law and legal principles to do so in a way that is consistent with the ECHR (Gardbaum 2003). The extent to which constitutional/human rights can be enforced horizontally will be an important consideration for national courts in assessing claims by irregular migrants of labour rights exploitation or discrimination in relation to private services.

9 R (AAA) V SSHD, 2023 UKSC 42. See https://www.supremecourt.uk/cases/docs/uksc-2023-0093-etc-judgment.pdf

In adjudicating inter-party rights disputes between irregular migrants and employers or service providers and contractors, courts in most European countries will also be required to consider the effects of principles or doctrines of illegality on rights claims. Illegality has long been a ground for nullifying contracts between individuals in legal systems across Europe, with the rationale based on the principle that, "... the law is unwilling to help to enforce a contract that places itself outside the legal and moral order on which a society is based" (Jansen and Zimmerman 2018, 1887). The application and, more significantly, the effects of the principle to cases of labour rights violations involving irregular migrants are known to vary substantially across European countries. In the context of work relations, courts in common law countries – such as Ireland (Dewhurst 2013), the UK (Bogg and Novitz 2014) and Cyprus (Pavlou 2021) – tend to use the illegal status of the migrant as a ground for voiding the employment or personal services contract *ab initio* and thereby annulling all duties and/or claims in respect of rights arising between the contracting parties. Courts in civil law countries on the other hand have been associated with preserving intact certain elements of the contract that continue to bind parties in the reciprocal performance of duties notwithstanding the illegality (Freedland and Kountouris 2011,147-148). The reasons for these apparent common law-civil law tradition differences are not fully clear however it has been suggested that, in certain common law countries, courts are foremost concerned with considerations of wide public interest and defending the integrity of the legal system, while in some civil law countries, there is greater motivation to protect labour standards and the rights of workers (Freedland and Kountouris 2011). Freedland and Kountouris (2011, 148) further note that in countries where the laws impose a criminal penalty for irregular migration, courts are more likely to annul contracts in their entirety, along with any associated rights.

In addition to horizontal-effect fundamental rights and principles of illegality, a third factor influencing national court adjudication of rights disputes between irregular migrants and private individuals is the status and scope of statutory regulation of labour standards within national legal systems. Again a divide has been noted been common law and civil law countries for, despite the convergence towards statutory regulation of labour relations and employment laws in all European countries (see Deakin et al. 2007), regulation is said to be, on the whole, much greater in countries with civil law traditions (Botero et al. 2004). Greater statutory regulation has important consequences both for the significance of horizontal rights and illegality principles as considerations in settling disputes between irregular migrants and private individuals in contractual relationships. The extent to which horizontal-effect rights apply becomes of less consequence because regulations themselves will be subject to the constraints of human rights norms in terms of compatibility requirements. Illegality principles will need to be interpreted in light of the codified laws and, where statutory regulation prioritises the rights of workers, this will undoubtedly be a consideration in limiting the nullifying effects of the illegality doctrine on the labour rights of irregular migrant workers.

We can conclude therefore that when it comes to the matter of national courts adjudicating rights disputes involving irregular migrants and private individuals, civil law legal systems with their rigid codified laws and higher levels of labour regulation will face less conflict in weighing immigration controls against fundamental rights and instead be more clearly guided by the labour rights standards which must themselves be human rights compatible. Thus, courts of civil law countries with broad, universal constitutional/human rights norms will more likely favour fundamental rights protections over immigration control goals in determining individual cases. By contrast, common law countries, without the definitive force of the civil code, will be more torn on how to reconcile the fundamental rights of irregular migrants and simultaneously uphold legal doctrines of illegality which carry important weight in their legal traditions. This conflict will arguably be most intense in common law countries like Ireland where horizontal-effect universal constitutional rights are explicit and heighten the conflict with illegality principles, whereas the comparatively

weaker fundamental rights protections in the UK system favours the resolution of the conflict on the side of immigration controls. Knowledge of these discrete attitudes and practices of national courts in managing inter-party disputes in contractual contexts will clearly be an important consideration of national policy-makers in weighing up the conflicting goals associated with policy on irregular migrants.

4 Political systems

Given that in all liberal democracies, policy on irregular migration involves goal conflicts, it is highly important to consider the way in which national political settings affect the *groups of political actors* who may participate in that 'conflict', as well as the *respective powers* that those groups of actors can exercise in order to attempt to influence both the terms and outcomes of the conflict. We know that European countries endorse different models of democratic governance, and each model provides different opportunities and constraints for democratic participation across societal groups and actors. In the context of policy vis-à-vis irregular migrants, we hypothesise that, in countries with political settings which increase the range of political interests involved in national policy-making processes, there are more likely to be competing conceptions of the goal conflicts associated with irregular migration as well as competing ideas of how to address these conflicts which may result in more of a balancing of immigration controls and fundamental rights protections. Moreover, we expect that the ways in which these different views find accommodation in the terms of agreed immigration policy will be significantly affected by how the settings of political institutions distribute power among these interests, including how they create 'veto players', (cf. Tsebelis 1995, 2002). By contrast, in countries with institutional settings which favour a more discrete set of core policy-making actors and operate systems which concentrate political power with those actors, we expect to find more unanimity on both the nature and management of the irregular immigration dilemma and preference more likely to be shown for one or other side of the conflict between immigration control and fundamental rights.

