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SPECIAL ISSUE

Migration and the Regulation of Social Integration

Edited by
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and Ines Michalowski

Preface

This volume of the IMIS-Beiträge is a collection of papers that are the outcome of two connected events in spring 2003: a seminar on illegal migration that took place at the DFG Graduate College ›Migration in Modern Europe‹ at the Institute for Migration Research and Intercultural Studies (IMIS) in Osnabrück and a conference held at the Netherlands Institute for Advanced Studies (NIAS) in Wassenaar, a joint venture between the research programme ›Transnationality and Citizenship: New Approaches to Migration Law‹ placed at the Universities of Amsterdam and Nijmegen and the DFG Graduate College ›Migration in Modern Europe‹. The aim of this joint conference was to bring together Dutch and German (Ph.D.) research projects in progress situated in overlapping fields of study. It was initiated by Dietrich Thränhardt who in 2003 was both a member of the IMIS Graduate College teaching staff and a NIAS fellow.

We would like to thank the NIAS in Wassenaar for its hospitality and the highly inspiring atmosphere for scientific discussion. We would also like to thank Sigrid Pusch and Jutta Tiemeyer who prepared the manuscripts for publication as well as John Peterson and Anke Schuster for proofreading some of the English articles.

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Anita Böcker, Betty de Hart
and Ines Michalowski

Introduction

Immigration and the presence of migrants have become the subjects of heated political debates in many western societies. In these debates, the *discourses on immigration and migrants* are changing.[1] Discourses have a performative value and influence the way reality is perceived and dealt with.[2]

National discourses on immigration and migrants construct national identities. This leads to the idea that nations are above all discursive, communicative entities (see Betty de Hart's contribution).[3] In several immigration countries, a shift of discourse can be observed from an emphasis on migrants' rights towards an emphasis on the obligations and individual responsibilities migrants have to fulfil. Furthermore, culture plays an important role in this construction of national identity while debates on migrant integration have come to focus on ›the conflict between western and Islamic values‹. Gender and the position of women are central to these debates. In all countries, issues of headscarves, female circumcision and forced and arranged marriages are important issues.[4] National discourses cross borders and affect each other; the discussions between EU Member States for the development of a European family reunification policy is a case in point (see Anne Walter's contribution). In the field of integration, the European Commission as well as several presidencies of the Council of the EU encouraged initiatives to further the exchange of ›best-practice policy examples‹ in the field of integration between the Member States, aiming at the construction of a common policy (see the contribution by Ines Michalowski).[5] In this way, not only national but

1 The word ›discourse‹ refers here to ways of speaking or writing about a certain social issue, which is connected to the practices that form the social issue.

2 Baukje Prins/Boris Slijper, Inleiding, in: idem (eds.), Hoe tolerant zijn we eigenlijk? Special Issue Migrantenstudies, 18. 2002, no. 4, pp. 194–210.

3 Craig Calhoun, Nationalism. Concepts in Social Thought, Minneapolis 1997.

4 See many of the contributions in Prins/Slijper (eds.), Hoe tolerant zijn we eigenlijk?

5 For the plans of the forthcoming Dutch presidency see Rapportage Integratiebeleid Etnische Minderheden 2003, Kamerstukken II, 2003/04, 29 203, no. 1, 16 September 2003.

also European identities are constructed. Germany, for example, has shifted from a bitter political battle over immigration and violent attacks on migrants to a relatively calm climate – especially when compared to other western European countries – which is marked by an approach of consensus on the issue of integration.[6] The argument that the integration of migrants has been more successful in Germany than in the Netherlands has caused additional doubts in the Netherlands over the ›failure‹ of Dutch integration policy.

The *relation between immigration and integration policy* is contextualised within such discursive backgrounds and is a common subject of discussions within migration research, where mechanisms of external and internal immigration control are distinguished.[7] External control relates to access to the territory and is controlled e.g. through visa controls and pre-flight checks while internal control refers to integration policy in the broader sense as a migrant's inclusion into economic, political, educational, social and/or welfare-state structures. Both control mechanisms work together in order to prevent ›undesired categories of immigrants‹ from immigration and to keep those who have managed to overcome the external control from settling in the receiving state. These mechanisms of inclusion and exclusion take place through controlling the migrants' access to welfare state provisions, education, private housing and the labour market (see Manon Pluymen's contribution).[8] Such controls now play an important role in the strategic and political discussions in several European countries that consider themselves as being confronted with an ›integration crisis‹. Plans to manage this crisis mainly concentrate on the enhanced integration of ›those who are already there‹ and the restriction of new immigration. It can be noticed that several Member States are not only ›fighting against illegal immigration‹ but also thinking of new ways to limit family reunion. Denmark, for example, has introduced the age limit of 24 for the marriage with a foreign spouse, as well as 3 years of residence in Denmark and the criteria that the couple's connection to Denmark must be greater than to any other nation.[9] Furthermore, several European (proposals for) directives give Member States the possibility to make the fulfilment of

6 Dietrich Thränhardt, Inclusie of exclusie: discoursen over migratie in Dutisland, in: Prins/Slijper (eds.), Hoe tolerant zijn we eigenlijk?, pp. 225–240.

7 James Hollifield, Ideas, Institutions and Civil Society: On the Limits of Immigration Control in France, in: Grete Brochmann/Tomas Hammar (eds.), Mechanisms of Immigration Control. A Comparative Analysis of European Regulation Policies, Oxford/New York 1999, pp. 59–95.

8 Michael Bommes, Migration und nationaler Wohlfahrtsstaat. Ein differenzierungstheoretischer Entwurf, Opladen/Wiesbaden 1999.

9 Cf. Dennis Broeders, Inburgering: Instrument van het Immigratie- of het Integratiebeleid?, Adviescommissie voor Vreemdelingenzaken, The Hague 2004.

integration requirements a condition for issuing a (permanent) residence permit. Thus, the fulfilment of integration requirements can not only become a potential instrument of internal control over access to permanent residence but it can also be used as an instrument of external control if countries such as the Netherlands succeed in setting up language tests in countries of origin as a condition for immigration. But how far can individual Member States really decide upon important changes in their immigration policy?

There is a common assumption that migration policy today is being ›denationalised‹ with *states loosing or transferring regulatory potential* to local authorities, private organisations, and particularly to the EU and other supranational institutions. In fact, the migration policies of EU Member States still differ remarkably from one another and the recent transfer of regulatory potential from the national level to the EU will not radically alter this. This can be seen in several cases where the wish of individual Member States to retain their own, restrictive immigration rules has played a more important role than European harmonisation. Partial liberalisation and the transfer of parts of the regulatory power characterise the regulation of labour migration. In particular highly skilled migrants and their employers benefit from this development (see the contributions by Holger Kolb and Tessel de Lange). With regard to low skilled migrants, there is much more concern that workers recruited for temporary employment may end up staying permanently. The Dutch policy towards labour migration from the candidate EU Member States in central and eastern Europe is a case in point. Whereas Germany in the 1990s introduced many exceptions to the ban on recruitment of foreign workers to facilitate the temporary employment of workers from the candidate countries, Dutch immigration policy did not provide for any liberalisation. With regard to family reunification, states appear still less inclined to surrender their control.

The papers of both conferences in Osnabrück (Illegal Migration) and in Wassenaar (Transnationality and Citizenship: New Approaches to Migration Law) are regrouped under four main topics: The first five papers presented by Guiseppe Sciortino, Dita Vogel and Franck Düvell and Norbert Cyrus, Manon Pluymen, Claudia Finotelli as well as Kazimierz Bem and Robert P. Barnidge deal with *new approaches to asylum and irregular migration*. These two categories should not be confused. In many receiving countries, however, asylum seekers and illegal migrants are perceived as belonging to the same, problematic group of immigrants.

Guiseppe Sciortino proposes a new and more generalised approach to social research on irregular migration by further differentiating the irregular migration flows in relation to their respective migration regime. This approach opens a new, dynamic and cognitive perspective on the interactions between (illegal) migration flows and migration regimes, stressing the idea of

double contingency and mutual influence. Sciortino gives a short historical overview showing that irregular migration is the response to a frequent mismatch between the social and political conditions of migration, rather than the result of country-specific events.

In their comparison between the UK and Germany, **Norbert Cyrus**, **Franck Düvell** and **Dita Vogel** discuss the different handling of illegal migration in both countries and the resulting socio-economic status of illegal migrants. The authors argue that the division in British society is organised more along social lines than along criteria concerning the right of residence, as is the case in Germany. For Germany, one can say that the legal position of foreigners is much more important for their social position: irregular migrants are always among the weakest members of society. The more market-orientated and less bureaucratic British society, on the other hand, offers opportunities for social mobility to illegal migrants.

Manon Pluymen's case study shows that the Dutch ›Linking Act‹ *(Koppelingswet)*, which links the right to all kinds of social benefits to a person's residence status, initially appeared to be an example of symbolic legislation but has paved the way for the exclusion of other (non-illegal) categories of migrants. Moreover, organisations providing assistance to migrants excluded from public benefits find themselves using criteria similar to those of the Dutch government when deciding whom they will and whom they will not support.

In a German-Italian comparison, **Claudia Finotelli** shows that the common supposition that Germany receives much more asylum seekers than Italy because of its well-developed asylum system linked to welfare-state provisions, can be challenged. Finotelli draws attention to the fact that in Italy many *de facto* refugees find opportunities of inclusion outside the foreseen asylum channel, namely through legalisation campaigns.

Robert P. Barnidge and **Kazimierz Bem** demonstrate how the United States' refugee laws since World War II, although phrased in neutral and humanitarian wordings, were and still are determined by foreign policy interests. The humanitarian language of the refugee laws of the 1990s still left room for a policy that especially offered protection to people fleeing from communist countries. Although fundamental changes in the language of the law have taken place, this has not necessarily reflected a fundamental change of policy.

The following four papers, presented by Anne Walter, Sarah van Walsum, Holger Kolb and Tessel de Lange, deal with the *regulation of family and labour migration*.

Anne Walter's contribution illustrates that EU Member States are reluctant to really give up their decision-making power when it comes to the admission of third-country nationals. The recently adopted European directive

on family reunification is a case in point. This will harmonise the regulation of family migration only to a limited extent. Moreover, the directive as it was adopted in September, 2003 is inconsistent with the stated purpose of furthering integration. Walter demonstrates that this failure can only partly be attributed to diverging family norms within Europe. The wish of individual Member States to retain their own, restrictive immigration rules played a more important role.

Sarah van Walsum's analysis of the Dutch family migration policy shows that over the past four decades, family norms in the Netherlands have radically changed. Van Walsum demonstrates that these changes are either not reflected in family migration policy or introduce a ›watering-down‹ effect on this policy, e.g. men and women are treated equally by depriving the men of the privileges they used to enjoy. The same applies to married couples versus unmarried couples. Moreover, the state increasingly interferes in the family life of transnational families. For example, marriage partners not only have to provide a marriage certificate and proof of sufficient income, they also have to convince the authorities that their marriage is based on romantic affection (and thus is not a ›bogus‹ marriage).

Holger Kolb focuses on the regulation of highly skilled labour migration to Germany. His analysis of the German ›Green Card‹ for IT specialists is based on the observation that in the forefront of its launching, the ›Green Card‹ was expected to attract a high number of IT specialists, while in the end only a limited number of (mainly small and medium-sized) companies made use of this possibility. By focussing his analysis on a mechanism for the introduction of a highly skilled labour force which, before the introduction of the ›Green Card‹, had been determined on a purely administrative level, Kolb points out a gap between the logic of the public presentation of migration policy and the driving, pragmatic routine beyond such public exhibitions.

Tessel de Lange analyses the Dutch agreement on health-care workers, where, at first sight, competencies have been transferred to private actors. The Dutch government increasingly makes use of agreements *(convenants)* with employers and unions to regulate the recruitment of migrant workers to particular branches of industry. De Lange's analysis of the agreement for the public health sector shows, however, that as a result, the state has gained control rather than lost it, because the employers were made responsible for the temporariness of the nurses' stay. Thus, transferring competencies and responsibilities to private actors can also be an instrument of restrictive immigration policy.

The following three papers presented by Betty de Hart, Ines Michalowski and Jan-Coen de Heer deal with *discourses on integration and naturalisation* in receiving states.

Betty de Hart argues that the Dutch political debates on dual nationality reveal a process of re-ethnicisation, since both opponents and proponents have acknowledged the migrants' wish to keep their initial nationality through their cultural identity which was supposed to be closely linked to nationality. Based on this analysis, de Hart discusses Christian Joppke's assumption that dual citizenship can be considered one element of de-ethnicisation.

Ines Michalowski shows that integration programmes help to make integration ›administrable‹. This enhanced control can be an important objective for European states responsible for the ›management of integration‹. However, recent developments at both the European as well as the national levels suggest that integration programmes also become politically interesting since they allow one to use ›integration requirements‹ as a criterion for access to and residence on the territory of a Member State.

Jan-Coen de Heer demonstrates how the relationship between Dutch minority and admittance policy has changed considerably since the 1970s. Starting out as separate policy fields, they have grown together to the point that a complete virtue convergence of migration and integration policy has taken place. The development of the policy of ›civic integration‹ *(inburgering)* has become a means of excluding immigrants, by refusing admission or a permanent residence permit to those migrants who ›refuse‹ to integrate. De Heer's contribution shows that, at least for the Netherlands, the theoretical distinction between external and internal migration control no longer reflects reality.

The last three papers presented by Pascal Goeke, Cathelijne Pool and Uwe Hunger provide an empirical approach to recent phenomena of migration. The mobility of migrants based on *transnational ties* that are used for business and labour migration *and the role of sending states* are the focus of these contributions.

In a discussion on transnationalism, **Pascal Goeke** demonstrates how, beyond public discussions about dual allegiance and loyalty, migrants living in Germany and related to Bosnia-Herzegovina, Croatia and Serbia construct and handle ›their identity‹. Goeke proposes thinking in terms of ›in-between positions‹ and focusing on the ›liberating potential of hybridity and transgression‹ when analysing the way in which these migrants produce their own geographies and link distant localities to a social space which they consider their personal social space.

Cathelijne Pool discusses the consequences of the future enlargement of the European Union for the migration from eastern European countries to western Europe. Using as an example the case of Polish people with a German passport, who already have free access to the EU labour market, she puts into perspective the fear of the Dutch and the German governments that the enlargement will lead to an uncontrollable influx of eastern European migrants.

Uwe Hunger concentrates on developing countries like India, China and Taiwan which have sent many highly skilled migrants abroad. For a long time migration scholars considered this ›brain drain‹ a tremendous loss for the sending states. However, Taiwan and India are re-attracting their emigrated elites to return or invest their money back home. Hunger analyses under what conditions such a strategy can be successful.

This volume mainly presents work in progress that has been vividly discussed at the two conferences mentioned above. The possibility of several international comparisons has shown that the subjects treated by the different authors contribute to current fields of migration research that are of importance in many immigration countries.

New Approaches to Asylum and Irregular Migration

Guiseppe Sciortino

Between Phantoms and Necessary Evils. Some Critical Points in the Study of Irregular Migrations to Western Europe

All developed countries have been involved for decades in a dense network of irregular migratory systems. Few observers would dispute the assertion that irregular migration is a significant phenomenon in the area, and even fewer would raise doubts on its structural significance.[1] As a matter of fact, nearly any migration study published in the last years feel obliged to tackle the issue of irregular migration or at least to insert some kind of disclaimer about the ›submerged‹ segment of the migratory flows studied. Newspapers, editorials and political talkshows regularly mention irregular migration in association to a wide variety of, usually negative, topic and rhetorical tropes. As shown by the third episode of the *Matrix* saga, irregular migration has even acquired the status of an icon of popular culture.

As far as western Europe is concerned, if we have a glance at the literature available, even a rudimentary survey reveals an interesting, and somewhat puzzling, phenomenon. From the point of view of policy-makers and social spokespersons, irregular migration seems a rather transparent world. We are confronted with convergent estimates of annual inflows of irregular migrants, duly accompanied to trustworthy references. The same applies to estimates of the stock of irregular migrants in EU countries, an evergreen darling of newspapers, graphics, departments and policy-oriented documents. Further knowledge, also taken for granted, is available on the irregular migrants' employment, their working conditions, the impact of the phe-

1 In legal terms, there is a common distinction between ›irregular‹ and ›illegal‹ migrants, contingent upon the ways in which states evaluate violations of the norms on the entry and abode of foreign citizens. Some states do consider it a criminal act, while others formalise them as a statutory offence. Such distinction is surely significant within the legal system. I have, however, not identified until now any structural difference in the treatment of irregular migrants that may be imputed directly to such distinction. Norms of expulsions and detention of migrants are not necessarily different in practice among states that define such behavior illegal or irregular, cf. Bruno Nascimbene (ed.), Expulsion and Detention of Aliens in the European Union, Milan 2002. I will, consequently, talk of irregular migration referring to both categories.

nomenon on natives' conditions. Parliamentary papers and minutes of intergovernmental meetings clearly identify the loopholes existing in the control systems and promise a variety of quick actions to close them for good. A minor publishing industry does even provide a consistent picture of the smuggling process, describing sophisticated multinational organisations, available routes, market positions and even detailed lists of prices for each service.[2]

The above-mentioned elements and approaches are widely shared across the main cleavages that orient the politics of irregular migration debates. Although with highly divergent purposes, most participants – no matter if they support a vision of the illegal migrants as victims or as prospective criminals, as humiliated and offended or misfits, as individualistic tricksters or instances of a new revolutionary multitude – use such materials, refer to them often and ground their criticism on such knowledge base. All participants play the number game, all actors – no matter how ideologically opposite they are – agree on framing the issue in terms of moral anomalies and pressing political problems. From their observation point, irregular migration is a phenomenon with stable and certain boundaries and definite features.

As soon as the surface is scratched, however, the whole edifice begins to crumble. Most estimates of flows turn out to be traceable to a single source[3] or to be based on rather fuzzy guesswork on the proportion of migrants who escape border controls. Estimates about stocks do not add up[4]

2 For examples of this type of literature on smuggling, see Bimal Gosh, Huddled Masses and Uncertain Shores: Insights into Irregular Migration, The Hague 1998; International Organization for Migration (IOM), Trafficking in Migrants: Characteristics and Trends in Different Regions of the World (Discussion Paper, 11th IOM Seminar on Migration), Geneva 1994; John Salt/Jeremy Stein, Migration as Business. The Case of Trafficking, in: International Migration, 35. 1997, no. 4, pp. 467–490.