4.1 Electoral Systems

Electoral systems are undoubtedly important for shaping the complexion of parliaments in liberal democracies. The most common electoral system in Europe – party-list proportional representation – operates in 20 EU Member States. Modalities of the proportional representation (PR) system operate in most of the remaining Member States: Ireland and Malta use the Single Transferable Vote; Germany and Hungary have a mixed member PR system; and Italy and Lithuania have mixed electoral systems.[10] France is the only EU country to operate a majoritarian ('one-person-takes-all') electoral system (the 'two-round' approach) and shares most affinity with the UK's 'first-past-the-post' model.

One of the most significant differential effects of PR versus majoritarian electoral systems is on the relationship between national vote shares and shares of parliamentary seats. Under the pure PR system, the share of seats in parliament should be roughly equivalent to the share of votes while in majoritarian systems the shares can be quite disparate. The Labour majority Government of 2005 went down in history as having a vote share of only 35.2 percent while nonetheless commanding 55.1 percent of the seats in the Westminster parliament. Relative to majoritarian systems and controlling for differences in the effect of national political cleavages, research findings therefore associate PR electoral systems with the parliamentary repre-

10 Changes to Italian electoral law in 2017 resulted in a system of one third FPTP (based on single-member districts) and two thirds PR (based on multi-member districts). For discussion see Paparo 2018.

sentation of a wider range of political parties and with a greater probability of the formation of coalition governments (Lijphart and Aitkin 1994).

While the policy positioning of stable, majority governments (typically associated with First Past the Post 'FPTP' type systems) will naturally be shaped strongly by the politics of the ruling party, the effect of coalition governments on the positioning of government policies on a left-right spectrum is not clear cut. Traditionally, there is a view that coalition-building will focus on more centrist political parties – moderating extremist views that may be represented on either side of the political divide (Schofield 1993). However, with populism on the rise across Europe and the decline of so-called 'third way' politics, coalition governments have been formed between unlikely political rivals – a recent case in point being the 2018 Italian Government which was formed as a coalition between the anti-establishment Movimento 5 Stelle and the right-wing Lega (Nord) (Paparo 2018). The latter coalition of populist politics helpfully illustrates how issues of commonality on the 'dilemma' of irregular migration can be reached in coalition governments without necessarily pulling policy towards the political centre. Effects of electoral systems on the treatment of value conflicts in the area of irregular migration will therefore depend critically on the landscape of national political parties and must be considered in the context of other national institutional models for encouraging the political representation of diverse political interests.

4.2 Mechanisms for social partnership in policy-making

Tripartite governmental models which encourage consultation, deliberation and concertation between the government, trade unions and employers are considered an important feature of healthy industrial relations and effective governance in the areas of national labour market, fiscal and welfare policies. Various models of tripartite governance have developed across European countries affording different degrees of policy-making power to organised interests vis-à-vis the government (Crouch 1994; Ebbinghaus 2006). Some arrangements focus primarily on wage agreements and labour conditions, including the setting of statutory national minimum wages, while others are more expansive and extend to influencing policy developments in the field of social welfare.

In countries with powerful trade unions and where constructive relationships between social partners are considered essential to the avoidance of industrial action and the smooth running of the economy and government, significant effort is invested in negotiating policy settlements among the partners. Where partners exercise their veto powers by exiting negotiations this threatens the stability of the government and thereby undermines the interests of incumbent political leaders.

Social pacts or partnership agreements derived under these bargaining mechanisms generally endure until the election of a new government. While governments are undoubtedly the central figures in any social partnership settlement (and, across European contexts, have been known to override the wishes of the partners [O'Donnell 2001]), tripartite mechanisms nonetheless serve an important constraining and moderating effect on the ideological orientation of particular ruling political parties. When it comes to determining value conflicts associated with irregular migration therefore, European variations in tripartite governance will have an important effect on the extent to which different interests are consulted, considered and incorporated in policy responses. The substantive outcome of such negotiations will however be driven by how each of the social partners conceive of their interests vis-à-vis irregular migrants and this is likely to differ cross-nationally depending on, inter alia, the settings of national labour markets and welfare states which we shall shortly discuss.

There may also be mechanisms for civil society representation in policy-making in an extended model of

social partnership, and this is likely to vary across countries. In the deliberative democracy tradition (Gutmann and Thompson 2004), some social partnership settlements have reached out beyond the traditional partners of unions and employers and sought to carve out a political space for the articulation of civil society interest groups. These arrangements alter the composition of those within the 'inner circle' of government policy-making and provide expression for marginal or counter-majoritarian interest groups associated with, for example, the rights of the unemployed, social justice, and human rights. Institutional mechanisms that bring civil society actors to the policy-making 'table' are only the beginning of a process of political influence that is thereafter driven by factors such as the political resources of these groups, the resonance of their positions with the ideas and interests of relatively more 'powerful' political actors and their ability to develop effective political/advocacy coalitions (Sabatier 1988; Sabatier and Jenkins-Smith 1993). In the context of irregular migration, the participation of human rights organisations and migrant-specific interest groups in social partnership arrangements may be important to 'agenda setting' (Kingdon 1984), including shaping the terms of the value conflict, in addition to giving political agency to migrants themselves.

'Citizens' conventions' are a relatively new and growing model of widening further the participation of civil society in the democratic process and in the broader circle of policy-making. Some of these, such as those in Ireland and the UK (modelled on the British Colombia Citizens' Assembly) have been limited to matters for constitutional review, hence their respective titles of "Citizens Constitutional Conventions" (Farrell 2014) and the "Citizens Convention in UK Democracy" (White 2019), while others have targeted specific issue topics such as the "Citizens' Convention for Climate" in France (discussion in Courant 2021). Such opportunities offer potential political platforms for the development of social movements and allow for mobilisation around discrete subject specific policy agendas and issues which, if extended to immigration issues, could provide scope for shaping the political debate on irregular migration and its management.

4.3 Procedural veto points

Opportunities for political participation and representation are necessary for shaping government policy at the agenda-setting stage (including agreeing 'problem definitions') and may also lead to opportunities for a broad range of political interests to engage in policy problem-solving deliberations. The extent to which policy-making engagement is however capable of influencing actual policy outputs is shaped in part by the relative power of the executive branch of government vis-à-vis the parliament and social partners. In countries where power is heavily concentrated in the executive and the legislature has weak powers of oversight, there may be little (outside of interventionist judicial action discussed previously) to prevent incumbent governments from casting aside the products of their political consultations or negotiations, and ultimately driving through the political agenda of their own political party/parties. Indeed, even in the presence of effective parliamentary checks and balances, governments with strong parliamentary majorities will enjoy greater freedom to see through their own political priorities and preferences.

Well-known political 'veto points' that have been much discussed in the political science literature, include: the effects of bicameralism; presidentialism; parliamentary procedures that raise the voting threshold above that of simple majority and instead require qualified or special majorities; the operation of parliamentary legislative committees to scrutinise particular categories of legislation; and statutorily required legislation proofing exercises such as equality or human rights impact assessments. Variation in European governance and parliamentary structures mean that the veto power, or otherwise, of these settings will also differ cross-nationally. There has been very limited research on how veto points shape policy-making on immigration. An important exception is Abou-Chadi (2016) whose analysis of 11 countries during 1980 and 2006 found that left-of-centre governments have a greater likelihood of passing liberal immigration reforms

but only if there was no open veto point, and that greater electoral competition together with politicisation of immigration makes liberal reforms of immigration policies less likely.

One more noteworthy and perhaps particularly topical way in which the executive branch of government can make significant changes to public policy without the usual scrutiny of the legislature is through the use of delegated powers in the form of secondary legislation. Whilst much criticised in some quarters for its potential to undermine the democratic process (Fleming and Ghazi 2023), the practice of delegated powers is constitutionally valid in many European country settings and indeed was a striking feature of many arguably substantive 'emergency law' changes that were deemed essential to respond to the Covid-19 pandemic. The practice has long been used in the UK (where it is commonly known as 'Henry VIII powers') and was a favoured vehicle for introducing many controversial reforms to social welfare legislation, particularly welfare cuts implemented by the Conservative-led Government in the aftermath of the global financial crisis (House of Lords 2021). It also has a significant history in France where constitutional changes introduced by the Fifth Republic under the French Constitution of 1958, strengthened the institutional powers of the executive so that a weaker parliamentary majority would not easily block executive policy-making (Immergut 1990). Ireland operates a similar model and is among the factors which has led to the Irish parliament being described as the weakest of all established European democracies in terms of its ability to check the powers of the executive (Hardiman 2002).

5 Labour market institutions

European countries differ considerably in terms of their labour markets and labour market institutions – including trade unions, collective bargaining, regulation of employment contracts etc. – and other institutions relevant to the formation of human capital such as education systems (e.g. OECD 2020). In the context of this paper, we focus on three specific variations that, we argue, can have important effects on how national governments manage goal conflicts associated with immigration control and fundamental rights protections, and on the conditions of irregular migrant workers: the degree of employment protections and the consequent flexibility of national labour markets; the organization of work; and the presence of 'strategic labour market supports'.

5.1 Employment protections and labour market flexibility

The degree and types of labour market regulation can affect the size of low-wage labour markets (e.g. McKnight et al. 2016) and the demand for (migrant) labour (Borang 2019; Afonso and Devitt 2016; Ruhs and Anderson 2010b). Countries with lower levels of labour market regulations and therefore more flexible labour markets – with fewer employment rights for workers, and greater opportunities for employers to adjust their workforce and employment conditions – tend to be associated with larger low-wage labour markets (see e.g. Grimshaw 2011) and greater employer demand for migrant labour, especially but not only in low wage jobs (see e.g., Wright 2012; Devitt 2011). This greater demand for migrant labour is partly driven by employers' greater ability to lower wages and employment conditions but also by the deficiencies of domestic skills production systems. As discussed within the Varieties of Capitalism literature (Hall and Soskice 2001), flexible labour markets are often associated with education and training systems that are aimed at providing general rather than industry-specific skills as reflected in relatively weak vocational training systems, which created a demand for migrants with specific skills (cf. Afonso and Devitt 2016). Depending on the presence or absence of legal labour immigration opportunities for low-waged work (which, in most

high-income countries, tend to be more restricted than for higher-waged jobs, see Ruhs 2013), this greater demand for migrant labour may result in relatively large numbers of irregular migrant workers compared to countries with more regulated labour markets.