3 For example, the estimate of yearly intake of irregular migrants provided by Jonas Widgren in the early 1990s has been adopted by Europol – quoting Widgren as the source – in 1998, subsequently copied by the European Commission – quoting Europol as the source – in 2000, and now quoted by a variety of authors as a EU Commission's estimate. I may add that in none of the steps it is explained how the estimate has been produced. It is worth noting that in fairly overlapping policy circles it is common to hear an estimate of the number of women trafficked yearly to the EU that amounts to the same volume of that proposed for the whole irregular flows by the previous estimate, apparently with nobody noticing the contradiction. Both estimates, moreover, appear to be identical in their use during the decade, even in the face of wide fluctuations in the business cycles, see Jonas Widgren, A Comparative Analysis of Entry and Asylum Policies in Selected Western Countries, Vienna 1994.

4 Depending on targets, political intentions and founding, speakers may select a wide variety of estimates, both at country and EU-levels. The largest (and often quoted one) is the estimate of around 3,000,000 irregular migrants in the whole Union, provided by the IOM in 2002 following some rather undisclosed methods (International Organization for Migration, World Migration 2003 – Managing Migration. Geneva, 2003). Other estimates, sometimes so precise that they are able to list two decimal

and they are mostly the results of undisclosed procedures. Such estimates, moreover, hardly confront the fact that – as shown by the massive report published by a Eurostat-sponsored working group in 1998 – the evidence that can be extracted from country-wide official sources is either shaky, idiosyncratic or of very limited use.[5] The ex-post analysis of regularisation programmes shows that most of the widespread assumptions about irregular migrant employment need serious revisions: as a matter of fact, most regularised immigrants are more than able to maintain their legal status subsequently, getting a regular contract in the formal economy.[6] Theoretical models and country studies document how the impacts of irregular migration on the receiving society may be evaluated in very different ways.[7] Many proposed policy actions turn out, at a closer look, largely unfeasible, exceeding expensive and sometimes plainly irrelevant.[8] The study of actual investigative and judicial papers shows that the structure of the smuggling industry is far from being the James Bond's Spectre reality so often presented to read-

digits, inform us that irregular migrants could actually well be twice such amount, while others give the impression that they could well be much less. Reviewing the available literature (Michael Jandl, Estimates of Illegal Migration in Europe, Working Paper for internal use, International Center for Migration Policy Development, Vienna 2003) shows how the estimates of irregular residents carried out at the country level show an even higher variance. Summing up the estimates available for 12 EU countries, he concludes that such estimates alone would give at the EU level a total ranging from 2,600,000 to 6,100,000. Again, two significant points of his study should be stressed. First, such estimates survive intact for years, with no adjustments for fluctuation in the business cycles or the enactment of massive regularisation programmes. Second, estimates adopted by newspapers are regularly chosen among the highest available.

5 See Daniel Delaunay/Georges Tapinos, La Mesure de l'immigration clandestine en Europe, 3/1998/E/7, Brussels (Eurostat) 1998. Even control data – such as the number of repelled at borders, expelled, deported – are collected in the various European countries in ways that make them uneven and difficult to compare; International Center for Migration Policy Development, Border Management in Europe, Vienna 1999.

6 Massimo Carfagna, I sommersi e i sanati. Le regolarizzazioni degli immigrati in Italia, in: Asher Colombo/Giuseppe Sciortino (eds.), Stranieri in Italia. Assimilati ed esclusi, Bologna 2002, pp. 53–91.

7 Joaquin Arango/Martin Baldwin-Edwards (eds.), Immigrants and the Informal Economy in Southern Europe, London 1999; Horst Entorf, Rational Migration Policy Should Tolerate Non-zero Illegal Migration Flows. Lessons from Modelling the Market for Illegal Migration, in: International Migration, 40. 2002, no. 1, pp. 27–43; Bertrand Girard, L'immigration clandestine, mal absolu?, in: Les Temps Modernes, 48. 1992, no. 554, pp. 154–163; Andreas Jahn/Thomas Straubhaar, A Survey of the Economics of Illegal Migration, in: Arango/Baldwin-Edwards (eds.), Immigrants and the Informal Economy in Southern Europe, pp. 16–42.

8 Guiseppe Sciortino, L'ambizione della frontiera. Le politiche di controllo migratorio in Europa, Rome 2000.

ers.[9] In short, the vast majority of the glossy studies that compose the by now massive bibliography on irregular migration in western Europe are quite successful as stage props for the policy bonfire of the vanities. But they would likely fail if presented as a final paper for most graduate courses in the social sciences curricula.

It may be argued that such weaknesses cannot be avoided, dealing with a phenomenon that by definition falls outside the states' knowledge apparatus. Such argument, however, may be criticised on two counts. First, there have been some attempts to develop adequate methodologies for studying the irregular population. Although they have until now failed in setting the standard for public debate, there is room to argue that they could well be employed more systematically, likely producing much better results.[10] Second, the compulsion to produce quantitative estimates, possibly arranged in multicolour graphs, is far from being a scientific necessity. Interesting as these exercises may be, there are plenty of social mechanisms in the field of irregular migration that may be investigated in less ritualistic and more reasonable ways.

In the following pages, it will be argued that a better understanding of irregular migration systems may be attained only by differentiating adequately social research from the conceptual framework that dominates and guides policy-oriented research on the same issue. The current conflation of the two perspectives does not only allow for a merely ritualistic (at best) or purely demagogical (at worst) use of knowledge in policy actions. It also keeps hidden to the research community how the study of irregular migration systems, when adequately differentiated by policy concerns, may bring

9 See Richard Black, Breaking the Convention: Researching the ›Illegal‹ Migration of Refugees to Europe, in: Antipode, 35. 2003, no. 1, pp. 34–50; Ferrucio Pastore/Pierpaolo Romani/Giuseppe Sciortino, L'Italia nel sistema internazionale del traffico di persone (Commissione per le politice d'integrazione degli immigrati, Working Paper 5), Rome 1999.

10 Beside the projects summarised in the Eurostat report (Delaunay/Tapinos, La Mesure de l'immigration clandestine), it is worth mentioning the research carried out in four Dutch cities (Joanne van der Leun/Godfried Engbersen/Paul van d. Heijden, Illegaliteit en criminaliteit. Schattingen, aanhoudingen en uitzettingen. Onderzoeksrapport Erasmus Universiteit, Rotterdam 1998) as well as the surveys performed yearly by the Osservatorio sull'immigrazione in the Italian region of Lombardy (Giancarlo Blangiardo/Stefania Rimoldi, Una finestra sull'irregolarità: Oltre gli stereotipi?, in: Colombo/Sciortino (eds.), Stranieri in Italia, pp. 91–118; idem (eds.), L'Immigrazione straniera in Lombardia. La seconda indagine regionale, Milan 2003; Giancarlo Blangiardo (ed.), L'Immigrazione straniera in Lombardia. La terza indagine regionale, Milan 2004). No doubt, the use of such methods would involve significant financial costs. They are likely to be lower, however, than the cost of the meetings-and-projects circus necessary to turn sloppy analyses into received wisdom.

to light several interesting dimensions both of migration systems and of contemporary European societies. This argument will be advanced along two strategies. Directly, it shall be shown that the adoption of a cognitive stance may actually improve significantly our understanding of the structure of irregular migration systems. Using both my own research and the review of the available literature, this article will sketch an outline of the main critical points opened up by research on these systems.[11] The second goal will be pursued indirectly, just trying to provide a persuasive generalised account, instead of the usual country-specific description. Differences among both migratory systems and EU countries are indeed wide. There is, however, room to argue that the conflation of states' and conceptual boundaries is not necessarily a good idea. If the basic structure of Western European irregular migration systems may be accounted persuasively in a way at least partially independent from the national framing of the ›problem‹, it would become possible to see such differences not as the result of historical individualities, but rather, analytically, as the outcome of varying combinations of factors operating with differential intensities.

Nature and Evolution of Irregular Migration Systems

Irregular migration systems are the outcome of the interaction of two social processes: the human mobility across social spaces and the enactment of state policies on the very same spaces. The adjective ›irregular‹ does not belong to the domain of description of the migration flows, but only to their interactions with political regulations. As a matter of fact, irregular migration is a field where the old wisdom proclaimed by St. Paul rings particularly true: *lex enim iram operatur ubi enim non est lex nec praevaricatio* (Romans, 4,15).

States may, with a single stroke of a pen, turn hundreds of thousands of irregular migrants into legal foreign residents, as it has happened so many times in the recent Western past with the enactment of amnesties.[12] Similarly, legislative reforms may turn previously semi-regular residents into irregular migrants, as it has happened to so many ›sans-papiers‹ with the French immigration reform of the 1980s. Irregularity is first and foremost a juridical status that entails a social relation to a state.[13] As such, it is not a label that

11 As stressing such critical points does imply the possibility of comparing it with alternatives, it is intrinsic to such attempt that I advance no claim to have identified the only possible selection.

12 The OECD Secretariat, Some Lessons From Recent Regularisation Programmes, in: Combating the Illegal Employment of Foreign Workers, Paris (OECD) 2000, pp. 53–70.

13 Nicholas P. De Genova, Migrant ›Illegality‹ and Deportability in Everyday Life, in: Annual Review of Anthropology, 31. 2002, pp. 419–447.

describes individuals, or even their most prominent social role. Legal status is significant, indeed relevant, only when and if – and to the degree to which – the legal reality is a constraint over the relationships and actions of the actor.[14] Human rights activists are right in claiming that human beings are never illegal. States appear equally right, however, in claiming that illegal roles do instead exist and actually it is their task to make and enforce them.

This point, however, does not imply that irregular migration is just the outcome of the working of the state apparatus. States' claim of control over a territory is just a claim with various, but never complete, degree of implementation. The policies enacted by the state are only one factor in the establishment of a migratory system. Strong mechanisms of control fail when the opportunities to be gained through migration are strong and the social precondition for migration amply fulfilled.[15] Weak or non-existent control policies may still be effective, when and if the demand for entries is scarce and limited or when other options are more attractive. The relationship between migration flows and migration policies, in other words, is not a matter of unilateral determination. It is more what Talcott Parsons used to call a double-contingency interaction, a situation were all actors involved try to anticipate the likely reaction of the others to their own performance and make their choices accordingly.[16] Migratory flows have their own life-cycle, activate their own resources and develop over time their own infrastructure. During migration, specific kinds of knowledge develop and become institutionalised into practices, including knowledge on regulations and on ways to react to – or circumvent – them.[17] The same, of course, applies to states. Policies have

14 Susan Coutin, Legalizing Moves: Salvadorean Immigrants' Struggle for U.S. Residency, Ann Arbor 2000.

15 See Douglas S. Massey/Joaquin Arango/Graeme Hugo/Ali Kouaouci/Adela Pellegrino/J. Edward Taylor, Worlds in Motion. Understanding International Migration at the End of the Millennium, Oxford 1998. The statement needs some qualification. As a matter of fact, some states – among others Nigeria, Libya, Kuwait and Thailand – have shown in recent years that contemporary states can indeed dismantle long-established migratory systems and repatriate hundreds of thousands of foreign residents in a few days. Their examples, moreover, show that such capacity does not require extensive bureaucratic infrastructures or late-fashion technology. The statement is however correct for liberal states, where an embedded liberal regime, supported by international conventions, does self-restrict the options available to rulers; Wayne Cornelius/Philip L. Martin/James F. Hollifield, Controlling Immigration. A Global Perspective, Stanford 1994.

16 Talcott Parsons, Interaction. Social Interaction, in: International Encyclopedia of the Social Sciences, vol. 7, New York 1968, pp. 429–441.

17 The most blunt statement of such process I know is by Douglas S. Massey: »Because [the migrants] understand the process of immigration much better, immigrants can usually circumvent the restrictive actions developed by political demagogues, academic geeks and policy wonks through their focus group, postmodern conferences

their own history, infrastructure and knowledge. They are not mechanical reflexes triggered by societal processes, but rather a selective, internally generated, achievement of their political systems.[18] Immigration policies are also based on a complex perceptive frame, and they try to anticipate how the perceived migrants will react to changes in the policy.

The birth and development of an irregular migration system is contingent upon the existence of a structural mismatch between the social and the political conditions for migration. This is actually a long-term, structural feature of the modern global configuration.[19] Such mismatch involves both sending and receiving societies, and it has both an external and an internal dimension. Externally, there must be a mismatch between the demand for entry, embedded in the international labour market and the supply of entry slots by the political system of the receiving societies. In the sending society, there must be a mismatch between widespread social expectations (usually called ›push‹ factors) and the state capacity to satisfy or repress them. In the receiving society, there must be a mismatch between the internal preconditions for migration (usually called ›pull‹ factors) and their interpretation within the political system. Irregular migration systems are in fact an adaptive answer to these unbalances. In his analysis, Parsons argued that only a shared normative culture could grant stability to double contingency interactions. In the case of contemporary international political system, such shared normative culture is clearly unavailable. Consequently, plenty of perverse effects, unexpected outcomes (and sheer tragedies) are to be expected (and they are in fact frequently recorded).

To say that the mismatch between social and political conditions for migrations is structural does not imply that its forms do not change over time. Truly, irregular migration of sorts has been existing since the first political restrictions of geographical mobility.[20] The forms and role of irregular

and think-thank seminars«; Douglas S. Massey, The False Legacy of the 1965 Immigration Act, in: World on the Move, 1996, no. 2, pp. 2f.

18 Guiseppe Sciortino, Toward a Political Sociology of Entry Policies, in: Journal of Ethnic and Migration Studies, 26. 2000, pp. 213–228.

19 Aristide Zolberg, International Migration in Political Perspective, in: Mary M. Kitz/Charles B. Keeley/Silvano M. Tomasi (eds.), Global Trends in Migration, New York 1981, pp. 3–27; Aristide Zolberg, Matters of State. Theorizing Immigration Policy, in: Charles Hirschman/Paul Kasinitz/Josh DeWind (eds.), The Handbook of International Migration. The American Experience, New York 1999, pp. 71–93.

20 It could be even argued that the history of social power may be seen as a perennial conflict between rulers – interested, among other things, in caging people over a territory as a pre-requisite for their control – and populations, trying to escape such rule in many ways including, among others, mobility. For a long-term view, see Michael Mann, The Sources of Social Power. From the Beginning to A.D. 1640, vol. 1, Cambridge 1986. For a radical assessment of modern societies along these lines, see

migration, however, has changed quite a lot over time, according to the changing structure of the above-mentioned interaction. A brief review of the modern migratory history of western Europe may help to clarify this point, albeit at the price of a rather brutal treatment of historical complexities.

As it is known, for quite a long time – until around 80 years ago – the international migratory regime involving western Europe was largely inspired by *laissez-faire* policies.[21] Cities had often fairly restrictive regulations for admission, although the high rate of mortality of the urban population discouraged a tough implementation of them.[22] And, for quite a long period of modern European history, a sizeable proportion of the rural population was not allowed anyway to move freely. A harsh system of territorial control was functioning in many places, but it was mainly concerned with keeping under control the presence of destitutes and political agitators.[23] Within such limits, however, European migrants could move fairly easily in other countries, or move to other territories overseas. Both international law and mercantilist thinking discouraged the closing of borders to new entries as well as the generalised, systematic eviction of foreigners.[24] For a long period, the modern state actually co-existed with a comparatively unrestricted freedom of movement.

It should not be forgotten, however, that such *laissez-faire* policy was mainly enacted by receiving countries. As a matter of fact, the first systematic examples of what has recently been called the »monopolisation of the legitimate means of movement«[25] by the modern state may be found in sending countries, where elites were fearing demographic loss, economic decline, political change and, above all, increase in the wages of agricultural labour. As soon as the emigration flows become noticeable, statistics started to be

Yann Moulier Boutang, Le Salariat bridé. Origines des politiques migratoires. Constitution du salariat et contrôle de la mobilité du travail, Paris 2002.

21 Jan Lucassen, The Great War and the Origins of Migration Control in Western Europe and the United States (1880–1920), in: Anita Böcker/Kees Groenendijk/Tetty Havinga/Paul Minderhoud (eds.), Regulation of Migration. Historical Experiences, Amsterdam 1998, pp. 45–72.

22 Angus Maddison, The World Economy: A Millennial Perspective, Paris (OECD) 2001.

23 Prussia may well have been an exception in this regard, as the control of the ethnic composition of population was included earlier among the goals of migration policy. Here we find a systematic policy of control, oriented to maintain the migration of Polish workers within the boundary of a seasonal migration, already in the early 1890s, cf. Klaus J. Bade, Europa in Bewegung. Migration vom späten 18. Jahrhundert bis zur Gegenwart, Munich 2000.

24 Richard Plender, International Migration Law, Leiden 1972.

25 John Torpey, The Invention of the Passport. Surveillance, Citizenship and the State, Cambridge 2000.

kept and administrative bodies were entrusted with the task of monitoring points of embankment and travel agencies. The introduction of some bureaucratic requirement to be fulfilled by the migrants before departure and some license to be acquired by the emigration brokers and agents quickly followed. Unsurprisingly, such attempts to regulate ›legal‹ migration produced quickly the ›illegal‹ ones. The case of Italy as a sending country does illustrate the point. The attempts to restrict emigration quickly produced a variety of actions aimed at circumventing such regulations. Bribery started to be used to acquire (otherwise difficult to obtain) emigration papers; local and transnational networks – entrusted with the recruitment of prospective emigrants and with organising their departure – developed; the traditional underworld centred on harbours included in their services the smuggling of irregular emigrants on board of sailing ships; smugglers along the land borders included in their services the movement of people along with goods.[26] A variety of credit systems, mainly based on remittances, was quickly established to finance such services.

Such infrastructure was not only acknowledged but also largely magnified in public debate. It was used as proof of the evil nature of emigration movements: the governments at that time explicitly requested local prefects to crack it down, although this was more easily said than done. The political debate on such irregular emigration reveals many features similar to the current one: participants wondered why emigrants appeared so trustful towards their brokers, why they were willing on occasion to prefer their services to the official ones, why they were investing a considerable amount of resources in their services even in face of heavy risks. The answer proposed by most participants looks also very familiar: emigrants were ignorant or desperate, easily duped by criminal and ruthless agents promising them a far-fetched life of joy in the receiving country. Only a few voices tried to put forward an alternative interpretation: not only emigration was to be considered as a right, but the illegal infrastructure supporting it was basically a matter of necessity given the regulations enacted by the Italian state and the rampant corruption in official channels.[27]

Italian emigration entered a state of crisis from the late 1920s to the end of the Second World War. From one side, the fascist regime enacted a rather harsh round of regulation, targeted both to restrict emigration abroad and to curtail internal geographical mobility. On the other side, the closure of the

26 Amoreno Martellini, Il commercio dell'emigrazione: intermediari e agenti, in: Piero Bevilacqua/Andreina De Clementi/Emilio Franzina (eds.), Storia dell'emigrazione Italiana, vol. 1: Partenze, Rome, 2001, pp. 293–308; Augusta Molinari, Porti, transporti, compagnie, in: ibid., pp. 237–256.