At the same time, in countries with relatively low levels of labour market regulations, all workers (including citizens) will enjoy fewer labour protections than workers in more regulated labour market economies. Flexible labour markets are also likely to be more permissive of differentiated categories of labour with different rights and employment conditions. This may have particular implications for irregular migrants who, one can expect, are likely to be at the bottom of the hierarchy of workers and rights. In other words, compared to countries with more regulated labour markets, countries with flexible labour markets are more likely to be characterised by a combination of (and potential trade-offs between) a relatively high degree of permissiveness (or tolerance) of the employment of irregular migrants on the one hand, and fewer rights protections and worse employment conditions for irregular migrants on the other. In more regulated labour markets, where trade unions are stronger, the prevalence of irregularity in migrant labour markets can be expected to be lower and migrants' rights and protections greater. Ruhs (2018) has shown that, when it comes to the admission and rights of *legal* labour migrants, liberal market economies (with flexible labour markets and liberal welfare states) are more likely to be characterised by trade-offs between openness to immigration and social rights for migrants than coordinated market economies (with more coordinated labour markets and other types of welfare states).

In flexible labour markets with limited regulation of employment conditions and relatively little enforcement against irregular working which includes the irregular working of migrants, the vulnerabilities and outcomes of irregular migrant workers may not differ greatly from those of migrants regularly employed on temporary work permits. In such contexts, the effects of regularisation for the conditions of migrants may be more limited as the primary causes of exploitation and vulnerability could lie with the characteristics of these broader institutions (e.g. limited protections of labour rights for all workers, not just migrants) rather than with 'irregular migration status' per se. There may, however, still be at least some significant consequences of irregular status because, for example, migrants may have fewer opportunities for legal redress in case of labour rights violations. Existing research on the impacts of regularisation on the labour market outcomes for migrants has shown that these effects are highly context specific and not always significant (e.g. Fasani 2015; Ruhs 2017; Ruhs and Wadsworth 2018; Lofstrom et al. 2013; Anderson et al 2006).

5.2 Organisation of work

There is significant variation in how particular products (and services) are produced (provided) across countries, and – more obviously – also across different products and services within countries. For example, the use of low-cost labour and technology in sectors such as social care and agriculture varies considerably across countries, with important implications for the organisation of work and, therefore, also employment conditions and demand for different types of labour. Work that is organised in a way that encourages precariousness, temporariness, informality and relative geographic 'isolation' can be expected to have adverse impacts on fundamental rights protections and other conditions of irregular migrants.

How production or service provision is organised is in part constituted by what is being produced, and the nature of the product or service is reflected in the specifics of sector governance and management, and this can have significant implications for workers' experiences and terms and conditions. To give some indicative examples, land is necessary for agricultural production, and hence agriculture and food processing work is concentrated outside large cities. In some cases, this means that employers provide accommodation

on site for workers and provisions regulating this may be the subject of sectoral agreements. The seasonality of some agricultural work may mean that fixed-term contracts of employment are permitted when the default position of national law is that the contract of employment is indefinite. In the case of care, how night-time hours are recognised and paid for varies considerably across Europe. In the UK workers are paid an allowance rather than the minimum wage for the hours they 'sleep in', whereas in France the time workers spend when required to sleep at a place of work and be available to respond at any time to the needs of care users counts as working time and is paid as such including overtime or night-time supplements. More generally the nature of the service or what is being produced may generate specific health and safety requirements: some jobs in waste management may be governed by strict regulations, especially when dealing with hazardous waste. These regulations often have cost implications with resulting pressure on employers and consequently for workers.

How production or service provision is organised is also a matter of institutional history and policy choices. This organisation has important implications for the nature of work and employment (contracts) and, thus, all workers' rights and conditions. Take the provision of elder care where the relative importance of home care vs residential care varies considerably across countries (Williams 2012). Home care is likely to be associated with greater degrees of informal working and a higher prevalence of atypical working and contracts, and this may have significant implications for the demand for (irregular) migrant labour as well as workers' employment conditions and vulnerabilities. Sector specific institutional features affect the share of self-employed people and agency workers in particular jobs, again with implications for the labour pools drawn on and workers' experiences (e.g. Anderson 2010). These differences in how work is organised and regulated, with implications for the demand for and conditions of (irregular) migrant labour, are likely to arise both between different sectors within the same country (e.g. in the UK, opportunities for self-employment are greater in construction than they are in restaurant service) but also may differ between the same sector in different countries (e.g. the provision of social care is organised differently across European countries).