27 Francesco Saverio Nitti, L'Emigrazione Italiana e i suoi avversari, Torino 1888; Torpey, The Invention of the Passport.

transatlantic route and the sharply reduced economic opportunities in the traditional receiving countries decreased the rationale for mass emigration. Still, the infrastructure supporting irregular emigration was still existing and working, although with a more limited scope and at higher prices. Irregular emigration was in fact an important escape route for politically persecuted persons, relatives of previous emigrants as well as – after the racial laws – for Jews.

The post-war period witnessed impressive migratory flows, strictly regulated by bilateral agreements between sending and receiving countries. Such agreements established a yearly contingent and defined the procedure for the selection of the migrants as well as the conditions of work and residence in the receiving country.[28] Such modalities of regulations generated – in all southern European countries – a corresponding irregular segment of the outflows. First of all, even when the size of the contingent was adequate, the selective process was nearly always strongly biased by political considerations and by the relative position in local cliques. In other words, a certain number of prospective migrants knew from the outset they would never qualify for emigration according to the actual rule of the game.[29] We have evidence in the period of a variety of professional roles active in the migration process: labour brokers, informal remittance managers, providers of credit in the sending countries, ›helpers‹ in various bureaucratic endeavours. It was an underworld reality more ›grey‹ than ›black‹, fairly atomised and usually fully embedded in a single, local, migratory stream. Their services, however, had values, as they allowed for a variety of contingencies that could not be dealt with through official means. Finally, politically motivated emigration had to cross the iron curtain on both ways, again resorting to illegal means.

The current European migratory system has its roots in the golden age of bilateral agreements and temporary labour migration. Many features of the current migration flows, both regular and unregular, cannot be understood without placing them in the context of the post-war history of migration. One difference, however, is crucial and it should be stressed. In the earlier phases of the European migration system, irregular migration did not necessarily imply illegal residence. A migrant could easily adjust his status after his entry, especially when there was an employer willing to hire him/her. Until the stop decisions in the early 1970s, most of the emigrants who had crossed the borders illegally or irregularly adjusted their status

28 As far as Italy is concerned, most of such agreements may be found at http://itra.esteri.it/default1.asp

29 A related form of irregular migration was made by inactive family members, who were operating a *de-facto* family reunification in spite of restrictive regulations.

quite quickly.[30] In these conditions, the irregular migration infrastructure was mainly specialised in removing obstacles to departure and helping border crossing. Further steps could be pursued individually or through the immediate social network of the migrant. Irregularity was then considered a transitional, limited, phase in the path of the migrants.[31]

The whole situation changed in the early 1970s, with the adoption of restrictive policies in all the main western European receiving countries.[32] western European states stopped labour recruitment, tightened the rules for foreign seasonal work and tried – albeit somewhat unsuccessfully – to curb the chances of new inflows. Where necessary, as in the United Kingdom and later in France, the possible migratory consequences of colonial citizenships were reduced through the reform of citizenship laws. Since then, layers after layers of new rules have been introduced in order to shift the burden of proof for admission on the shoulders of the migrants themselves.

An adequate explanation of the adoption of stop policies in all the main European receiving countries is still lacking. Although it is usually related to economic consequences of the ›oil shock‹, an adequate explanation of the enactment of such policies is likely to require a more sophisticated account, centred on a combination of political and social factors.[33] The enactment of

30 At a certain number of destinations – notably in the case of Italians and Portuguese, France – clandestine entry was usually followed by a quick regularisation ›from within‹; cf. Claude-Valentin Marie, Entre économie et politique: Le ›clandestin‹, une figure sociale à géometrie variable, in: Pouvoirs, 47. 1988, pp. 45–92. The frequency of such adjustment of status in France may well have been exceptional, as there is evidence that, since the early 1960s, the irregular immigration of southern European workers was tolerated by the authorities, as they satisfied a demand that would have been otherwise fulfilled legally by citizens of the former colonies; cf. James F. Hollifield, Immigrants, Markets and States: The Political Economy of Postwar Europe, Cambridge 1992. Channels of *ex-post* regularisation were however available in nearly all western European countries, and spells of irregularity are recorded in the life-histories of many southern European migrants at many destinations.

31 Marie, Entre économie et politique.

32 Western European countries are likely the place where this restrictive trend is more severe and sometimes even difficult to explain. The trend, however, is larger and common to all developed countries. As Aristide Zolberg has observed, »although considerable attention has been devoted to variation among the contemporary immigration policies of capitalist democracies, the most striking fact about them is that, if one imagines a hypothetical continuum ranging from open to closed borders, they are clustered very narrowly around the closed pole«; see Zolberg, Matters of State.

33 As a matter of fact, stop policies were enacted at a time when employers were hiring foreign workers by the busloads. The adoption of stop policies reflects more the shifting perception of politicians on the costs and benefits of immigration. This was openly recognised in the very first SOPEMI report, written in 1979: the immigration stop decision is presented in the report as motivated »strictly by political reasons« and it is argued that the ›oil shock‹ had been an occasion for pushing forward »re-

stop policies shaped the migratory flows in a variety of ways. Directly, a large segment of new entries has to proceed outside the established procedures. Indirectly – as such policies have been presented, and correctly perceived by migrants, as long-term decisions – such decisions made return unappealing. For many, in other words, the risks of being caught appeared less significant of the anticipated consequences of returning home and not being able to try the migratory option at a later stage. A variety of irregular conditions, previously of a transitional nature, had an incentive to stay even in conditions less appealing than before.[34] These irregular migrants, however, could not rely any more on *ex-post* regularisation channels. As a matter of fact, legal residence has been made contingent upon an appropriate legal entry rather quickly across European countries. Seasonal workers could not convert any more their permits in long-term ones, students found it increasingly difficult to remain in the country as workers, tourists were not allowed to change their reasons of stay during the trip. Stop policies, in other words, have produced the first clusters of ›irregular migrants‹ within its contemporary meaning of the word.[35] In the beginning, such clusters were fairly limited in size, made mainly of ›overstayers‹ rather than ›clandestines‹. It has also a strong seasonal or cyclical component. Such segment, moreover, was largely embedded within the regular communities, being in fact the ›irregular‹ sequel to the already established migratory chains. Not surprisingly, from the early 1970s to the mid 1980s the issue of irregular migration is seldom evoked and rarely presented as a priority.[36] The infrastructure supporting the irregular segment is in this phase largely local and flexible. In the

strictive decisions grounded in the political and social situation« rather than in the economic one.

34 Such consequence of restrictive regulations may well be still operative today. As it has been observed for ›sans-papiers‹ in France, »if there were the chance to go and come back again, the flow would probably be circular rather than linear«, see Mamadou Diouck, Sans-Papiers in France, in: Dilek Cinar/August Gächter/Harald Waldrauch (eds.), Irregular Migration. Dynamics, Impact, Policy Options, Vienna 2000, pp. 55–60, here p. 56.

35 In the spring of 1974, the Churches Committee on Migrant Workers congregated in Geneva to hear the opinions of ten experts on the problem of illegal employment of migrants in Belgium, Britain, France, Germany, Italy and Switzerland. They estimated that half a million foreigners were illegally working in western Europe, especially in the construction industry, agriculture and in services. They duly noted that irregular migration involved a variety of figures and called for a regularisation programme for all those who were in Europe. The assembly could not agree on the issue of introducing heavy employers sanctions, see Church Committee on Migrant Workers, Illegal Migration, Geneva 1974.

36 Evidence for such statement may be found, among other sources, in the editions of the SOPEMI reports. They nearly never mention irregular entries, and pay quite a scarce attention to irregular residence.

Netherlands, Engbersen and van der Leun write about a long period, from 1969 to 1991, of »considerable tolerance«, where the difficulties in entering the country legally are much stronger than the difficulties irregular migrants experience in living and working in the country once entered.[37] The Netherlands, however, do not seem to have been an exception in this regard. The number of expulsions – attempted or realised – in those years appears to be fairly low in most countries, and many migrants' account of their lives during the period reveals a considerable grey area sheltering them from control in many ways. If we look at the infrastructure supporting irregular migration at that time, it is still mainly oriented at the provision of papers (especially in countries where obtaining the passport is difficult) and in providing the migrant, while acting as a tourist, enough cash to prove ›adequate means‹ to border guards. Clandestine entry is a very limited reality, where most smugglers perform occasionally or part-time. The brokering of irregular labour and the provision of housing is, however, more strategically important than before, and we witness in general a marked shift towards the receiving countries: most support activities are now targeted to enter and stay on the territory.

The main changes take place in the late 1980s, when most European immigration control systems are deeply restructured in the wake of the Eastern fear and the pressures of the mounting number of application for asylum. Such restructuring, mainly centred on external controls, is focused predominantly on visa policy: all European states introduce visa requirements for most non-OECD countries and such choice will be further strengthened by the development of the Schengen system. This is a sharp change: Western European states used to have very few visa requirements, usually the result of geopolitical retaliation.[38] In a few years, however, visa requirements have been introduced for nearly all the potential sending countries, although requirements have been subsequently relaxed for many eastern European countries. The reform of visa policy has moreover been accompanied by the strengthening of border controls, the intensified patrolling of borders, the systematic attempt to use the ›first safe country‹ principle, the introduction of carrier sanctions and the externalisation of control on the territories of buffer states.[39]

37 Godfried Engbersen/Joanne van der Leun, The Social Construction of Illegality and Criminality, in: European Journal of Criminal Policy and Research, 9. 2001, pp. 51–70.

38 Jonas Widgren, A Comparative Analysis of Entry and Asylum Policies.

39 Gallia Lahav/Virginie Guiraudon, Comparative Perspective on Border Control: Away from the Border and Outside of the State, in: Peter Andreas/Timothy Snyder (eds.), The Wall Around the West, Lanham 2000, pp. 55–80; Grete Brochmann/Tomas Hammar, Mechanisms of Immigration Control, Oxford 1999.

Such reforms were clearly targeted to reduce the flows of potential asylum seekers, making it difficult for them to enter the territory of a state where they could claim asylum.[40] The list of states whose citizens are subject to stringent visa requirements is indeed basically identical to the list of countries where refugee flows originate.[41] On the contrary, the eastern European states that enjoy a very relaxed visa regime are made up of countries that have been previously defined as ›safe‹ and thus by definition unable to produce refugees flows. The policy measures enacted has had a notable degree of success in reducing the flows of asylum seekers and refugees. Their introduction, however, has altered in depth the decision-making context for all migrants. First, it has made it more difficult to enter the territory of receiving states, making it often necessary to utilise some kind of professional services. The strengthening of external controls has likely had an effect on the volume of the flow, as the sharp increase in the cost and risk of the voyage has a selective effect on those willing to migrate. For those who migrate, however, the use of professional services makes migrants more dependent on those who have provided the capital or are more interested in the return of investment. A main effect of the strengthening of controls has consequently been the heightened stratification of the irregular flows. Beside the ›elites‹ who can acquire faked papers or celebrate faked marriages in the receiving countries, there is a large number of migrants who can still mobilise enough connections and resources – or rely on the migratory knowledge diffused in their networks – to acquire a tourist visa and subsequently overstay. Immediately below, we find the citizens of countries enjoying a relaxed or even comparatively liberal visa regime. The availability of such channels makes possible the existence of a mass circuit of temporary irregular migration without significant percentages of illegal crossings. Below them, there are those migrants who need the services of a professional smuggler. Some of them will have enough capital, or relatives in the receiving country to be used as collateral, to pay for an organised trip with a certain degree of predictability. Some others will manage the trip step by step, using smugglers only at key points and when enough resources are available. At the very bottom, there are those migrants who cannot afford any service nor mobilise any connec-

40 The control strategy enacted by most western European states in the early 1990s is similar to the one previously tested by Western Germany during the Turkish asylum seekers ›crisis‹ of the early 1980s. At that time, the potential growth of asylum seekers had been solved with the introduction of visa requirements, the agreement with border states – in that case, East Germany – for a similar action and the manipulation of the living conditions for asylum seekers.

41 See the Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

tion, thus being forced to deal with the trip in terms of a series of emergencies and chaotic events.[42]

The change in control policy has effects also on the situation of the irregular foreign residents. The visa policy of the receiving countries does make a difference in the structure and prospects of irregular migrants' insertion in the local economy. For those coming from where visa requirements are relaxed or lifted, there are high chances that the migratory system will be dominated by temporary or seasonal spell of residence, although they will be often repeated. Whole irregular migration systems, sometimes of mass dimension, are known to operate in many European countries in order to deal with seasonal variations in agricultural activities, in the growing demand for domestic labour, as well as with upsurges of work in the construction industry.[43] Among those coming from countries where visa requirements are rigidly enforced, there will be a higher chance to encounter migrants that maintain an irregular status in the receiving country for quite a long time, with a severely reduced mobility. The larger risks in border imply that circulatory movements are less likely and return periods more spaced. Besides migratory failure, long-term migrants have to wait for an amnesty (in the countries were such programmes take place), enter the asylum process (in countries were it works as an *Ersatz*-amnesty programme) or work out some kind of accommodation through local offices. Any possibility of lowering the chances of being caught will acquire consequently a higher importance, be it the access to faked (or irregularly obtained) documents and codes or looking for employment in sectors – such as domestic services – less likely to be raided by labour inspectors.

The impact of regulations is not, however, only contingent upon the kind of visa scheme that regulates the influx. Timing is also important. It should not be forgotten that the main control reforms of the 1990s were introduced when some migratory circuits had just appeared or re-surfaced on the scene. Several migratory systems of the late 1980s were fairly recent, often

42 Hanni Heikkinen/Reinhard Lohrmann, Involvement of the Organized Crime in the Trafficking in Migrants, 1998, available at http://migration.ucdavis.edu/mm21/lohrmann.html, accessed 1999; Ahmet Icduygu/Sule Toktas, How Do Smuggling and Trafficking Operate Via Irregular Border Crossings in the Middle East? in: International Migration, 40. 2002, no. 6, pp. 25–54; Frank Laczko/Amanda Klekowski, Migrant Trafficking and Human Smuggling in Europe: a Note on Data and Definitions, in: Cinar/Gacher/Waldrauch (eds.), Irregular Migration, pp. 195–203; Pastore/Romani/Sciortino, L'Italia nel sistema internazionale del traffico di persone.

43 Trends in International Migration. Annual Report 1999, Paris (OECD) 1999; Lotfi Slimane, L'Immigration clandestine. De main d'œuvre dans la région bruxelloise, Brussels 1995; Georges Tapinos, Irregular Migration. Economic and Political Issue, in: Combating the Illegal Employment of Foreign Workers, Paris (OECD) 2000, pp. 13–44.

composed by a large number of prime-movers. Few of them could rely on the set of personal connections and resources necessary to enter legally or to exploit the best opportunities for illegal entry. Once arrived, moreover, only comparatively few of them have been able – in the countries that have not enacted regularisation programmes – to adjust their status and thus provide the necessary connections for further legal or semi-legal flows. This has sharply reduced the condensation of social capital across the various waves of migration: far from being largely embedded in networks made by a vast majority of legal residents, a section of the recent flows is decoupled from previous inflows, or connected to them only weakly. For some of the newly arrived, this implies a larger dependence for a longer time on an illegal (or a-legal) infrastructure for a wide variety of needs and contingencies.

In sum, the control policies enacted by western European states since the early 1970s – together with the structural demand for unskilled foreign labour – have produced a sizeable population of irregular migrants, that relies on informal accesses to employment opportunities, housing and services. A significant segment of such a population, at any given point in time, is made of temporary and seasonal migration, both organised around a succession of temporary stays. A second segment is made of long-term irregular migrants, living on the territory for years through systematic control avoidance. It is the existence of such segment, and the growing recognition of its existence in policy arenas and public opinions, that triggers most alarm and concern in public opinions and policy circles. It raises, however, also quite interesting questions. How is it possible to live on the territory of a western European state for years outside or against the wishes of the state apparatus? The next paragraphs will investigate the ways in which states observe and categorise such population as well as the ways in which migrants exploit alternatives to state regulations.

The Irregular Migration Regime

In recent years, it has become increasingly popular to talk about a country's ›migration regime‹ to signify the set of rules and practices historically developed by a country in order to deal with the consequences of international mobility through the production of a hierarchy – usually messy – of roles and statuses. To conceptualise a migration regime has many advantages. First, it brings to attention the effects of norms in contexts, rather than operating a simple review of juridical rules. The notion of a ›migration regime‹, moreover, pays its due to the historical character of such regulation: a country's migration regime is usually not the outcome of consistent planning. It is rather a mix of implicit conceptual frames, generations of turf wars among bureaucracies and waves after waves of ›quick fix‹ to emergencies, triggered

by changing political constellations of actors. The notion of a migration regime allows room for gaps, ambiguities and outright strains: the life of a regime is the result of continuous repair work through practices. Finally, the idea of a ›migration regime‹ helps to stress the interdependence of observation and action. Migration regimes are rooted both in ways of observing and acting. The overall structure of the migration will determine how flows – regardless of their ›true‹ nature – will be observed and acted upon. Similar flows will be observed very differently within different regimes. Differential treatments will feed back in different ways of observing.

In the current work on European countries' migration regimes, the attention has focused nearly exclusively on regular migration. Irregular flows are usually either ignored or conflated in a single residual category, in an undifferentiated bottom strata. This is a pity. The development of an adequate notion of ›migration regime‹ may actually turn out to be quite an important step towards a fully-fledged sociology of irregular migration. Irregular migrants are seldom the outcome of a unified and consistent classification, they are rarely clustered within a single category. As a matter of fact, irregular migration systems are deeply affected by a wide bundle of states' categorisations and actions, creating a complex web of overlapping strata of irregular statuses. Nor such differences may be imputed only to organisational contingencies. The management of irregular migration is not only a matter of practices being different from rules: a whole series of rules and statuses for irregular migrants is built within each country's migration regime. Such varying statuses have different implications both for states and for migrants.