The proportion of large to small employers in a sector may also have consequences for working conditions. This is not to claim that poor or good conditions can be read off employer size: potentially, large companies may find it easier to implement sectorally-based requirements or protections than small companies, and large and/or nation-wide companies may be more influential in encouraging the development of national employment protections (see e.g. Pedersen 1993). At the same time, arguably some small-scale employers may feel more responsibility for the experiences of their workers. Related to size, contract and organisation is the public-private mix in production or provision of the good/service with implications for financing, employment relations and trade union membership. For example, the UK government's underinvestment in social care has fuelled a demand for migrant labour and, when legal opportunities for migrants to work in this sector were limited, this naturally created pressures that sometimes resulted in irregular working of migrants. In other states too, the marketisation and privatisation of care has been found to have detrimental impacts on the workforce (Theobald et al. 2018).

5.3 Strategic labour market supports

There can also be variation in the extent to which particular types of work and workers are considered of strategic importance for the host country's economy and society. The perceived strategic importance of a sector and the status of individual jobs can have important implications for how governments think about the use and conditions of different types of workers including irregular migrant workers. Host countries often support 'strategic' sectors and industries with specific policies ('industrial policies') that may not ap-

ply to other sectors (e.g. Chang and Andreoni 2020). Covid-19 expanded both popular and public understandings of what constitutes 'essential work' needed to maintain social provision and order and shone a light on the fact that migrants play an important role in the provision of essential services (such as food production, health services and social care) in many European countries. It is possible that governments strengthen labour protections for and reduce immigration control measures against irregular migrants who are employed in sectors and jobs that are considered to be of strategic importance. For example, during the Covid-19 pandemic, a number of European countries temporarily regularised the status or migrants residing and working irregularly in 'essential' jobs (Anderson et al 2021).

'Strategic' can be defined broadly, to include a range of considerations about, for example, the importance of the sector for ensuring societal resilience to sudden external shocks like Covid-19, the need to respond to long-term demographic and technological change (e.g. population ageing and the emergence of new forms of automation in the labour market and access to services), and/or facilitation of the rise of the 'green economy' as a response to climate change. It is an open empirical question to what extent such strategic considerations affect workers' (including irregular migrant workers') fundamental rights and employment conditions in meaningful and lasting ways. For example, it remains unclear whether and how Covid-19 will have lasting effects on public attitudes towards essential workers in general or migrant workers in particular (e.g., Allen et al 2023; Dennison et al. 2023). Moreover, again as highlighted by COVID-19, just because a job is essential does not mean that it is well paid, with implications for its position within the skills hierarchy and for job status, but also for workers' exposure to disrespect including racism from service users and colleagues. However, as noted above, the strategically important role of these sectors will remain, and whether policymakers embrace or ignore this strategic importance *can* have long term consequences for those employed within them.

6 Welfare state institutions

As with labour markets and labour market institutions, European welfare states have developed along different paths and display substantial variation over several dimensions. It has also become increasingly evident that the institutional development in labour markets and welfare states, as well as education systems, covary to a large extent (e.g., Hall and Soskice 2001). In the following discussion, we will draw on the insights from the large and growing body of comparative welfare state research, to discuss the potential implications of different types of welfare regimes and welfare programmes for the perception and management of goal conflicts in policies vis-à-vis irregular migrants and for the conditions of irregular migrants more generally. We distinguish and discuss both welfare regimes and programmes because there can be significant heterogeneity of welfare programmes within each welfare regime, e.g., family policy is not necessarily designed in the same way as core social insurance programmes that typically define the different regimes. We start our analysis with the 'regime approach' to welfare state analysis before we turn to a 'programme perspective' and then conclude with expectations about how variations in regimes and programmes are likely to influence whether and how selectively host states provide irregular migrants with legal access to (aspects of) the host country's welfare state.

Our main argument is that variations in national welfare regimes and specific welfare programmes can matter for the management of goal conflicts as well as the conditions of irregular migrants because these institutional variations can affect: 1) the perceived and potentially also the actual numbers of irregular migrants in the host country; 2) the perceived and potentially also the actual material effects of irregular

migrants on the host country's welfare state and public finances; and 3) the perceived 'deservingness' of irregular migrants to access welfare benefits and services. By 'perceptions' we include *public* perceptions and perceptions of *policy elites*, both of which are likely to influence host country politics and policies vis-à-vis irregular migrants. As we explain in more detail below, we argue that the perceived goal conflicts between immigration controls and fundamental rights protections – and thus also the political pressure and potential scope for restricting welfare rights of irregular migrants – will be greater in countries with welfare regimes and/or specific welfare programmes that are associated with perceptions of attracting potentially large numbers of irregular migrants, greater fiscal costs of rights provisions for irregular migrant, and a relatively low degree of perceived welfare deservingness because of a lack of reciprocity or universality as central institutional features of the welfare regime/programme.

6.1 Welfare state regimes

The regime approach has been very influential for shaping almost the entire field of comparative welfare state research (e.g., *Journal of European Social Policy* 2015/1). The reason for this is that the regime approach is a powerful tool for summarising often complex patterns of differences and similarities in terms of how modern welfare states have crystalised. Existing approaches to regime categorisation differ in their emphasis, with some being focused on labour markets and others more on the core welfare state institutions (e.g. cf. Hall and Soskice 2001 with Korpi and Palme 1998). Although there is a strong correlation between how welfare states and labour markets are organised, there is no complete consistency, which motivates a specific discussion of welfare state variations and their implications for conflicts of values and interests in government policies vis-à-vis irregular migrants and, more generally, the conditions of irregular migrants.

The 'welfare magnet hypothesis' (Borjas 1999) suggests that more accessible and generous welfare states will attract more migrants than other types of welfare states. Empirical research, most of which analyses migrants with regular status, has found mixed evidence in assessing this hypothesis (e.g., Giulietti and Wahba 2013; Ferwerda et al 2023; Ponce 2019; Razin and Wahba 2015; Martinsen and Werner 2019). In practice, in most high income-countries irregular migrants are formally excluded from access to certain welfare benefits. Nevertheless, even if in reality there is no welfare magnet effect and no automatic or easy access to welfare benefits and services for irregular migrants, public and policy elites' perceptions may not be in line with this reality. In other words, even if migrants do not take up benefits in large numbers (and the perceived costs are not real) citizens of the host country may still presume that there is a net cost, and these perceptions may be particularly pronounced in countries with generous and easily accessible welfare states (cf. Blinder and Markaki 2019 on public misperceptions about the costs of regular EU mobile workers). We would expect that perceptions of larger numbers of irregular migrants in a country would generate more political conflicts that are potentially related to both interests and values, with consequences for the nature of rights protections for irregular migrants.

In addition to the perceived number of irregular migrants, a key question is whether and how perceptions of the net fiscal effects of irregular migrants for the host country as well as the perceived welfare deservingness of irregular migrants depend on the welfare state context. We argue that there are, in theory, two specific features of welfare regimes and programmes that can act as *spill-over-mechanisms* for reducing political tensions and pressure to restrict access to rights arising from the presence of substantial numbers of irregular migrants. One spill-over-mechanism stems from the principle of *reciprocity*, which is a strong institutional feature in some welfare state regimes, not least in the various corporatist welfare regimes but also in other regimes that apply the earnings-related principle in social insurance programs. Although, in practice, there may not be large differences in the fiscal effects of migrants across welfare regimes (Österman et al.

2023), reciprocity may affect (and improve) perceptions of the fiscal effects of irregular migrants (cf. the discussion in Blinder and Markaki 2019). Perhaps even more importantly, reciprocity can also be expected to strengthen the perceived deservingness of irregular migrants as welfare recipients because migrants (and other benefits recipients) can be understood to have 'earned' their rights through their 'contributions' (also see Mårtensson et al 2023; Reeskens and Van Oorschot 2012). We have this expectation because, even if some irregular migrants are not actually contributing through payment of social security contributions, they are still contributing through their employment and other taxes (including VAT on products and services), with the consequence that they may still be seen as contributors in a system where the reciprocity principle also applies to them.

A second kind of spill-over-mechanism stems from the principle of *universality*, which is a strong institutional feature in some welfare regimes (most notably in the universal welfare regimes). Arguably, this principle suggests and encourages the inclusion of all residents in the country's social protection system. We expect that the solidarity among regular residents spills over to solidarity with irregular migrants residing in the country, which reduces political conflicts and pressures to deny irregular migrants access to rights. In other words, we expect welfare regimes without strong reciprocity and/or universalism to be more exposed to the conflict generating nature of irregular migration and to greater pressure to restrict the access of irregular migrants to the welfare state.

From a regime perspective, another important factor that we believe is highly relevant to the nature and management of goal conflicts in policies vis-à-vis irregular migrants is the public-private mix in the system of social protection, including interactions with labour market institutions. The public-private mix involves a range of questions that relate to both the numbers, effects and conditions of irregular migrants. A fundamental assumption here is that low levels of public financing generate higher levels of private financing of protection (Esping-Andersen 1990). As public financing can be combined with private provision (e.g., if publicly funded services are outsourced to private providers), we need to analyse both financing and provisioning if we want to understand the implications of a public-private mix for the politics and conditions of irregular migrants. There are likely to be a range of diverse and sometimes counter-acting effects on the conditions of irregular migrants which makes it hard to spell out specific expectations without further analysis of interactions with labour market institutions. For example, with regard to pensions and other social insurance programmes, we can expect that private plans (that tend to be occupational rather than private individual) are more difficult to access for irregular migrants (as benefit recipients) than public ones. The same is likely to be true for access to private 'social' services. At the same time, a large private sector in the social services is likely to generate a larger number of irregular migrants as workers. This is also likely to apply to the private provision of public services, even if more ambitious forms of regulation may dampen that correlation.

6.2 Welfare state programmes

When considering the potential consequences of variations in welfare institutions for goal conflicts and conditions of irregular migrants, it is important to go beyond the regime approach and also consider the characteristics of specific welfare state programmes. While regime variations are, to a large extent, mirrored in variations of welfare programme characteristics, or at least in the relative importance of different kinds of programmes, there is more cross-national variation in welfare programmes than is captured by the regime classification of countries.