An adequate phenomenology of such statuses is not yet fully available. It is however possible to make some steps towards a rudimentary formulation starting from the assumption that all the different statuses available to irregular migrants may be distinguished according to the degree of ›sheltering‹ – or self-restraint by state – they offer. Such ›sheltering‹ may be normative or factual, embedded in some rules the control system is supposed to respect or rather on the practical implications of the repressive activity. Starting from the normative, there are irregular migrants that are ›sheltered‹ from possible state reactions by norms recognised by the very same state. A first example is provided by irregular migrants who are able to claim asylum. As it is known, asylum seekers are sheltered in various ways. It cannot be imputed to them to have entered the country illegally[44], their number cannot be managed according to quotas or contingents; they can file their claim at various stages of their migratory process, for example as soon as they are

44 Although there is a growing tendency to detain or monitor asylum seekers in a way or another.

caught by the police. A second category, sometimes overlapping with the first, is composed of those who cannot be returned to their sending country for the *non-refoulement* clause of the Geneva Convention. The size and composition of such segment varies across western European countries, as it depends on the complex process of establishing which sending countries, and for which reasons, should be included in the list of dangerous places for certain categories of people. In all cases, however, the migrants who can claim to deserve such protection have an access to the juridical infrastructure for protection, a ground that can be activated often, and in various stages of the migratory process.[45] The result is often a segment of a very peculiar situation, caught in the middle of competing political imperatives: migrants who cannot be legally expelled but who, at the same time, do not have an official access to labour and housing markets.[46]

A further layer of irregular migrants is made up of overstayers and working tourists. We find here the cases both of people who enter the country without having their passport stamped – thus making it difficult to date the beginning of their stay – and migrants who return home regularly, making a succession of regular stays. Both groups are made up of people who are difficult to identify as irregular migrants: their chances of being caught are basically restricted to labour inspections during working hours and, in the case of long-term overstayers, to random checks by the police. In both cases, they are groups who are not sheltered through normative protection, just as little as by the technical difficulties of proving their wrongdoings. Their position, in other words, is configurated in a way that makes it possible to control them only through individual investigation. This, however, means that control actions have to compete for a very scarce resource in western European states: investigative time and energies. There is evidence that such groups compose a large segment of the irregular migration systems western Europe is involved in.

Although the icon of the irregular migrants is the clandestine smuggled across borders by some ruthless criminal, it is worth noting that overstayers

45 The case of the *non-refoulement* clause is a particularly interesting example of the importance of migration regimes. We find in western Europe countries where conditions for enjoying such protection are defined very restrictively but the activation of the protective infrastructure is frequent and largely systematic, as well as countries where such conditions are ambiguous and uncertain, but where migrants still hardly ever get access to such protection. As a result, not necessarily the countries where rules are more detailed and restrictive are also the countries were evictions of irregular migrants are more shift and rapid.

46 There are also many other conditions that work as sheltering devices. In many European countries, migrants may avoid deportation on grounds of minor age, pregnancy, health risks or situations associated with position within a family; see Nascimbene, Expulsion and Detention of Aliens.

and tourist visas appear actually to be the most common situation. A survey in Lombardy has found that most of the labour migrants interviewed in 2002 had entered the region with a tourist visa, or entered Italy through a Schengen country that did not request visa.[47] A similar situation seems to apply to Germany, where a large segment of irregular migrants is involved in circular migration from Poland or other eastern European countries that enjoy a relaxed visa procedure.[48] In absence of strict visa requirements, circular flows of irregular migration may develop even between countries that are geographically quite far apart, for example between Italy and Poland or Spain and Ecuador.[49]

As a matter of fact, the geography designed by EU visa policy is highly selective, and largely independent of concerns over the size of the flows. During the 1990s, rules have been notably relaxed for many eastern European countries, increasingly tightened for Latin American countries, kept rather strict for all Mediterranean, Asian and African sending countries. Many interpretations of such changes may be put forward. Such changes may be seen as an attempt to steer migration flows away from the traditional sources, favouring recruitment of European, white (and usually Christian) migrants instead. On the other hand, it may be argued that the relaxing of visa conditions for eastern European countries is the functional consequence of the growing economic interdependence between the EU, the accession countries and, more generally, eastern Europe. The importance of such relationships, it may be argued, has put a severe constraint on the ambition to regulate unilaterally the flows, leading them to tolerate some irregular flows. A further interpretation could describe the selective relaxing of visa requirements as the result of a preference for temporary irregular migration over long-term immigration. Faced with the remarkable demand for unskilled foreign labour operating in the European economies, governments may have actually chosen to tolerate an irregular version of *Gastarbeiter* programmes, rather than opening channels for labour migrants, whose stay could become over time a ground for claiming residency rights. More detailed information

47 The example is even more significant if we consider that Italy has one of the most restrictive, both in theory and in practice, visa regimes in western Europe. Also cf. Blangiardo, L'Immigrazione straniera in Lombardia, 2003.

48 Jörg Alt, Illegal in Deutschland. Forschungsprojekt zur Lebenssituation ›illegaler‹ Migranten in Leipzig, Karlsruhe 1999; Philip Anderson, In a Twilight World. Undocumented Migrants in the United Kingdom, 1997, available at www.geocities.com/jrsuk/twilight.htm, accessed 4 June 2003; Norbert Cyrus, Komplementäre Formen grenzüberschreitender Migration: Einwanderung und Mobilität am Beispiel Polen, in: Klaus Schmals (ed.), Migration und Stadt, Opladen 2000, pp. 115–135.

49 Anna Kosic/Anna Triandafyllidou, Making Sense of Italy as a Host Country. A Qualitative Analysis of Immigrant Discourse, downloadable from www.iue.it/RSC/IAPASIS, Florence 2002.

on visa policies, currently unavailable, are necessary to settle the point. For the moment, it is enough to point to the structural significance of this segment of irregular migrants.

At the bottom of the hierarchy we find the case of those migrants who are least sheltered from control actions. They are the bulk of what makes up the statistics of those repelled at borders, intercepted on the territory, voluntarily or coercively deported or expelled in the sending or transit country. Even within such groups, however, it is possible to distinguish very different situations. Although perceived and acted upon unilaterally, most control actions do actually require, in the current international system, some kind of bilateral co-operation. Such co-operation is an important variable in the system of control: there are many migrants who could be deported *de iure* but they are not deportable *de facto*. It is a well-known secret of all western European control systems that there is a sizeable number of irregular migrants who are not expelled or deported because the administrative and financial cost of processing their case would be too high. This has something to do with the survival strategy of the migrants – tactics such as the destruction of identification papers or the use of multiple identities – but also with the geopolitical situation of many sending and transit countries and with the degree of collaboration that may be expected from their administrative infrastructure in identifying the migrants, release the necessary documents and so on.[50]

50 It is important to stress that such hierarchies of statuses and positions are not necessarily fixed. Irregular migrants may move, among others, to regular status through a variety of means, including marriage and return to the sending country just in order to be ›called from abroad‹ by an employer. But there are also quite important – and numerically significant – processes of social mobility within the irregular migration hierarchy. Irregular migrants caught by the police or by labour inspectors may file an application for political asylum or activate the humanitarian protections connected to the *non-refoulement* clause. On the other hand, many asylum seekers may end up descending progressively the stairs, until finding themselves at serious risks of expulsion. The distribution of migrants in the various strata may also change given to exogenous events that trigger channels of collective mobility. Amnesty programmes are the clearest example of such events. It is reckoned that most of the migrants having regular status in Italy have acquired it through a regularisation programme, after a spell of irregular residence. A large majority of them, moreover, has been able to renew the sojourn permit subsequently, thus showing their capacity to participate subsequently in the official labour market; cf. Carfagna, I sommersi e i sanati. Similar considerations may be found for the case of Spain and Portugal, two other countries where amnesty programmes are a functional substitute for an active entry policy. Amnesties, however, are only one of such events. Survey data in Italy suggest that the two national groups that have had the least need to wait for an amnesty are Somali and former-Yugoslav citizens, two groups that have been able to regularise their status, regardless on when they had actually entered the country, on humanitarian grounds; cf. Blangiardo, L'Immigrazione straniera in Lombardia, 2004. Refugee protection schemes are of temporary nature and in some cases do not allow

So far, the stratification of irregular statuses produced directly by a country's migration regime has been discussed. Another dimension, equally important, is the indirect effect on geographical mobility exercised by the varying relationships of the states with their populations. The significance of the irregular status is highly correlated to the scope of states' controls over the interactions and exchanges taking place on their territories. Such differences may be found in the infrastructure established in order to identify individuals by the state apparatus, which varies significantly among European countries as well as on the grounds allowed to state agents to operate such controls. It has to do with the amount and types of transactions where the legitimate residence of the transaction's partner may be considered significant: very low in the case of daily life interactions and for many forms of consumer actions, fairly widespread in the access to many utilities and markets, often endemic in the access to housing and labour markets.[51] There is in fact a wide variety of structural pre-conditions for irregularity that have nothing to do with immigration policies as such. Eventually, the main indirect effect is on the degree to which states allow – or cannot avoid – the development of a robust informal economy, the main factor that makes irregular migration possible and feasible.[52]

Living as an Irregular in Western Europe

The migration regime is one side of the coin. The other is composed of the myriad of migration trajectories that interact with the attempts at control in various ways. Migrants do not just try to exploit the loopholes existing in actual legislation. They also are usually able to identify gaps between stated policy objectives and their practical content, working out ways to circumvent

for access to the official labour market. However, if the humanitarian emergency lasts long enough, at least a fraction of those covered are usually able to turn their permits into long-term ones.

51 Ilke Adam/Nadia Ben Mohammed/Bonaventure Kagné/Marco Martiniello/Andrea Rea, Itinéraires de sans-papiers en Belgique, Brussells/Liège 2001; Anderson, In a Twilight World; Norbert Cyrus, Nadelöhr Wohnen. Wie Polnische Wanderarbeiter in Berlin unterkommen, in: Renate Amann (ed.), Eine Stadt im Zeichen der Migration, Darmstadt 1997, pp. 92–94; Sophie Robin/Lucille Barros, Measures Undertaken to Prevent and Combat the Employment of Foreigners in an Irregular Situation in Certain OECD Member Countries, DEELSA/ELSA/MI(99)4, Paris (OECD) 1999.

52 Manolo Abella, Migration and Employment of Undocumented Workers: Do Sanctions and Amnesties Work?, in: Cinar/Gächter/Waldrauch (eds.), Irregular Migration, pp. 205–235; Emilio Reyneri, The Role of the Underground Economy in Irregular Migration to Italy. Cause or Effect?, in: Journal of Ethnic and Migration Studies, 24. 1998, no. 2, pp. 313–331; Guiseppe Sciortino, Troppo buoni? La politica migratoria tra controlli alle frontiere e gestione del mercato del lavoro, in: Sociologia del lavoro, 46. 1997, pp. 50–84.

them or to carve niches where migration may be carried out. At the same time, migrants do indeed adapt to the framework posed by the migration regime: flows passing through selectively liberal visa regimes will have more circular migration and high rates of turnover; flows going through illegal entries will have longer spells of residence and higher rates of settlement.[53] To understand such interactions, there is a need of adequate information on how irregular migrants succeed in living irregularly in a country, which kind of resources they may draw upon, the kind of social infrastructure that makes their presence possible. Most of such elements are not necessarily specific to irregular migrants. Some of these resources are actually utilised also by resident foreigners, while others may be shared with lives of natives with similar socio-economic insertions. Their combination, however, acquires specific features in the case of foreigners irregularly residing on the territory of a state that defines them as unwanted. With no expectation of being complete, it seems that three elements are particularly worthy of further investigation.

First of all, irregular strategies change with time. There is a temporal dimension of the migratory experience that must be taken into account in order to understand how irregular migration may be considered by the migrants themselves much less worrisome and scary than it appears to most observers. Faced with the experiences of people willing to assume high risks in exchange for a life marked by (what appears to many observers as) social marginality in the receiving countries, it is a diffused temptation to impute such willingness either to exotic cultures or to socio-economic desperation.[54] At the same time, many who have done empirical work on (or with) irregular migrants are conscious that, at least for a sizeable part of them, the irregular status appears as a nuisance or as a practical problem to be managed according to a logic of expediency. Irregular migrants often see the possibility of being detected as an eventuality to be calculated and minimised rather than as a condition to be lived in experiential fear.

Such attitudes may be traced back to an extensive experience in the sending countries, where skills in »beating the system/bending the law« have been acquired and valued[55], as well as, in some cases, to a fully-fledged

53 Diouck, Sans-papiers in France.

54 Such approach is widespread both among restrictive actors – as such reconstructions legitimise their being against irregular migration without being openly against irregular migrants individually (the poor guys are cheated and exploited by rude criminals…) – and among those groups that are willing to make support for irregular migrants a moral issue, to be dealt with inside an ethic of principle rather than of consequences.

55 Ewa Morawska, Gappy Immigration Control, Resourceful Migrants and *Pendel* Communities, in: Virginie Guiraudon/Christian Joppke (eds.), Controlling a New Migration World, London 2001, pp. 173–199.

culture of resistance.[56] Such puzzling features may, however, be understood even better if they are placed in connection with the timing of the migratory experience. Michael Piore observed in 1979, that for a long initial phase labour migrants are the closest approximation available to the *homo oeconomicus*. They pay scarce attention to the degradation of their social status in the receiving countries, regarding their presence there only as a means to a broader end, to be enjoyed upon return. Their evaluation of the context where they operate is consequently rather different from that of a native: the economic incentives and the community of recognition are located in two different spaces, and the risks and dangers of migration are evaluated consequently.[57] Such assumptions by the migrant are not necessarily wrong: many migrants do in fact return, sometimes after a fairly short period, and only a fraction of the flow will eventually settle in the receiving country. Piore's analyses were mostly concerned with post-war labour migration, where legal status was rarely an issue. The logic of the argument does, however, hold true even more for irregular migrants. For a period, the prospect of being employed in the informal economy does not make a significant difference for a migrant, as he/she does not expect to work long enough to acquire retirement rights or work-related benefits. Indeed, sometimes work in the informal economy may even bring higher cash salaries, thanks to the avoidance of taxation and social contributions, so being preferred also by regular migrants – and natives – who could get access to the official labour market.[58] Indeed, there are also recorded cases where the acquisition of a legal status as migrant worker would imply the risk of losing some kind of welfare benefit in the sending country. In the same way, there is hardly any doubt that most irregular migrants know from the outset that their legal status will have certain consequences in terms of constraints to be accepted and risks to be faced. Until the migrants perceive their presence as short and temporary, however, such constraints and risks are often evaluated in very limited

56 Some Albanian migrants interviewed for this research hinted at the existence in their recognition circles of a positive status hierarchy based on the number of successful attempts to enter Italy, as well as on the individual capacity to return on the territory quickly when deported. In some sense, they regarded their presence in Italy – and the consumption levels associated to it – as a right, violated by the immigration controls of the receiving country. Consequently, their abilities in beating them was clearly seen as a proof of resistance – as well as malehood – in the face of arbitrary repression. Similar attitudes have been found in young migrants involved in various forms of informal trade. See Asher Colombo, Etnografia di un'economia clandestina. Immigrati algerini a Milano, Bologna 1998.

57 Michael J. Piore, Birds of Passage. Migrant Labor and Industrial Societies, New York 1979.

58 Arango/Baldwin-Edwards, Immigrants and the Informal Economy; Reyneri, The Role of the Underground Economy; Adam et al., Itinéraires de sans-papiers.

terms. True, irregular status does put severe consequences in terms of people with whom to interact, places that may be visited, activities that may be carried out. Most of such forgone possibilities, however, are scarcely significant for a migrant in his/her earlier stages anyway. Most of the internal controls enacted by receiving states are just operating on a different plane from the actual behaviour of migrants. In other words, there may be a certain fit between some circular migratory systems on one side and, on the other side, a control policy that tolerates temporary irregular migration but prevents long-term settlement. Circular irregular migration and restrictive migration policy may under this point of view coexist for a long while, actually reinforcing each other.

The situation changes, however, for those who prolong their residence spell as well as for those who settle since the very beginning. In the latter group we find a disproportionate number of migrants who have operated a clandestine entry and of the citizens of the countries that cannot exploit a relaxed visa regime. For them, given the costs and risks associated to travel, circular migration is just outside the range of available options. And regularisation options become more and more important the longer the spell of residence lasts.[59] Their survival strategies have to be much more sophisticated and complex from the outset, as they are actually much more integrated, and dependent upon, the fabric of the receiving society. Time, however, is an important dimension also for long-term irregular migrants. Practically, an irregular migrant is usually more at risk of being detected in the first weeks of his/her stay, when the tacit knowledge about the locale is plainly unavailable. Length of residence means higher chances to increase the stock of knowledge of social and administrative mechanisms, to acquire the behavioural skills necessary to decrease the chances of being detected, to build up social links and connections. The longer the time, the more likely it is to learn successfully how to live as an irregular migrant without being detected.[60] Length of stay, moreover, is a ground that may be invoked in a variety of ways in case of trouble. In some countries, to document a long duration of stay may lead to higher chances to win a leave to remain on humanitarian grounds.[61] Many of the puzzling features of irregular migration that appear ›weird‹ to natives' opinion is likely to be rooted in a misconception on the differential effects of timing in the migrants' trajectories (unclear).

A second important factor that should be taken into account is the structure and ramification of the matrix of social relationship the irregular

59 Diouck, Sans-papiers in France.

60 Leo R. Chavez, Shadowed Lives. Undocumented Migrants in American Society, Fort Worth 1992.

61 Anderson, In a Twilight World.

migrant is embedded in. Contrary to the usual vision of irregular migrants as atomised individuals pushed by epochal crises, the process of irregular migration does nearly always require a high level of social capital.[62] It is a reasonable assumption that irregular migrants face a much lower risk of being detected if they can rely on relatives or friends who are legally resident foreigners or citizens. More generally, even temporary or seasonal patterns of migration are usually embedded in a complex social structure that provides information, contact or other practical assistance linking sending places to opportunities in the receiving society.[63] Studies of irregular migration flows have already shown how the presence of relatives in the receiving country is crucial in the process of irregular migration, as they may provide the migratory knowledge or the founding for the trip.[64] The same applies, intensified, to the case of irregular migration. Finding a job in the informal labour market, to have access to a fairly secure housing condition, to be informed on which kind of services may be accessed without risk, up to have a figurehead for the telephone bill: there is quite a wide range of pre-conditions for a successful irregular stay that are contingent upon the availability of people in the receiving country willing to face the risks for the irregular migrant.[65] The significance of such social relationships for irregular migrants are also likely to be higher under the present policy conditions. As most of the internal control mechanisms are designed as devices for closing the administrative loopholes, making it more difficult for an irregular migrant to get inclusion in the various societal sectors without valid residence paper, irregular migration is more and more contingent upon the availability of services that may be acquired through figureheads.[66] Social capital, moreover, is necessary also

62 Ibid.; Blangiardo, L'Immigrazione straniera in Lombardia, 2003; Godfried Engbersen, The Unanticipated Consequences of Panopticon Europe: Residence Strategies of Illegal Immigrants, in: Guiraudon/Joppke (eds.), Controlling a New Migration World, pp. 222–246 ; Morawska, Gappy Immigration Control.

63 Ibid.

64 Ferrucio Pastore et al., L'Italia nel sistema internazionale del traffico di persone.

65 Engbersen and van der Leun, in their study of irregular migrants in four Dutch cities argue that the differential involvement of irregular migrants in the criminal sphere may also be explained, at least partly, by the degree to which they are embedded in solidarity networks. They also argue, quite rightly in my view, that the impact of restrictive control policies puts a severe strain on such integrative capability of ethnic networks. The period in which support must be given gets longer, and the risks get higher. See Engbersen/van der Leun, The Social Construction of Illegality and Criminality.

66 There are several legislative attempts, both at the national and the EU level, to deter the creation of such social capital through the introduction of sanctions for those who help irregular migrants, even if such activity is not pursued for profit. Some countries have already such principle in their legislation, while since 2000 there is also a French-sponsored initiative at the community level: Council of the European

to substitute for legal protection on a variety of working arrangements. Most jobs available to irregular migrants are temporary in nature and often based on payment after completion. As in most shadow relationships, risks of guile and malfeasance are endemic. In short, they are the kind of situation where free riding and defaulting on contracts could be easier, as the interaction is unlikely to be repeated more than once. As Axelrod has convincingly argued, however, co-operative behaviour is greatly enhanced by repeated interaction.[67] Such social mechanism explains why so many irregular migrants do establish employment relationships through the use of middlemen: what would be one-spot interaction for individual employers and employees turns then into two chains of repeated interactions linking both the irregular migrant and the employers to shared obligations through a third party.[68]

A final important factor is money. It is known that the availability of financial capital may play quite a great role in the process of acquiring a tourist visa or in making a successful irregular entry.[69] Along the land borders, the willingness to pay more implies more professional passeurs and smaller groups, thus making detection less likely; along the sea borders, it often implies smaller and safer vessels, thus again making chances of detection lower; in most cases, it implies the chance of having a valid visa and the support necessary to avoid arousing suspicion in using it. The emphasis of the role played by financial capital in securing a safe entry, however, should not imply that the availability of capital becomes less important in the subsequent phases. As a matter of fact, many migrants may acquire significant resources through market channels: in all European cities there are tenants willing to offer shelter to irregular migrants in exchange for higher rent, employers willing to hire irregular migrants in exchange for lower salary or for more flexible schedules, brokers willing to provide faked documents or fiscal numbers for a fee.[70] In the case of housing, as well as services, an irregular status does not mean exclusion, but rather inclusion at a (far) higher price. Markets evaluate migrants as economic opportunities: if their irregular status deters some provisions, it induces also others to exploit the differential

Union, Initiative of the French Republic with a View to the Adoption of a Council Directive Defining the Facilitation of Unauthorised Entry, Movement and Residence, in: Official Journal of the European Communities (C253), 2000, pp. 1f.

67 Robert Axelrod, The Evolution of Cooperation, New York 1984.

68 This is not to deny the existence of frequent cases of exploitation and cheating. The available literature documents the existence of other ways of guaranteeing the respect of the informal contract, from the menace to destroy the manufact, intimidation or recourse to criminal organisation to request the enforcement of contracts, cf. Alt, Illegal in Deutschland.

69 IOM, Trafficking in Migrants.

70 Diouck, Sans-Papiers in France; Adam et al., Itinéraires de sans-papiers en Belgique.

chances for economic gain. An estimate of the differential pricing for services in the case of irregular migrants would likely tell us much more on internal controls than any statistics on the random checks by some state's agency. Differential pricing is not the only market-type channel that provides an infrastructure for irregular migrants. Markets may even provide functional substitutes to juridical and political structures. Through payments, migrants may buy the enforcement of working contracts (through the involvement of a specialised third party) as well as the settling of minor disputes through the recourse to informal judges.[71] Money can also buy institutional identities, through the services providing faked documents of various kinds. There are apparently well-known providers of such documents, the price being strictly related to the quality of the documents provided and to the degree of protection from controls they guarantee. Market channels are particularly relevant for those migrants who cannot rely on structured networks, thus having to pay for a wide range of services, including information and advice. In many other cases, however, market channels are complementary to social networks and often are overlapping with them.

The timing of migration, the social capital and the financial resources available to migrants are only three of the main pre-conditions for irregularity that may benefit for a more detailed study. Human capital is likely to be just as important, especially if a variety of informal skills are included in the definition. When and if such elements are related to the strategies enacted by irregular migrants, and these are in turn seen as interacting with the migration regime of the receiving country, a sketch of the main structure of irregular migration systems emerges. Such a sketch is surely less certain and more problematic than the usual vision vehiculed by policy papers and *Ersatz*-research. It has however a definitive advantage: it highlights what it is in need of research, instead of hiding it behind smokescreens.

71 Alt, Illegal in Deutschland.

Norbert Cyrus, Franck Düvell
und Dita Vogel

Illegale Zuwanderung in Großbritannien und Deutschland: ein Vergleich

Neben vielen anderen Staaten sind auch Deutschland und Großbritannien mit dem Problem der illegalen Zuwanderung verstärkt konfrontiert.[1] Dieser Beitrag stellt Einschätzungen zu den wichtigsten Kontextfaktoren und Kennzeichen der Illegalität vergleichend zur Diskussion[2], beginnend mit einer Vorstellung der nationalen Migrationspolitiken, die aufgrund historisch gewachsener politischer Kulturen auf unterschiedlichen Wertvorstellungen beruhen und unterschiedliche Zielvorgaben verfolgten. Dann folgt eine Darstellung von Ausmaß, Zusammensetzung und Verlaufslogik illegaler Zuwanderung und Aufenthalte in beiden Ländern. Abschließend wird auf die öffentliche Wahrnehmung und Thematisierung der illegalen Zuwanderung eingegangen und das zivilgesellschaftliche Engagement für Zuwanderer ohne Status beschrieben.

Migrationspolitiken

Die von Deutschland und Großbritannien verfolgten Migrationspolitiken unterscheiden sich, was unter anderem in Geschichte, Geographie und politischer Kultur der Länder begründet liegt.

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1 Die Autoren arbeiten seit langem über Migrationspolitik und Illegalität in Großbritannien (Düvell) und Deutschland (Cyrus und Vogel), zum Teil im gemeinsamen EU-Forschungsprojekt ›Improving the Human Research Potential and the Socio-Economic Knowledge Base‹ (IAPASIS), gefördert durch die Europäische Kommission (DG RTD 5. Forschungsrahmenprogramm, Key Action Improving the Socio-Economic Knowledge Base), www.iue.it/RSCAS/Research/IAPASIS/Reports.shtml Allg. hierzu: Klaus J. Bade, Europa in Bewegung. Migration vom späten 18. Jahrhundert bis zur Gegenwart, München 2000.

2 Dieser Artikel basiert auf einem im November 2002 in der Evangelischen Akademie in Berlin gehaltenen Vortrag, der Anfang 2003 grundlegend für die Veröffentlichung überarbeitet wurde. 2004 wurden nur geringfügige Aktualisierungen ohne Sichtung neuerer Literatur hinzugefügt.

Großbritannien

Geschichte und Selbstverständnis: Die Geschichte der Immigration und der nationalen Identität ist geprägt durch die Geschichte Großbritanniens als Kolonialmacht, Empire und Kernland des Commonwealth. Bis 1962 bestanden keine Zuwanderungsbeschränkungen für Bewohner anderer Commonwealth-Staaten. Sie galten als britische Staatsbürger. Obwohl die Zuwanderung – wie auch in anderen europäischen Staaten – nach 1971 stark eingeschränkt wurde, unterhält Großbritannien nach wie vor besondere Beziehungen zu diesen Staaten. Beispielsweise trägt Großbritannien die gemeinsame Visa-Liste der Europäischen Union nicht mit und gewährt den Bürgern einiger ehemaliger Commonwealth-Staaten bevorzugte Konditionen.[3]

Nach dem Zweiten Weltkrieg hat Großbritannien den Übergang von einer homogenen zu einer multi-ethnischen Gesellschaft vollzogen.[4] Dieser Übergang wurde von tiefen Krisen, rassistischen Gewaltexzessen, dem Aufstieg und Niedergang rechtsradikaler Parteien und schweren Unruhen in den 1950er, 1970er und 1980er Jahren begleitet.[5] Unter Premierministerin Thatcher antwortete die Regierung mit einer Kombination aus ›Null-Migration‹ nach außen und Antidiskriminierungspolitik im Innern.[6]

Mittlerweile ist die Antidiskriminierungspolitik zu einem wirkungsvollen Instrumentarium ausgebaut worden, das formal weitgehende Rechtssicherheit zusichert, den vollen Schutz vor Benachteiligung oder rassistischer Gewalt aber nicht garantieren kann.[7] In den vergangenen Jahren begann auch eine Liberalisierung der rigiden Zuwanderungspolitik, was jedoch nicht für den Asylbereich gilt. Andererseits wirbt die Regierung inzwischen für die Vorzüge der Migration[8], und auch die Familienzusammenführung wurde erleichtert. Mittlerweile erklärt die Einwanderungsbehörde: »Research indicates that migration as a whole has a positive impact on the UK economy«.[9]

3 Zig Layton-Henry, The Politics of Immigration, London 1992.

4 Randall Hansen, Citizenship and Immigration in Post-War Britain. The Institutional Origins of a Multicultural Nation, Oxford 2000.

5 Franck Düvell, ›Schwarze‹ Revolten im Kontext von Diskriminierung und sozialer Bewegung in England, in: Zeitschrift für Sozialgeschichte des 20. und 21. Jahrhunderts, 17. 2002, H. 1, S. 51–79.

6 Christian Joppke, Immigration and the Nation State, Oxford 1999.

7 Karen Schönwälder, Die britische Gesellschaft zwischen Offenheit und Abgrenzung. Einwanderung und Integration vom 18. bis zum 20. Jahrhundert, Berlin 2001.

8 Barbara Roche, UK Migration in a Global Economy. Rede der ehemaligen Staatssekretärin für Inneres auf der gleichnamigen Konferenz des Institute for Public Policy Research (IPPR), London, 11.9.2000.

9 Home Office, Written Evidence, in: House of Lords (Select Committee on the European Union), A Common Policy on Illegal Immigration, 37th Report, London 2002, S. 92–103.

Heute bekennt sich Großbritannien dazu, eine multi-ethnische Gesellschaft zu sein. Wirklichkeit, Politik und Rhetorik befinden sich weitgehend im Einklang miteinander. Es gibt 54 ethnische Gruppen mit jeweils mehr als 10.000 Angehörigen, die mehrheitlich im Großraum London konzentriert leben. Viele Menschen mit Migrationshintergrund sind wirtschaftlich und sozial erfolgreich. Ihr Beitrag zur kulturellen und wirtschaftlichen Diversität des Landes wird gewürdigt.[10] Daneben wird die Kultur des Landes durch traditionell stark ausgeprägte individuelle bürgerliche Freiheiten bestimmt, die mit einem Mißtrauen gegen allzuviel Staat, Kontrolle und Überwachung einhergehen. Mitspracherechte von Klienten und Nutzern öffentlicher Einrichtungen sind oft gesetzlich verankert und organisatorisch institutionalisiert. Staatliche und kommunale Behörden agieren weitgehend eigenständig.[11]

Externe und interne Kontrollpraktiken: Traditionell konzentriert sich die britische Migrationskontrolle auf die Außengrenzen.[12] Das Land hat bis heute nicht das Schengener Abkommen unterzeichnet. Es kontrolliert also – mit Ausnahme von Irland – nach wie vor seine Grenzen zu anderen EU-Mitgliedstaaten. Die Grenzkontrollorgane konzentrieren sich ganz auf die ›Eingangstore‹ – die Fährhäfen von Dover und Calais, die Flughäfen sowie den Kanaltunnel. Nur dort werden bislang auch illegal einreisende Zuwanderer auffällig. Schiffe voller Einwanderungswilliger wie an den italienischen und griechischen Küsten sind dagegen bislang noch nicht entdeckt worden.

Seit Mitte der 1980er Jahre gibt es Versuche, das interne Kontrollregime auszubauen. Zuständig sind vorrangig das Immigration Service Enforcement Directorate (ISED) des Innenministeriums sowie daneben die Polizei. Während aber das ISED 1996 nur 546 Beamte hatte, die auf das ganze Land verteilt waren[13] – erst jüngst wurden weitere 1.000 Beamte geschult –, stehen Vergehen gegen die Einwanderungsbestimmungen weit unten auf der Prioritätenliste der Polizei. Sukzessive sind auch die öffentlichen Dienste aufgefordert worden, den Aufenthaltsstatus abzufragen.[14] Die Kontrollbestimmungen haben sich aber in der Praxis nicht durchgesetzt. Es gibt darüber hinaus weder eine Meldepflicht noch die Verpflichtung, einen Personalausweis mit sich zu führen, so daß auch viele Briten nicht ohne weiteres ihre Staatsangehörigkeit nachweisen können.[15] Außerdem genügt allgemein bei Antragstellungen oft das gesprochene Wort, ohne daß Belege nötig sind. Der Daten-

10 Commission on the Future of Multi-Ethnic Britain, Report, London 2000.

11 Kenneth Dyson, The State Tradition in Western Europe, Oxford 1980.

12 National Audit Office, Entry into the United Kingdom, London 1995.

13 Immigration and Nationality Department, Annual Report 1996, London 1997.

14 National Audit Office, Entry into the United Kingdom.

15 House of Lords, A Common Policy on Illegal Migration. Select Committee on the European Union, London 2002.

schutz läßt den Datenabgleich zwischen verschiedenen Behörden oft nicht zu. Darüber hinaus steht eine Kultur der Nicht-Diskriminierung der gezielten Kontrolle von ethnischen Minderheiten, Ausländern und Migranten entgegen. Wenn jemand bei einer Behörde seinen Aufenthaltsstatus nicht nachweisen kann, riskiert er allenfalls die Ablehnung des Antrags, aber keine Benachrichtigung der Polizei oder Einwanderungsbehörde. Die wichtigsten Mechanismen zur Aufdeckung von illegalem Aufenthalt sind daher Zufallsergebnisse der Polizeiarbeit sowie Denunziationen, insbesondere unter Migranten und Ausländern ohne Aufenthaltsstatus.[16]

Auf dem Arbeitsmarkt besteht trotz der Deregulierungspolitik eine hohe Kontrolldichte fort. Die unterschiedlichen Behörden kontrollieren jedoch entweder den Aufenthaltsstatus des Personals nicht (z.B. Health and Safety Commission), oder aber sie melden solche Daten aus datenschutzrechtlichen Gründen nicht weiter (Inland Revenue). Einzig das ISED kontrolliert gezielt den Aufenthaltsstatus. Die Sozialbehörde (Department for Social Security, DSS) führte bis 1998 häufig gemeinsame Razzien mit dem ISED durch, hat sich aus diesem Bereich aber inzwischen zurückgezogen. Als Grund wurde angegeben, daß die Razzien sehr personalintensiv, aber wenig ergiebig wären. Zudem trägt das DSS den Richtlinien der Antidiskriminierungspolitik insofern Rechnung, als seither ausschließlich der Straftatbestand Sozialleistungsbetrug, aber nicht die Nationalität handlungsleitend ist. Eine Rolle dürfte aber auch gespielt haben, daß Razzien sehr unpopulär waren und regelmäßig Proteste von Unternehmern, Handelskammern und Stadträten provozierten.[17]

Zugang zum Arbeitsmarkt: Die Rechtsgrundlage des Zugangs zum Arbeitsmarkt wird nicht durch das Einwanderungsgesetz, sondern durch Einwanderungsverordnungen (›Immigration Rules‹) und Ermessensentscheidungen (›concessions‹) bestimmt. Die Verordnungen werden ohne Zustimmung durch das Parlament erlassen, die Bereiche für Ermessensentscheidungen werden direkt vom Staatssekretär für Inneres festgelegt. Die ›Immigration Rules‹ werden flexibel gehandhabt und unterliegen permanenten Änderungen.

Die aktuelle wirtschaftliche Situation ist durch langanhaltenden wirtschaftlichen Aufschwung, weitgehende Vollbeschäftigung sowie Arbeitskräfteknappheit in vielen Sektoren geprägt. So ist es denn auch kein Wunder, daß

16 Vgl. auch Bill Jordan/Dita Vogel/Kylza Estrella, Leben und Arbeiten ohne regulären Aufenthaltsstatus. Brasilianische MigrantInnen in London und Berlin, in: Hartmut Häußermann/Ingrid Oswald (Hg.), Zuwanderung und Stadtentwicklung (Leviathan Sonderh. 17), Wiesbaden 1997, S. 215–231, hier S. 223.

17 Franck Düvell/Bill Jordan, Immigration Control and Economic Migration Management in the UK. Organisational Culture, Implementation, and Enforcement in Public Services (Forschungsbericht, IAPASIS Projekt), Exeter 2002.

Wirtschaftsmigration heute einen positiven Beiklang hat. Bei der Zulassung werden die Interessen der Wirtschaft stark berücksichtigt. Anträge auf Einreise und Beschäftigung durch Unternehmen werden großzügig beschieden. Die Unternehmen müssen zwar teilweise nachweisen, daß sie sich zuvor um inländische Arbeitskräfte bemüht haben. Davon sind aber nicht nur Mitarbeiter multinationaler Konzerne und Praktikanten ausgenommen, sondern auch eine Reihe von Mangelberufen. Ausländischen Arbeitnehmern, seien es IT-Experten oder Hausangestellte, werden oft weitgehende Rechte zugebilligt. Beispielsweise erhalten auch ihre Angehörigen eine sofortige Arbeitserlaubnis und nach vier Jahren die Möglichkeit zur dauerhaften Niederlassung. Aber auch die (befristete) Zuwanderung von Studenten, was in der Lesart der ›Immigration Rules‹ auch Sprachschüler umfaßt, wird gern gesehen. Studenten sowie sogenannte Arbeitsurlauber (Working Holiday Makers) erhalten ebenfalls weitgehende Arbeitserlaubnisse. Großbritannien sieht sich in einem Wettbewerb insbesondere mit den USA um begehrte Arbeitskräfte und sucht diesen mittels großzügiger Regelungen für sich zu entscheiden.[18] Einzig für Asylbewerber besteht eine sechsmonatige Wartezeit. Zusammengenommen waren 2000 etwa 1,1 Millionen ausländische Arbeitnehmer, darunter 460.000 Bürger der EU, sowie weitere 2,2 Millionen im Ausland geborene Arbeitnehmer offiziell in Großbritannien beschäftigt. Von den Nicht-EU-Bürgern waren rund 80.000 Inhaber einer Arbeitserlaubnis (Work Permit) einschließlich ihrer Angehörigen, 40.000 Working Holiday Makers, 10.000 landwirtschaftliche Saisonarbeiter und 10.000 Hausarbeiterinnen. Die größte Gruppe bilden ausländische Studierende mit rund 125.000. Alle Zahlen zeigen seit Beginn der 1990er Jahre eine stetig steigende Tendenz.[19]

Tatsächlich aber übt die große Nachfrage an Arbeitskräften in die stark deregulierten Arbeitsmärkte auch eine große Anziehungskraft auf Ausländer ohne Aufenthaltsstatus aus. Auch die kaum regulierten privaten Vermittlungsagenturen und informellen Jobbörsen eröffnen Zugänge zum Arbeitsmarkt. Hierbei können illegale Arbeitnehmer entweder ihre früheren Sozialversicherungs- und Steuernummern aus Zeiten des legalen Aufenthaltes weiterverwenden oder aber fremde oder alte Sozialversicherungsnummern angeben. Häufig zahlen sie in der Tat Abgaben. Illegale Arbeit ist deshalb nicht automatisch auch Schwarzarbeit.[20]

18 Roche, UK Migration in a Global Economy.

19 John Salt/James Clarke, Foreign Labour in the United Kingdom. Patterns and Trends, in: Labour Market Trends, October 2001, S. 473–483.