When the specific welfare state programmes follow the patterns established by the welfare state regimes (as they often do), they do not typically change the pattern of relevant cross-national variation as established by the regime classification. We should also be aware, however, of the fact that welfare states in general have a bundle of programmes with characteristics that follow the core features of 'other' regimes. For example, all EU countries have some programmes that are targeted to the poor by the use of means-testing. The programme specific information does not always add significant relevant information to what we know already from the regime classification of countries. However, if a country puts a strong reliance on a specific programme that reflects some of the typical characteristics of some of the 'other' welfare state regimes and if it becomes highly salient in public and policy debates (e.g. when concern about a country's health system is more salient than concern about the country's overall welfare regime), then we have to modify our regime expectations based on the programme-specific characteristics. In other words, it may be that the key features of particular welfare programmes rather than the overall regimes influence public and policy elites' perceptions and policy-making.

For example, child benefits – which have been a highly salient issues in public debates on migration in many European countries in recent years – are universal in a number of countries, i.e. even in countries which are not categorised as having 'universal' welfare states. It could be the case that the principle of universalism in this specific kind of benefit spills-over in terms of how policymakers as well as the public view what is a legitimate ground for access to such benefits for irregular migrants. Even if some kind of registered residence is typically required that would exclude irregular migrants, the residence principle as such would perhaps speak in favour of including irregular migrants, depending of course on the nature of the residence requirement and how easy or not it is to fulfil (in paperwork and procedural terms) for irregular migrants.

Based on the reasoning we applied when comparing welfare regimes, we expect a hierarchy of benefits in terms of their likelihood of being associated with goal conflicts and pressures to restrict irregular migrants' access. In particular, we expect means-tested benefits, especially social assistance, as having the strongest potential for increasing goal conflicts and pressure to restrict irregular migrants' access to these benefits. We expect social insurance benefits to be less conflictual than means-tested benefits such as social assistance because of the reliance on reciprocity (cf. the discussion in Nagayoshi and Hjerm 2015). Although they may be perceived to attract larger number of irregular migrants, universal benefits programmes such as child benefits may also be somewhat less likely to spark conflicts than means-tested benefits.

Furthermore, in addition to affecting perceptions of numbers, effects and deservingness of irregular migrants (as welfare regimes do), variations in welfare programmes may also matter because of actual and/or perceived differences in the degrees of state control and potential for 'fraud' (i.e. 'illegal access'). In this context, there is likely to be an important distinction between cash benefits and in-kind benefits (including state services). Drawing on Eick and Larsen's (2022) reasoning about how the different nature of welfare state benefits and services have implications for public attitudes and the conflicts they are likely to generate in relation to migration, we expect social services and other benefits in-kind (such as education and health care) to be less conflictual than cash benefits because of the perceived lower levels of fraud and moral hazards involved with in-kind services.

In addition, there may also be differential degrees of state control over access to different types of benefits, depending on the nature of the benefit. For example, means-tested benefits typically require formal residence permits, even if there might be local deviations/exceptions from that. Social insurance benefits typically require some kind of contribution record (based on the principle of reciprocity) that is difficult to access for irregular migrants. Following this reasoning, we expect a kind of hierarchy between different

benefits in terms of ease of access for irregular migrants, with access easiest with universal benefits followed by means-tested and social insurance benefits in that order.

Our analysis above implies cross-country and cross-programme variations in the degree to which host states are likely to provide irregular migrants with legal access to parts of the welfare state. We expect that the more welfare states are based on reciprocity and/or universality, the more likely they are to include regulations that give also irregular migrants some access to benefits and services, in particular the latter. Similarly, we expect host states to favour legal access to welfare programmes that are reciprocal or universal rather than targeted (means-tested).

With reference to Eick and Larsen (2022), we also formulate the expectation that access is most likely to be provided to programmes where a lack of access for irregular migrants may generate negative external effects for the host country's population. The clearest example here is access to the health care system: lack of access to health care in general and emergency care in particular may, for example, result in the spread of contagious diseases.

7 Conclusion

To understand the conditions of irregular migrants, we need to consider the host country politics of irregular migration and recognise the inherently conflictual nature of the issue: all host country policy responses to irregular migrants involve the management of goal conflicts between protecting fundamental rights and immigration control. National institutions, we have argued in this paper, play an important role in shaping how these goal conflicts are perceived and addressed in different countries, with important consequences for the conditions of irregular migrants.

Our aim in this paper has been to provide a theoretical framework for a new research agenda on how national institutions shape the conditions of irregular migrants in Europe. To achieve this, we have, first, provided a conceptual framework for studying the links between national institutions, the management of goal conflicts (grounded in conflicting values and interests) in government policies, and the conditions of irregular migrants; and second, discussed how variations in the settings of legal, political, labour and welfare institutions may shape the nature and management of goal conflicts and the conditions of irregular migrants in European countries. To facilitate future empirical analysis, we have developed a number of expectations/hypotheses summarized in Table 1 below.

The theoretical analysis and expectations in Table 1 can inform empirical analyses of how and why the multifaceted conditions of irregular migrants vary across countries with different legal, political, labour market and welfare institutions. An important next step that any empirical analysis will have to consider carefully is how to design a feasible and meaningful methodological approach to the comparative empirical analysis. We have kept the theoretical discussion deliberately broad to facilitate a range of different empirical research designs that investigate the roles of some, or all of the institutions discussed in this paper on various aspects and dimensions of government policies and the conditions of irregular migrants. One approach, for example, could be a 'most similar cases' design where country comparisons are selected based on differences in one set of institutions (e.g., legal) in otherwise similar institutional settings (e.g., in political, labour and welfare systems).

Other methodological approaches to the empirical analysis could consider the effects of different types of

institutions taken together, e.g., through studying the association between conditions and different national 'institutional configurations'. A configurations approach is inevitably more challenging and exploratory, as the analysis would need to consider the effects of a number of institutional variations at the same time. From a theoretical perspective, we can expect certain national institutional settings to interact in particular ways within countries. This kind of reasoning dates back to (at least) Esping-Andersen's seminal work on *Three Worlds of Welfare Capitalism* and can also be found in later institutional classifications of countries (cf. Goodin 1999; Hall and Soskice 2001; and Ebbinghaus and Manow 2001). These institutional interactions within particular national institutional configurations may then re-enforce, reduce or modify in other ways some of the 'isolated' (or 'ceteris paribus') effects of particular national institutions that we discussed in this paper, and this is an important area for further theoretical analysis and refinement.

Table 1: Summary of key institutional variations and associated expectations (based on analysis in this paper)

Institutional variations:	Theoretical expectations for goal conflict and the conditions of irregular migrants
1. Variations in legal institutions: 1.1. nature and scope of de jure fundamental rights protections; 1.2 scope of judicial powers to enforce rights; 1.3 effects of competing laws on the adjudication of rights disputes between private individuals	• The more that states bind themselves in constitutional law to protect universal fundamental rights, and the wider the scope of these rights protections, the greater the prima facie rights constraint in national policy-making on irregular migration. Additionally, the more 'fundamental' the constitutional right, the harder it will be for states to justify interference with those rights on grounds of immigration controls. • Countries with strong-form judicial review powers will exercise a more formal constraining effect on national policy-making relating to irregular migrants and, when accompanied by broad, universal constitutional rights norms, will weight policy towards the goal of fundamental rights. Goal conflicts will be at their greatest in countries with strong rights norms but weak-form judicial review powers. • In adjudicating rights disputes between private individuals on matter relating to work and services, courts in common law legal systems face strong conflicts between upholding the integrity of the legal system (and therefore enforcing illegality principles) and protecting fundamental rights of irregular migrants. Conflicts between laws will be less pronounced in civil law countries given the higher level of statutory regulation/codification of labour rights.
2. Variations in political institutions: 2.1 electoral systems 2.2 mechanisms for social partnership in policy-making 2.3 procedural veto points	• In countries with political settings that increase the range of political interests involved in national policy-making processes (e.g. through election systems that are based on proportional representation, strong social partnership mechanisms and more veto players in policy-making), there are more likely to be competing conceptions of the goal conflicts associated with irregular migration as well as competing ideas of how to address these conflicts, which may result in a greater balancing of immigration controls and fundamental rights protections. By contrast, in countries with institutional settings which favour a more discrete set of core policy-making actors (two-party systems and weak social partnership) and operate systems which concentrate political power with those actors (via procedural rules), we expect to find more unanimity on both the nature and management of the irregular immigration dilemma and preference more likely to be shown for one or other side of the conflict between immigration control and fundamental rights.
3. Variations in labour market institutions: 3.1 Employment protections 3.2 Organization of work 3.2 Strategic labour market supports	• Countries with flexible labour markets will: generate greater employer demand for migrant labour, especially but not only in low wage jobs; be more likely to adopt a policy approach that is characterised by a relatively high degree of permissiveness (or tolerance) of the employment of irregular migrants coupled with relatively fewer rights protections and worse employment conditions for irregular migrants. • Different ways of organizing work will lead to considerable variations in the demand for, and conditions of (irregular) migrant labour across different sectors and occupations of host countries. • Governments will strengthen labour protections for, and reduce, immigration control measures against irregular migrants who are employed in sectors and jobs that are considered to be of strategic importance.
4. Variations in welfare institutions: 4.1 Welfare regimes 4.2 Welfare programmes 4.3 Public-private mix in social protection system	• Welfare regimes that are based on reciprocity and/or universality result in weaker perceived goal conflicts and are more likely to include specific regulations that give irregular migrants some legal access to benefits and services, in particular the latter. • Means-tested benefit programmes, in particular social assistance, have the strongest potential for generating (goal) conflicts. Social insurance programmes (based on reciprocity) and universal benefits programmes are less conflictual than means-tested benefits. • Access to in-kind benefits, especially those associated with positive externalities for the host country, generate fewer/weaker goal conflicts than access to welfare benefits. • A greater share of private funding in social protection makes it more difficult for irregular migrants to access benefits and services. At the same time, a larger private sector in the provision of social protection and public services is likely to increase the number of irregular migrants employed as providers of these services.

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