20 Franck Düvell/Bill Jordan, Immigration Control and the Management of Economic Migration in the United Kingdom. Organisational Culture, Implementation, Enforcement and Identity Processes in Public Services, in: Journal of Ethnic and Migration Studies (Special Issue: From Guardians to Managers. Immigration Policy Implementation in Europe), 29. 2003, H. 2, S. 299–336.

Erst 1996 wurde der Straftatbestand der illegalen Beschäftigung eingeführt. Vorher war es Arbeitgebern nicht verboten, Ausländer ohne Arbeitserlaubnis einzustellen.[21] Auch für Arbeitnehmer ist nicht die Arbeit an sich, sondern der Verstoß gegen die Einwanderungsbestimmungen strafbar.

Staatlicher Umgang mit Illegalität: Eine noch von der konservativen Regierung 1996 gestartete gesetzliche Initiative zur Bekämpfung illegaler Beschäftigung war im Sande verlaufen, nicht zuletzt aufgrund der vehementen Proteste einer Allianz aus Antirassismus-Lobbyisten und Unternehmerverbänden. Auch Versuche, die Kooperation zwischen den Einwanderungskontrollbehörden und den sozialen Diensten oder Bildungsinstitutionen zu verbessern, brachen sich am Protest von Gewerkschaften und Vertretern der Antidiskriminierungsstellen. Razzien sind selten. Die Strafen gegen Arbeitgeber wegen illegaler Beschäftigung werden bislang nicht angewendet.[22]

2002 kündigte die Regierung eine erneute Initiative an, eine Kombination aus verstärkter Kontrolle, großzügigeren Regelungen für die Wirtschaft sowie leichterem Zugang zu Arbeitserlaubnissen. Unter ›Migration Management‹ heißt es darin: »The development of managed migration schemes will help to ensure that, wherever possible, those wishing to come to the UK have legal routes open for them to do so and employers can fill vacancies with legal workes« (S. 16). »Providing opportunities of work in the UK legally will reduce the need for economic migrants to enter and work clandestinely« (S. 38), »a modern, flexible and coherent immigration policy […] means welcoming those who have a contribution to make to our country« (S. 5).[23]

Mittlerweile wurden zwei neue Programme eingerichtet, das Sector Based Scheme (SBS) für ungelernte Arbeitskräfte sowie das Highly Skilled Migrant Programme. Zudem wurde die Quote für landwirtschaftliche Arbeitskräfte auf 25.000 angehoben und das Working Holiday Maker Scheme auf das gesamte Commonwealth ausgeweitet (53 Staaten). Die Regierung kommt damit auch den langjährigen Forderungen des Unternehmerverbandes entgegen, der wiederholt die negativen Effekte der Bekämpfung illegaler Arbeit sowie der Einschränkungen bei der Anwerbung ausländischer Arbeiter kritisiert hatte und statt dessen Erleichterungen bei der Beschäftigung ausländischer Arbeiter forderte.[24] Mittlerweile formuliert das Innenministerium einen

21 Ulrike Davy/Dilek Cinar, Vereinigtes Königreich, in: Ulrike Davy (Hg.), Die Integration von Einwanderern. Rechtliche Regelungen im europäischen Vergleich, Frankfurt a.M./New York 2001, S. 795–924.

22 Düvell/Jordan, Immigration Control and Economic Migration Management in the UK.

23 Home Office, Secure Borders, Safe Haven. Integration with Diversity in Modern Britain, London 2002.

24 Confederation of British Industries (CBI), CBI Response. Home Office Consultation Paper, Immigration and Asylum Bill, Proposals Relating to Employer Sanctions, London 1999; CBI, Interview mit Anthony Thompson, London 2000.

insgesamt ausgewogenen Blick auf ausländische Arbeitnehmer, tatsächlich spielt es die Bedrohungs- und Konkurrenzaspekte sogar herunter und betont: »Research suggests that migrants do not compete for jobs with existing workers, […] migrants can also expand sectors, create new business and jobs«.[25] In bezug auf illegale Arbeit wird weniger der Straftatbestand skandalisiert als vielmehr der Aspekt ihrer verletzlichen Situation hervorgehoben.

Großbritannien hatte zuletzt 1974 und 1978 Amnestien erlassen, die sich an die Gruppe der Angehörigen ethnischer Minderheiten aus dem ›New Commonwealth‹ gerichtet hatten. Doch daneben besteht die Möglichkeit individueller Legalisierung aufgrund von Härtefallregelungen. Dies ist aber kein einklagbares Recht, sondern eine Ermessensentscheidung (concession) und wird vom Innenminister nach sorgfältiger Prüfung erteilt. Diese Regel ist flexibel auslegbar und wird jährlich zwischen 1.400 und 3.300 Personen gewährt. Daneben besteht die Möglichkeit der Legalisierung nach einer Heirat, einem Asylantrag oder aber durch einige Schlupflöcher in den Bestimmungen über selbständige Beschäftigung.

Deutschland

Mit der Einsetzung diverser Zuwanderungskommissionen und der Verabschiedung eines Zuwanderungsgesetzes im Bundestag deutete sich in Deutschland zu Beginn des Jahrtausends ein Wandel im gesellschaftlichen Selbstverständnis an: Einwanderung wurde erstmals in der Geschichte der Bundesrepublik als Ziel von Migrationspolitik formuliert. Mit dem neuen Gesetz sollten die Voraussetzungen für eine offenere Zuwanderungspolitik geschaffen werden. Das Gesetz scheiterte im Bundesrat, wurde unverändert wieder eingebracht und wird nach erneuter Verabschiedung unter deutlich restriktiveren Vorzeichen beraten, ohne daß sich derzeitig ein Scheitern oder ein Kompromiß klar abzeichnet.[26] Daher ist eine genauere Einschätzung der weiteren migrationspolitischen Entwicklung zur Zeit schwierig. Hier wird die deutsche Situation vor Inkrafttreten eines neuen Gesetzes charakterisiert.

Geschichte und Selbstverständnis: Die Geschichte der Zuwanderung und nationalen Identität in Deutschland ist durch ein ethno-nationales Verständnis von Staatsvolk und Staatsangehörigkeit geprägt[27], das bis in die jüngste Zeit

25 Home Office, Secure Borders, S. 12.

26 Gesetzentwurf der Fraktionen SPD und Bündnis 90/Die Grünen, Entwurf eines Gesetzes zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthaltes und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz), Bt-Drs. 14/7387, 8.11.2001 (http://dip.bundestag.de/btd/14/073/1407387.pdf). Zur vollständigen Dokumentation der parlamentarischen Vorgänge: http://dip.bundestag.de/extrakt/14/019/14019817. htm

27 Werner Schiffauer, Die Civil Society und der Fremde. Grenzmarkierungen in vier politischen Kulturen, in: Friedrich Balke u.a. (Hg.), Schwierige Fremdheit. Über Inte-

grundlegend für den Umgang mit Zuwanderung und Ausländern war. Mit dem bis 1999 gültigen Reichs- und Staatsangehörigkeitsrecht, das bis auf das Jahr 1913 zurückgeht, bestand ein im wesentlichen ethno-national verfaßtes Staatsbürgerschaftskonzept. Auch die im Ausländergesetz geregelte Zuwanderung von Ausländern wird traditionell unter dem Aspekt der Abwehr von Gefahren für die öffentliche Ordnung betrachtet.[28] Insgesamt vertrat Deutschland bisher gegenüber Zuwanderern eine »paradoxe Doppelstrategie«[29]: Sie sollten sich möglichst reibungslos anpassen, während der Staat sich zugleich die Option offenhielt, sie zurückzusenden. Trotz der ablehnenden Grundhaltung – vorherrschend war eine *Rhetorik* der Abschottung – erreichte die Zuwanderung aber eine solche Größenordnung, daß es in Deutschland mehr im Ausland Geborene als in vielen anderen Ländern gibt.[30] Diese *faktische Einwanderung* war aber nicht als solche gesteuert und gewollt, sondern ergab sich als (unbeabsichtigte) Nebenfolge anderer Politiken.[31]

- Die europäische Integration führte dazu, daß Bürger aus EU-Mitgliedstaaten die volle Freizügigkeit genießen und deutschen Staatsangehörigen beim Zugang zum Arbeitsmarkt gleichgestellt sind.
- Ausländische Arbeitnehmer wurden vor allem in den 1960er Jahren als Reaktion auf Arbeitskräftemangel angeworben. Mit zunehmender Aufenthaltsdauer wurde ihnen aus ökonomischen, humanitären und sozialrechtlichen Gründen ein dauerhaftes Bleiberecht zugestanden.
- Die Zuwanderung der Familienangehörigen von in Deutschland lebenden Ausländern beruhte auf grund- und menschenrechtlichen Normen, die teilweise erst nach der Anrufung von Gerichten durchgesetzt wurden.

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gration und Ausgrenzung in Einwanderungsländern, Frankfurt a.M. 1990, S. 185–199; Johan Galtung, Menschenrechte anders gesehen, Frankfurt a.M. 1994, S. 77.

28 Knut Dohse, Ausländische Arbeiter und bürgerlicher Staat. Genese und Funktion von Ausländerpolitik und Ausländerrecht. Vom Kaiserreich bis zur Bundesrepublik Deutschland, Königstein i.Ts. 1981.

29 Elcin Kürsat-Ahlers, Die Bedeutung der staatsbürgerschaftlich-rechtlichen Gleichstellung und Antidiskriminierungspolitik für Integrationsprozesse, in: Ursula Mehrländer/Günther Schultze (Hg.), Einwanderungsland Deutschland. Neue Wege nachhaltiger Integration, Bonn 2001, S. 117–143, hier S. 119.

30 Klaus J. Bade/Michael Bommes, Migration und politische Kultur im ›Nicht-Einwanderungsland‹, in: Klaus J. Bade/Rainer Münz (Hg.), Migrationsreport 2000. Fakten – Analysen – Perspektiven, Frankfurt a.M./New York 2000, S. 163–204.

31 Norbert Cyrus/Dita Vogel, Immigration as a Side Effect of Other Policies – Principles and Consequences of German Non-Immigration Policy (IAPASIS Deutschland, Working Paper 1/2000), Oldenburg, Juli 2000, hierzu s. www.iue.it/Research/IAPASIS/index.shtml

- Die Aufnahme von Flüchtlingen und Asylbewerbern erfolgte aufgrund historisch begründeter, rechtlicher Selbstverpflichtungen (Grundgesetz, internationale Schutzabkommen, z.B. Genfer Konvention).[32]
- Die Einwanderung von Aussiedlern, seit 1993 im ›Kriegsfolgenbereinigungsgesetz‹ geregelt, wird als eine der Konsequenzen aus dem Zweiten Weltkrieg betrachtet. Sie setzte die Aufnahme von Vertriebenen in der unmittelbaren Nachkriegszeit fort und knüpfte an Deutschstämmigkeit als Kriterium an.

Als Konsequenz aus der politikfeldabhängigen Regelung der Zuwanderung ergibt sich eine große Vielfalt von Integrationsszenarien[33]: Während Spätaussiedler unmittelbar mit der Aufnahme zu deutschen Staatsbürgern werden, ist die Einbürgerungsquote bei anderen Ausländergruppen im europäischen Vergleich sehr niedrig. Unterhalb der Einbürgerung existiert eine Vielzahl von Statusmöglichkeiten: Während einige Gruppen wie Familienangehörige und Arbeitskräfte aus bestimmten Ländern nach drei bis fünf Jahren einen eigenständigen und vom Einreisegrund unabhängigen Status erhalten, können andere auch nach Jahren noch regulär, aber ohne dauerhaftes Bleiberecht in Deutschland leben. Ein Antidiskriminierungsgesetz gibt es nicht, und die bestehenden Rechte auf Schutz vor Diskriminierung können nur schlecht geltend gemacht werden.[34]

In den letzten Jahren kündigt sich ein Politikwandel an, der bisher aber nur zögernd umgesetzt wird – mit der Reform u.a. des Staatsbürgerrechtes, der Anwerbung ausländischer Computerspezialisten, der Einsetzung einer Unabhängigen Kommission ›Zuwanderung‹ durch die Bundesregierung und schließlich dem Gesetzentwurf für ein Zuwanderungsgesetz. Obwohl ein breiter Konsens organisierter gesellschaftlicher Gruppen besteht, daß aus demographischen und ökonomischen Gründen Einwanderung nötig ist, wurde und wird die Frage der Gestaltung von Zuwanderung immer noch parteipolitisch instrumentalisiert.[35]

Die Begrenzung und Steuerung von Zuwanderung wird – wie in Thatchers Großbritannien – in der öffentlichen Darstellung als Voraussetzung der

32 Christian Joppke, Why Liberal States Accept Unwanted Migration, in: World Politics, 50. 1998, S. 266–293.

33 Ulrike Davy/Dilek Cinar, Deutschland, in: Davy (Hg.), Die Integration von Einwanderern, S. 277–423.

34 Per Johansson u.a., Racial, Ethnic and Religious Discrimination. A Comparative Analysis of National and European Law, Migration Policy Group, Brüssel 2001.

35 Karl-Heinz Meier-Braun, Deutschland, Einwanderungsland, Frankfurt a.M. 2002, S. 87, 105; Dietrich Thränhardt, Einwanderungsland Deutschland – von der Tabuisierung zur Realität, in: Mehrländer/Schultze (Hg.), Einwanderungsland Deutschland, S. 41–63, hier S. 43f.

Integration der bereits zugewanderten Ausländer betont.[36] Dementsprechend ambivalent bleibt das Verhältnis zur Zuwanderung: Die Begrenzungsrhetorik besteht nach wie vor, zugleich wird aber auch ein Bedarf an Zuwanderung betont. Die Begrenzung der Zuwanderung bleibt in Deutschland das hervorgehobene Ziel, für dessen Durchsetzung weiterhin erheblicher Kontrollaufwand eingesetzt wird.

Externe und interne Kontrollpraktiken: Die in Deutschland bestehende Ambivalenz beim Umgang mit Zuwanderung (Rhetorik der Begrenzung und Praxis der Aufnahme) prägt auch die Migrationskontrolle. Einerseits wird eine strikte Abschottung der Grenzen und Begrenzung der Zuwanderung vertreten. Durch aufwendige Verfahren zur Erteilung von Einreisevisa und Aufenthalts- und Arbeitserlaubnissen sowie durch Grenzkontrollen mit hohem personellen und materiellen Aufwand soll unerwünschte Zuwanderung verhindert werden. Es besteht aber – anders als in Großbritannien – kein Anspruch, die Einreisen *aller* Ausländer an den Außengrenzen zu kontrollieren und zu dokumentieren. Der Beitritt Deutschlands zum Schengen-Abkommen führte zum Abbau der innereuropäischen Grenzkontrollen. Aber auch an den Grenzen zu Polen und Tschechien wurden aufgrund des hohen Verkehrsaufkommens schon vor dem EU-Beitritt dieser Staaten nicht alle Einreisenden intensiv kontrolliert, sondern vor allem Personen, die augenscheinlich (nach äußerem Erscheinungsbild oder nach der Farbe des Reisepasses) aus visumspflichtigen Drittstaaten stammten. Personen aus diesen Ländern, die kein Visum für die Einreise nach Deutschland besitzen und dennoch einreisen wollen, bleibt nur der Versuch der illegalen Einreise außerhalb der offiziellen Grenzübergänge, die ebenfalls mit steigendem technischen und personellen Aufwand überwacht werden.

Neben den Kontrollen an den Außengrenzen werden – verglichen mit Großbritannien – in Deutschland aber auch erhebliche Kontrollanstrengungen im Inland unternommen.[37] Zugereiste Ausländer sind ebenso wie ansässige Bürger verpflichtet, sich bei der örtlichen Meldebehörde registrieren zu lassen, selbst wenn sie visumsfrei als Touristen eingereist sind und es sich nur um einen kurzen Aufenthalt handelt. Allerdings wird diese Meldepflicht von visumsfrei eingereisten Personen wahrscheinlich nur zum geringen Teil eingehalten, zumal sie ihnen auch nur zum Teil bekannt ist.

Mit der Migrationskontrolle im Inland ist eine Vielzahl von Behörden befaßt, die intensiv miteinander kooperieren und Daten austauschen. Die kommunalen Ausländerbehörden sind der koordinierende Kern dieses frag-

36 Ausländerpolitik und Ausländerrecht in Deutschland, hg.v. Bundesministerium des Innern, Berlin 2000, S. 122.

37 Dita Vogel, Migration Control in Germany and the United States, in: International Migration Review, 34. 2000, H. 2, S. 390–422.

mentierten Systems, in dem eine Vielzahl von Behörden zusätzlich zu ihren Hauptaufgaben auch den Aufenthaltsstatus kontrollieren und ggf. Polizei bzw. Ausländerbehörden informieren. Es gibt nur wenige Abteilungen bei Behörden, deren zugewiesene Aufgabe hauptsächlich in der Kontrolle von Ausländern besteht: So bestehen bei den Polizeidirektionen sogenannte Arbeitsgruppen Ausländer.[38] Andere Behörden haben allgemeiner formulierte Aufträge und kontrollieren in diesem Rahmen auch gezielt Ausländer. So ist der Bundesgrenzschutz im Inland für die Sicherung von Verkehrsanlagen (Bahn und Flughäfen) zuständig und kontrolliert im Rahmen dieser Aufgaben auch gezielt Ausländer. Abteilungen der Hauptzollämter und der Bundesagentur für Arbeit sind für die Bekämpfung von illegaler Beschäftigung und Leistungsmißbrauch zuständig und kontrollieren im Rahmen dieser Aufgabe an Arbeitsplätzen gezielt Aufenthalts- und Arbeitsgenehmigung.

Die Anzahl der Behördenmitarbeiter, die im Zuge ihrer Arbeit im Inland Ausländer kontrollieren, ist in den letzten Jahren angestiegen: Während fast überall im öffentlichen Dienst Personal und Mittel eingespart wurden, ist das Kontrollpersonal deutlich aufgestockt worden. Der Etat des Bundesgrenzschutzes wurde von 0,7 Milliarden (1990) auf 1,6 Milliarden Euro (2000), der Personalstand von 25.187 (1990) auf 38.928 (2000) Stellen erhöht.[39] Von 1982 bis 1998 war das mit der Bekämpfung illegaler Beschäftigung befaßte Personal der Bundesanstalt für Arbeit von 50 auf 2.450 Stellen erhöht worden. Seit 1992 führen auch die Hauptzollämter mit polizeiähnlichen Befugnissen Arbeitsmarktkontrollen durch. Sie haben 2003 diese Aufgabe vollständig übernommen. Mittelfristig sollen sie mit rund 7.000 Mitarbeiterstellen (inklusive übernommener Arbeitsamtsmitarbeiter) Kontrollen durchführen. Ein neues Gesetz zur Bekämpfung der Schwarzarbeit wurde Anfang 2004 im Parlament debattiert, das bestehende Vorschriften integrieren und verschärfen soll. Vor allem die geplanten erweiterten Strafen und Kontrollen in privaten Haushalten wurden in der Öffentlichkeit heftig kritisiert, die geplanten Verschärfungen teilweise zurückgenommen.[40]

38 Illegal in Berlin. Momentaufnahmen aus der Hauptstadt, hg.v. Erzbischöflichen Ordinariat, Berlin 2000, S. 83f.

39 Norbert Cyrus/Jörg Alt, Illegale Migration in Deutschland. Ansätze für eine menschenrechtlich orientierte Migrationspolitik, in: Bade/Münz (Hg.), Migrationsreport 2002, S. 141–162, hier S. 155.

40 Gesetzentwurf der Fraktionen SPD und Bündnis 90/Die Grünen, Entwurf eines Gesetzes zur Intensivierung der Bekämpfung der Schwarzarbeit und damit zusammenhängender Steuerhinterziehung, Bt-Drs. 15/2573, 2.3.2004; Norbert Cyrus, Stellungnahme zur öffentlichen Anhörung zum Gesetzesentwurf der Fraktionen SPD und Bündnis 90/Die Grünen, ›Entwurf eines Gesetzes zur Intensivierung der Bekämpfung der Schwarzarbeit und damit zusammenhängender Steuerhinterziehung‹, Drs. 15/2573, im Bundestagsauschuß für Finanzen, 24.3.2004, Berlin, unveröff. Ms.

Von besonderer Bedeutung für die Verhinderung bzw. Aufdeckung illegaler Ausländerbeschäftigung sind regelmäßig durchgeführte Datenabgleiche, u.a. von Arbeitserlaubnisdatei und Sozialversicherungsanmeldung (Kontospiegel), wodurch eine angemeldete Beschäftigung ohne Aufenthalts- und Arbeitserlaubnis nahezu unmöglich gemacht wird.[41] Darüber hinaus sind öffentlich Bedienstete verpflichtet, die Ausländerbehörden vom Verdacht der Illegalität zu informieren, wenn sie z.B. bei einer Antragstellung auf fehlende Papiere aufmerksam werden (§ 76 Ausländergesetz, AuslG). Da in Deutschland in aller Regel bei öffentlichen und privaten Anträgen aller Art Identitätspapiere (Personalausweis oder Reisepaß) vorgelegt werden müssen, vermeiden Personen ohne regulären Aufenthalt den Kontakt mit öffentlichen Stellen.[42]

In Deutschland ist also vor allem die Kontrollintensität im Inland höher, während sich Großbritannien, begünstigt durch die Insellage, auf die Überwachung der Eingangstore konzentriert. Die Durchführung der binnenländischen Migrationskontrollen wird in Deutschland bisher nicht unter dem Gesichtspunkt der Diskriminierung diskutiert.[43]

Zugang zum Arbeitsmarkt: Grundsätzlich ist in Deutschland Ausländern der Zugang zu den Arbeitsmärkten seit 1973 versperrt. Eine Arbeitsgenehmigung darf Ausländern nur in Ausnahmefällen erteilt werden, wobei neben aufenthaltsrechtlichen Beschränkungen auch die Lage und der allgemeine Trend auf dem Arbeitsmarkt zu berücksichtigen sind. Insgesamt wird offiziell die Linie vertreten, daß eine Anwerbung ausländischer Arbeitnehmer bei Erwerbslosenzahlen, die zwischen drei und vier Millionen liegen, nur in begründeten Ausnahmefällen erlaubt werden soll, wenn keine deutschen oder bevorrechtigten ausländischen Arbeitnehmer zur Verfügung stehen (Vorrangprüfung). Von Frühjahr 1997 bis Ende 2000 war Asylbewerbern der Arbeitsmarktzugang absolut versperrt.[44] Auch Ausländer, die sich als Familienangehörige oder als Asylbewerber bereits in Deutschland aufhalten, erhalten

41 Bernhard Weber, Illegale Beschäftigung – Aussagen über das Hellfeld, in: Siegfried Lamnek/Jens Luedtke (Hg.), Der Sozialstaat zwischen ›Markt‹ und ›Hedonismus‹?, Opladen 1999, S. 337–346.

42 Dita Vogel, Identifying Unauthorized Foreign Workers in the German Labour Markets, in: Jane Caplan/John Torpey (Hg.), Documenting Individual Identity. The Development of State Practices in the Modern World, Princeton 2001, S. 328–344.

43 Zur Wahrscheinlichkeit, daß eine solche Diskussion in Zukunft geführt werden wird, s. Norbert Cyrus/Dita Vogel, Ausländerdiskriminierung durch Außenkontrollen im Arbeitsmarkt? Fallstudienbefunde – Herausforderungen – Gestaltungsoptionen, in: Mitteilungen aus der Arbeitsmarkt- und Berufsforschung, 35. 2002, H. 2, S. 254–270.

44 Bericht der Beauftragten der Bundesregierung für Ausländerfragen über die Lage der Ausländer in der Bundesrepublik Deutschland, Berlin/Bonn 2002, S. 82.

frühestens nach Ablauf einer gesetzlich vorgeschriebenen Wartezeit Zugang zum Arbeitsmarkt und unterliegen überwiegend (zunächst) der Vorrangprüfung. Trotz dieser Zugangsbarrieren waren aber im Jahr 2000 gut 1,9 Millionen ausländische Arbeitnehmer sozialversicherungspflichtig beschäftigt.

Zusätzlich wurden auf Drängen von Arbeitgeberorganisationen mit der Anwerbestopp-Ausnahmeverordnung 1990 Möglichkeiten des Außenzugangs für eine befristete Beschäftigung ausländischer Arbeitnehmer eingeführt, um einen Bedarf an inländisch nicht vorhandenen Arbeitskräften zu bedienen. Zur Zeit kommen pro Jahr etwa 300.000 ausländische Arbeitnehmer für eine zeitlich befristete Beschäftigung als Saisonarbeitnehmer oder Werkvertragsarbeitnehmer nach Deutschland. Die Anwerbestopp-Ausnahmeverordnung regelt darüber hinaus auch die Beschäftigung von hochqualifizierten Arbeitnehmern, Wissenschaftlern, Künstlern usw. Weitere Möglichkeiten einer befristeten Beschäftigung ausländischer Arbeitnehmer wurden mit der Einführung der ›Green Card‹ für IT-Spezialisten (2000) und Haushaltshilfen in Privathaushalten mit Pflegefällen (2002) eröffnet.

Es besteht insgesamt betrachtet für Ausländer, die der Arbeitserlaubnispflicht unterliegen, im Prinzip eine Vielzahl an Zugangsmöglichkeiten zum Arbeitsmarkt, die allerdings an strenge Auflagen gebunden sind. Da in die Vorrangprüfung genau die Sachbearbeiter der Bundesagentur für Arbeit einbezogen werden, die für die Vermittlung von Arbeitslosen zuständig sind und sich diesen verpflichtet fühlen[45], führt das Verfahren eher zu restriktiven Ergebnissen, die allerdings je nach der Arbeitsmarktsituation in einem Arbeitsamtsbezirk stark variieren können. Nicht bevorrechtigten ausländischen Arbeitnehmern, die arbeiten wollen, bleibt daher nur eine illegale Beschäftigung. Zu den wichtigsten Bereichen illegaler Ausländerbeschäftigung zählen das Baugewerbe, das Hotel- und Gaststättengewerbe sowie der Bereich der von privaten Haushalten nachgefragten Dienstleistungen für Renovierung, Haushaltshilfe, Kinderbetreuung und Pflege von alten Haushaltsmitgliedern. Die intensive Zusammenarbeit der Kontrollbehörden mit regelmäßigem Datenaustausch verhindert weitgehend, daß Ausländer ohne Aufenthalts- oder Arbeitserlaubnis bei einer Beschäftigung Steuern und Sozialabgaben leisten.

Staatlicher Umgang mit Illegalität: Mit Ausnahme von Ausländerbeauftragten herrscht in staatlichen Behörden und Institutionen eine durchgängig repressive Rhetorik gegenüber dem Problem illegaler Aufenthalte vor. »Der illegale Aufenthalt von Ausländern im Bundesgebiet gefährdet die öffentliche Sicherheit und Ordnung […]. Die privaten Interessen auf Aufrechterhaltung der beruflichen und sozialen Existenz gehen in Fällen des illegalen Aufent-

45 Norbert Cyrus/Dita Vogel, Work-permit Decisions in the German Labour Administration. An Exploration of the Implementation Process, in: Journal of Ethnic and Migration Studies (Special Issue: From Guardians to Managers), 29. 2003, S. 225–255.

halts den öffentlichen Interessen an der Aufrechterhaltung der öffentlichen Sicherheit und Ordnung nicht vor«.[46]

Betont wird das Recht des Staates, über Einreise und Aufenthalte von Ausländern auf dem Territorium souverän (im Rahmen der internationalen, z.B. EU-Vereinbarungen) zu entscheiden. Der illegale Aufenthalt ist juristisch eine Straftat, die mit einer Freiheitsstrafe von bis zu einem Jahr geahndet werden kann (§ 92 AuslG). Soziale Problemlagen werden nicht zur Kenntnis genommen oder aber die Verantwortung wird den Statuslosen selber zugewiesen: »Ausländer, die ohne entsprechenden Aufenthaltstitel nach Deutschland einreisen oder sich hier aufhalten, verletzen das geltende Recht und sind sich […] in der Regel völlig darüber im klaren, welche Konsequenzen dies für ihre Lebensumstände in Deutschland haben wird. Sie sind in diesem Sinne selbst für ihre Illegalität verantwortlich. Aus dieser Position heraus können keine Ansprüche an den deutschen Staat oder die deutsche Gesellschaft abgeleitet werden«.[47]

Eine Lösung des Problems illegaler Aufenthalte hat in dieser Lesart allein durch die freiwillige Ausreise bzw. die Ausweisung oder Abschiebung zu erfolgen. Entsprechend wird vor allem auf eine Ausweitung von Kontrollen und die Aufstockung von Kontrollpersonal gesetzt.

Die gesellschaftliche Bearbeitung sozialer und humanitärer Probleme wird in die Verantwortung zivilgesellschaftlicher Akteure (Kirchen, Wohlfahrtsverbände) verwiesen[48], ohne jedoch entsprechende Mittel bereitzustellen oder zumindest die entsprechenden gesetzlichen Rahmenbedingungen zu schaffen. Bei Sozialarbeitern, Ärzten, Lehrern und anderen helfenden Professionen besteht große Unsicherheit, ob humanitäre Hilfe für Menschen ohne Aufenthaltsstatus als Beihilfe zum illegalen Aufenthalt bewertet und bestraft wird. Eine allgemeine Legalisierung wird von offizieller Seite grundsätzlich abgelehnt. Allerdings erhalten bisher immer wieder Personen, deren Abschiebung aus humanitären oder faktischen Gründen nicht möglich ist, eine sogenannte Duldung. Damit erhalten sie keine Aufenthaltsperspektive und keinen regulären Status, wohl aber einen in der Regel eng befristeten Abschiebeschutz und die Möglichkeit, grundlegende Sozialleistungen zu beziehen. In der Vergangenheit hat es immer wieder Altfallregelungen für Geduldete und Asylbewerber gegeben, deren Abschiebung längerfristig nicht möglich war. So erhielten in den Jahren 2000 und 2001 insgesamt 57.500 Personen im Zuge einer Altfallregelung eine längerfristige Perspektive.[49] Inso-

46 Hans-Peter Welte, Illegaler Aufenthalt in Deutschland, in: Zeitschrift für Ausländerrecht und Ausländerpolitik, 22. 2002, H. 2, S. 54–58, hier S. 55.

47 Bundesministerium des Innern, Antwortschreiben auf die Eingabe des Jesuiten-Flüchtlingsdienstes, 14.2.2001, unveröff. Schreiben, Berlin, S. 6.

48 Bericht der Beauftragten der Bundesrepublik für Ausländerfragen, S. 87f.

49 Ebd., S. 67–73.

fern können Altfallregelungen als mittelbare Legalisierung betrachtet werden. Für visumsfrei eingereiste und behördlich nicht registrierte Personen gibt es keine unmittelbare Möglichkeit, den Aufenthalt zu legalisieren. Es bleibt allein die Möglichkeit, durch Heirat einen Aufenthaltsstatus zu erlangen, wobei jedoch zum Zeitpunkt der Eheschließung der Aufenthalt formal legal sein muß (z.B. touristisch oder Aufenthaltsgestattung[50]).

Im Vergleich zu Großbritannien ist in Deutschland noch immer eine größere Kluft zwischen Zuwanderungsrealität und Zuwanderungspolitik zu erkennen. Während Großbritannien auf eine gespaltene Migrationspolitik mit einer gezielten Öffnung für erwünschte Arbeitskräfte und eine Abschreckung von Asylbewerbern setzt, dominiert in Deutschland noch eine Rhetorik der allgemeinen Abschreckung. Allerdings gibt es auch in Deutschland begrenzte Zugangsmöglichkeiten zum Arbeitsmarkt. Kontrollanstrengungen in Großbritannien konzentrieren sich auf die ›Eingangstore‹ an den Grenzen. Versuche verstärkter interner Kontrollen sind gescheitert – am Fehlen von Melde- und Ausweispflichten, an einer Behördenkultur mit geringer Kooperation und geringem Datenaustausch in Kombination mit einer gezielten Anti-Diskriminierungspolitik. In Deutschland investiert ein auf Datenaustausch angelegter Staat in interne Kontrollen, die durch eine leichte Identifizierbarkeit von Staatsbürgern dank allgemeiner Meldepflicht begünstigt werden. Externe Kontrollen konzentrieren sich auf die Abwehr illegaler Einreisen an den Grenzen. Die Auswirkungen dieser Rahmenbedingungen auf die soziale Situation von Ausländern ohne Aufenthaltsstatus in beiden Ländern werden im folgenden behandelt.

Illegale Zuwanderung

Grundsätzlich kann eine illegale Situation durch eine illegale Einreise, einen illegalen Aufenthalt oder eine illegale Beschäftigung entstehen.[51] Illegalität kann in diesen drei Dimensionen gleichzeitig bestehen. Es kann aber auch nur eine einzige Dimension betroffen sein.[52] Wenn von ›Illegalen‹ gesprochen wird, ist es deshalb meistens nicht eindeutig, um welche Form der Illegalität es sich handelt.

- Zunächst einmal kann *illegale Einreise* zu illegalem Aufenthalt führen, der aber durch einen Asylantrag anschließend auch legal werden kann.

50 Ein Asylsuchender erhält zur Durchführung des Asylverfahrens in Deutschland eine *Aufenthaltsgestattung*. Die Aufenthaltsgestattung ist kein Aufenthaltstitel im eigentlichen Sinn und berechtigt nicht zum Grenzübertritt.

51 Neil G. McHardy, Das Recht der Illegalen, in: Recht der Arbeit, 1994, H. 2, S. 93–104.

52 Hans van Amersfoort, Migration: The Limits of Control, in: New Community, 22. 1996, H. 2, S. 243–257.

- Ein illegaler Aufenthalt kann auch *im Anschluß an einen legalen Aufenthalt* entstehen, wenn z.B. der Aufenthalt nach einer visafreien Einreise länger als drei Monate dauert oder die Aufenthaltsgenehmigung abläuft (visa overstayer).
- Ein an sich legaler Aufenthalt kann *durch die Aufnahme einer Arbeit illegal* werden (z.B. bei Touristen).
- Wenn Ausländer eine Aufenthaltsgenehmigung oder Duldung besitzen, aber ohne Arbeitserlaubnis, also illegal beschäftigt sind, dann ist nur die *Erwerbstätigkeit illegal*, nicht aber der Aufenthalt.
- Umgekehrt ist auch möglich, daß *Menschen ohne Aufenthaltsrecht in regulären Beschäftigungen* arbeiten und Steuern und Sozialabgaben zahlen.

Illegale Situationen können also sehr unterschiedlich sein. Wie die drei Dimensionen von Einreise, Aufenthalt und Beschäftigung jeweils kombiniert sind, hängt von den jeweils spezifischen nationalen gesetzlichen und kulturellen Rahmenbedingungen ab, die zu spezifischen Mustern illegaler Einreisen und Aufenthalte führen. Sowohl in Großbritannien wie auch in Deutschland konzentriert sich die Berichterstattung in den Medien auf illegale Einreisen, obwohl die weit überwiegende Mehrheit der Ausländer ohne Aufenthaltsstatus legal eingereist sein dürfte.

Für den folgenden Überblick ist anzumerken, daß hier keine quantitativen Aussagen über das Ausmaß und die Zusammensetzung illegaler Zuwanderung gemacht, sondern allein die Verlaufslogiken und typischen sozialen Lagen illegaler Zuwanderung skizziert werden können. Werden teilweise trotzdem vorsichtige quantitative Urteile gewagt, z.B. Aussagen über ›die Mehrheit der Ausländer ohne Status‹, so handelt es sich um die Einschätzung der Autoren als Experten auf der Basis eigener und fremder Studien.

Großbritannien

Zusammensetzung der illegalen Bevölkerung: Die Bevölkerung ohne Aufenthaltsstatus läßt sich nach ihren Herkunftsländern und der sozialen Lage grob in drei unterschiedliche Gruppen von illegalen Zuwanderern unterteilen.[53] Die erste Gruppe resultiert aus den sogenannten Arbeitsurlaubern (Working Holiday Makers). Diese besondere Aufenthaltserlaubnis können Bürger des ›Old Commonwealth‹ (Kanada, Australien, Neuseeland, Südafrika, Jamaika), seit 2002 sogar des gesamten Commonwealth, für zwei Jahre erhalten. Doch nicht alle reisen wieder aus. Insbesondere die Staatsangehörigen des ›Old Commonwealth‹ haben typischerweise eine ›weiße‹ Hautfarbe, einen höheren Schul- oder Universitätsabschluß und arbeiten als Angestellte in London.

53 Düvell/Jordan, Immigration Control and Economic Migration Management in the UK.

Sie sind unauffällig und als Gruppe noch nie in das Fadenkreuz der öffentlichen Aufmerksamkeit geraten.[54]

Die zweite Gruppe wird mit den ethnischen Minderheiten des ›New Commonwealth‹ (Indien, Pakistan, Nigeria, Barbados etc.), aber teilweise auch China in Verbindung gebracht. Sie sind vielleicht als Studenten oder als Familienangehörige gekommen, leben teils schon seit vielen Jahren im Land und wissen eventuell gar nicht, daß sie rechtlich betrachtet ebenfalls Visa-Übertreter sind. Sie sind quasi-legale Illegale. Viele sind keine Schwarzarbeiter. Anders als in den 1970er und 1980er Jahren wird über diese Gruppen in der Öffentlichkeit heute ebenfalls wenig diskutiert.

Es ist hauptsächlich die dritte Gruppe, die die größte Aufmerksamkeit erregt: die Neuankömmlinge aus Ländern, die entweder keine historischen Verbindungen mit Großbritannien haben und/oder mit Asylmigration oder mit Armutsflüchtlingen in Verbindung gebracht werden.

Zusammenfassend läßt sich sagen, daß wohl zu jeder ethnischen oder nationalen Minderheit auch illegale Mitglieder gehören. Es sind ›Weiße‹, ›Schwarze‹ oder ›Asiaten‹. Es wäre irreführend, bestimmte Nationalitäten hervorzuheben. Gleichwohl stammt die Mehrheit aus solchen Ländern, mit denen Großbritannien entweder eine lange Geschichte verbindet und/oder mit denen historische, kulturell oder wirtschaftlich begründete Migrationssysteme bestehen. Viele kommen und gehen mehrfach und beabsichtigen gar nicht erst, dauerhaft im Lande zu bleiben. Den Arbeitsmigranten unter ihnen ist eine vergleichsweise gute Ausbildung gemeinsam, ein hohes Maß an ›sozialem Kapital‹ und dementsprechendes Durchsetzungsvermögen. Diese Eigenschaften prädestinieren sie für eine deregulierte Gesellschaft und deren wettbewerbsorientierte, individualistische Kultur. Sie sind deshalb relativ gut in den Arbeitsmarkt und die sozialen Strukturen integriert.[55]

Die Datenlage zur Zahl der Zuwanderer ohne Status ist unzureichend. Offizielle Schätzungen des Innenministeriums gibt es nicht. In den Medien werden gelegentlich Zahlen genannt: Mal wurde die Zahl der illegalen Zuwanderung mit 10.000 jährlich (BBC 2, Panorama, 14.7.1997), die der abgelehnten und potentiell untergetauchten Asylsuchenden mal mit 44.000 (Daily Mail, 21.8.1997), mal mit 300.000 angegeben (Daily Mail, 26.9.2001), andere Quellen vermuten allein 40.000 illegale Australier in England.[56] Den Daten der Kontrollbehörde kann entnommen werden, daß im Jahr 2000 offiziell 38.300 Personen an den Grenzen zurückgewiesen wurden. Gegen 47.330 Per-

54 Joint Council for the Welfare of Immigrants (JCWI), Time for an Amnesty?, in: JCWI Bulletin, Sommer 1999, S. 1.

55 Düvell/Jordan, Immigration Control and the Management of Economic Migration.

56 JCWI, Time for an Amnesty?

sonen wurden Verfahren wegen illegaler Zuwanderung und Aufenthalt eröffnet, aber nur 7.600 Personen als ›illegale Zuwanderer‹ identifiziert.[57]

Soziale Situation und soziale Problemlagen: Zunächst wird die soziale Lage von irregulären Zuwanderern durch die allgemeinen Bedingungen deregulierter Arbeitsmärkte, eingeschränkter Sozial- und Gesundheitsdienste, Wohnungsknappheit, hohe Mieten und – insbesondere in London – hohe Lebenshaltungskosten bestimmt. Dies gilt aber nicht nur für Ausländer ohne Aufenthaltsstatus, sondern für die gesamte Bevölkerung und insbesondere für die einkommensschwachen Gruppen.

Die soziale Situation der Ausländer ohne Aufenthaltsstatus hängt unter anderem davon ab, welcher der oben beschriebenen Gruppen sie angehören. Zum größten Teil unterscheidet sich ihre Lage kaum von derjenigen der Durchschnittsbevölkerung. Das gilt insbesondere für die erste und zweite Kategorie. Sie leben quasi wie Legale, zahlen Steuern und Sozialabgaben und haben Zugang zu vielen sozialen Diensten und Leistungen. Gehören die Ausländer ohne Aufenthaltsstatus zur dritten Gruppe der ›Neuankömmlinge‹, finden sie in der Regel zunächst nur sehr schlecht bezahlte und unsichere Arbeit und leben unter schwierigen Wohnbedingungen. Doch auch für sie gibt es mit der Zeit Aufstiegsmöglichkeiten. Sie finden Zugang zum Arbeits- und Wohnungsmarkt und einigen öffentlichen Diensten, so daß sie ein relativ normales und unauffälliges Leben führen können. Selbst die Bildung von Wohneigentum kann dazugehören.

Auch Ausländer ohne Aufenthaltsstatus haben faktisch Zugang zum Gesundheitssystem, zum privaten Wohnungsmarkt, zum primären und sekundären Bildungssystem, zu nicht-finanziellen sozialen Diensten (Gemeindepflege, Nachbarschaftshilfe, Sozialarbeit) und verfügen über gewisse rechtliche Sicherheiten. Zu letzterem gehört u.a. Gerichtskostenbeihilfe (legal aid) und damit beispielsweise auch der Zugang zu Arbeitsgerichten. Gleichwohl läßt die Qualität beispielsweise des Gesundheitsdienstes zu wünschen übrig, und illegale Zuwanderer insbesondere aus osteuropäischen Ländern ziehen es schon allein deshalb oft vor, zu medizinisch notwendigen Behandlungen vorübergehend nach Hause zu reisen.

Die Verlierer in solch einer Umgebung deregulierter und stark segmentierter Gesellschaft sind zum einen Neuankömmlinge. Sie erhalten die schlechteste und am niedrigsten bezahlte Arbeit und leiden unter Ausbeutung und schlechten Arbeitsbedingungen. Die größten Probleme haben vor allem jene, die über keinerlei Kontakte oder Netzwerke verfügen, oder aber Mitglieder einer Community, die ohnehin bereits stark benachteiligt ist und deshalb illegalen Mitgliedern weder Arbeit in der Nischenökonomie beschaffen noch Unterstützung zukommen lassen kann. Es sind aber auch Menschen

57 Home Office, Control of Immigration. Statistics United Kingdom 2000, London 2001.

in besonderen Problemlagen, beispielsweise alleinerziehende Frauen, Alte oder Kranke. Daraus resultiert Arbeitslosigkeit, Wohnungsnot, (sexuelle) Gewalterfahrung, Krankheit und die damit einhergehende psychische Not.[58]

Deutschland

Zusammensetzung der illegalen Bevölkerung: Über die Zusammensetzung der illegalen Bevölkerung in Deutschland liegen keine gesicherten Erkenntnisse vor. Einige Hinweise finden sich in amtlichen Statistiken, die aufgrund unterschiedlicher Intensität und Schwerpunktsetzung jedoch keine gesicherte repräsentative Abbildung von Trend und Zusammensetzung illegaler Zuwanderung geben können. Die polizeiliche Kriminalstatistik (PKS) bietet Informationen über die Nationalität von Tatverdächtigen ohne Aufenthaltsstatus, die gegen das Ausländergesetz verstoßen haben. Danach ist die Zahl der Tatverdächtigen mit illegalem Aufenthalt seit 1984 von 28.337 Personen auf 122.583 im Jahr 2001 angestiegen.[59] Ein Teil von ihnen wird vom Bundesgrenzschutz im Grenzbereich aufgegriffen und unmittelbar zurückgeschoben. Der Tatvorwurf, der gegen illegale Ausländer am häufigsten verfolgt wurde, lautete mit 92 Prozent Verdacht des Verstoßes gegen Ausländergesetz und Asylbewerberleistungsgesetz.[60]

Auch wenn die PKS sicherlich keine Zufallsstichprobe aus der Bevölkerung ohne Aufenthaltsstatus darstellt, gibt sie doch einen Eindruck, welche Nationalitäten auf jeden Fall betroffen sind. Betrachtet man zusätzlich Studien zur Situation von Ausländern ohne Aufenthaltsstatus, so lassen sich in Anlehnung an die britische Gruppenbildung in Deutschland folgende Kategorien identifizieren:

Die erste Kategorie bildeten schon vor ihrem EU-Beitritt visumsfrei einreisende Angehörige der Nachbarländer Polen und Tschechien, zu denen vielfältige grenzüberschreitende soziale Verbindungen bestehen und die ein deutlich niedrigeres Kaufkraft- und Einkommensniveau aufweisen als Deutschland. Tschechen und Polen sind in der Regel unauffällig und können sich in den meisten Alltagssituationen als Touristen ausgeben, so daß sie vor allem während der Ausübung einer unerlaubten Arbeit als illegal identifiziert werden.[61] Nach Angaben des Bundeskriminalamtes wurden im Jahr

58 Franck Düvell, Social and Economic Aspects of Living Conditions of Undocumented Immigrants: United Kingdom, in: Book of Solidarity – Assisting Undocumented Migrants in Germany, the Netherlands, Belgium and the United Kingdom, hg.v. Platform for International Cooperation on Undocumented Migrants (PICUM), Brüssel 2002.

59 Bundeskriminalamt, Polizeiliche Kriminalstatistik 2001, Wiesbaden 2002, S. 118.

60 Ebd., S. 121.

61 Norbert Cyrus/Dita Vogel, Managing Access to the German Labour Market – How Polish (Im)Migrants Relate to German Opportunities and Restrictions (IAPASIS

2001 insgesamt 16.555 polnische und 2.647 tschechische Staatsangehörige verdächtigt, gegen Ausländer- und/oder Asylverfahrensgesetz verstoßen zu haben.[62] Da auch nach dem EU-Beitritt dieser Länder keine unmittelbare Freizügigkeit vereinbart ist, wird die Situation in ähnlicher Form bei verbesserten Rechten der Zuwanderer noch einige Jahre fortbestehen.

Die zweite Kategorie bilden Angehörige visumspflichtiger Staaten, zu denen aufgrund historischer Umstände mit der Bundesrepublik Deutschland Migrationsbeziehungen bestehen bzw. früher mit der DDR bestanden. Dazu zählen die Länder, mit denen es ›Gastarbeiter‹-Abkommen gab und die heute eine große ausländische Bevölkerungsgruppe in Deutschland stellen. Angehörige dieser Staaten sind in der Regel fest in ethnische Netzwerke eingebettet, die eine Einreise mit Visum und einen anschließenden illegalen Aufenthalt unterstützen. Nach Angaben des Bundeskriminalamtes wurden im Jahr 2001 insgesamt 16.057 türkische und 15.102 jugoslawische sowie 11.634 ukrainische, 5.921 russische und 6.412 rumänische Staatsangehörige verdächtigt, gegen Ausländer- und/oder Asylverfahrensgesetz verstoßen zu haben.[63]

Als dritte Kategorie bleiben schließlich Angehörige visumspflichtiger Staaten, die räumlich weit entfernt sind und Menschenrechtsverletzungen und/oder ein niedriges Einkommensniveau aufweisen. Vielen Zuwanderungsinteressierten aus diesen Ländern ist es nur auf dem Wege einer illegalen Einreise möglich, nach Deutschland zu kommen. Oft wird ein Asylantrag gestellt, wodurch die aufenthaltsrechtliche Illegalität zumindest bis zur Entscheidung vermieden wird. Bei einer ablehnenden Entscheidung können Menschen, die teilweise seit Jahren im Asylverfahren lebten, in die Illegalität untertauchen. Nach Angaben des Bundeskriminalamtes wurden im Jahr 2001 z.B. insgesamt 8.997 irakische, 5.334 indische und 5.282 afghanische Staatsangehörige verdächtigt, gegen Ausländer- und/oder Asylverfahrensgesetz verstoßen zu haben.[64]

Seriöse Schätzungen über die Gesamtzahl illegaler Migranten in Deutschland liegen nicht vor. Die Angaben schwanken zwischen einer halben und einer Million. Wegen der unterschiedlichen Muster illegaler Aufenthalte sind diese immer wieder genannten Vermutungen mit großen Unsicherheiten behaftet. Auch über die demographischen Merkmale der illegalen Bevölkerung in Deutschland liegen keine gesicherten Erkenntnisse vor. Die vorliegenden Forschungsarbeiten zeigen aber, daß Illegalität bei Männern

Deutschland, Working Paper 1/2002), Oldenburg, Mai 2002, www.iue.it/RSAC/Research/IAPASIS/index.shtml

62 Bundeskriminalamt, Polizeiliche Kriminalstatistik 2001, S. 115.

63 Ebd.

64 Ebd.

und Frauen und in allen Altersgruppen vorkommen kann, wobei sicherlich ein Schwerpunkt im Alter zwischen 20 und 40 liegt.[65]

Soziale Situation und soziale Problemlagen: Auch wenn Ausländer ohne Aufenthaltsstatus in der Regel auf Phasen der Legalität zurückblicken können, hatten sie doch meist nicht die Gelegenheit, während dieser Zeit regulär zu arbeiten. Selbst wenn sie eine Sozialversicherungsnummer erhalten haben, verhindert der Datenabgleich eine längerfristige reguläre Beschäftigung trotz fehlendem Aufenthaltsstatus, so daß illegaler Aufenthalt nur selten mit regulärer Beschäftigung einhergeht. Auch der Zugang zum Wohnungsmarkt ist in der Regel nur mit Unterstützung von regulären Einwohnern möglich. Es kann dennoch davon ausgegangen werden, daß die Mehrzahl der Menschen ohne Aufenthaltsrecht sich in der Illegalität eingerichtet hat und kleinere Probleme mit Hilfe von Verwandten, Freunden oder Unterstützern bewältigen kann. Solange keine größeren und ernsthaften Probleme auftreten, ist es möglich, daß illegale Zuwanderer ein annähernd normales Leben führen.

Da die Hilfekapazitäten dieser unterstützenden Netzwerke aber begrenzt sind, besteht ein hohes *Risiko*, in Notlagen zu geraten. In der aktuellen Diskussion wird vor allem auf Probleme in den Bereichen Gesundheit, Bildung und Rechtssicherheit hingewiesen.[66] Im Unterschied zu Großbritannien, wo der Zugang zur staatlichen sozialen Infrastruktur weitgehend möglich ist, vermeiden illegale Zuwanderer in Deutschland auch in Notlagen den Kontakt mit staatlichen Stellen aus Angst, daß ihre Daten an die Ausländerbehörde weitergegeben werden. Illegalität in Deutschland ist daher mit dem Risiko verbunden, daß Erkrankungen oder Verletzungen nicht oder zu spät behandelt werden, daß Kinder von Eltern ohne Aufenthaltsstatus nicht eingeschult werden, daß illegal beschäftigten Ausländern der vereinbarte Lohn von betrügerischen Arbeitgebern teilweise oder vollständig vorenthalten wird, ohne daß sie eine Möglichkeit sehen, sich rechtlich dagegen zu wehren; daß ihre Schutz- und Rechtlosigkeit z.B. von Frauenhändlern kriminell ausgenutzt wird. Dabei können Angehörige nahegelegener Staaten leichter mit diesen Risiken umgehen als Angehörige entfernterer Staaten. Polen entwikkeln z.B. Pendelmigrationsmuster, durch die sie ihre Familie sehen und auch ihren Kindern eine schulische Ausbildung in Polen ermöglichen, so wie sie auch die polnische Gesundheitsversorgung bei Besuchen weiter nutzen können.[67]

65 Alt, Illegal in Deutschland; Norbert Cyrus, Migrationssozialarbeit im rechtsfreien Raum. Ausgangssituation und Perspektiven der Arbeit mit Menschen ohne Aufenthaltsstatus, in: Widersprüche, 74. 1999, S. 157–168.

66 Alt, Illegal in Deutschland; Cyrus, Migrationssozialarbeit im rechtsfreien Raum; Klaus J. Bade (Hg.), Integration und Illegalität in Deutschland, Osnabrück 2001.

67 Cyrus/Vogel, Managing Access to the German Labour Market.

In Großbritannien gibt es weitaus mehr Märkte als in Deutschland, die auch für Ausländer ohne Aufenthaltsstatus in gleicher Weise zugänglich sind. Sie können dort wie Einheimische eine Wohnung mieten oder ein Haus kaufen. Auch reguläre Beschäftigungsverhältnisse sind möglich, vor allem für Ausländer ohne Status, die vorher ein Visum mit erlaubter Erwerbstätigkeit hatten. Daher gibt es in Großbritannien eine große Gruppe quasi-legaler Ausländer ohne Status, die ein normales Leben unabhängig von Netzwerken organisieren können, während ein annähernd normales Leben in Deutschland die Pflege umfangreicher sozialer Netze erfordert.[68] In beiden Ländern haben es Neuankömmlinge aus entfernteren Ländern am schwersten, vor allem, wenn sie eine Rückkehr aus persönlichen oder politischen Gründen fürchten. In Großbritannien kann sie ein Mangel an Information von der Inanspruchnahme grundlegender Dienste im Sozial- und Gesundheitsbereich abschrecken, während sich in Deutschland die soziale und gesundheitliche Versorgung durch die berechtigte Furcht vor Aufdeckung der Illegalität schlechter darstellt. Die Spaltung der Gesellschaft scheint in Großbritannien stärker entlang sozialer Linien als entlang aufenthaltsrechtlicher Linien zu verlaufen: Schlecht integrierte Ausländer ohne Aufenthaltsstatus teilen das Schicksal vieler regulärer Einwohner, die mit harten Bedingungen in einem deregulierten Arbeitsmarkt klarkommen müssen und auf durchweg elementare Sozial- und Gesundheitsdienstleistungen auf niedrigem Niveau angewiesen sind, während besser gestellte Ausländer ohne Status auch von den gleichen marktlichen und sozialpolitischen Chancen für Aufsteiger profitieren können, die die britische Gesellschaft bietet. In Deutschland dagegen ist ein Aufstieg für Ausländer ohne Status nicht möglich, und reguläre Einwohner sind auch in niedrig bezahlten Arbeitsverhältnissen, bei Arbeitslosigkeit und Krankheit durchweg besser abgesichert als britische Bürger in vergleichbarer Lage, so daß sich in Deutschland eine stärkere Kluft zwischen regulären Einwohnern und Ausländern ohne Status auftut.

Öffentlicher und zivilgesellschaftlicher Umgang mit Illegalität

Wie im vorherigen Abschnitt deutlich wurde, sind mit Illegalität in beiden Ländern Probleme verbunden, die aber teilweise unterschiedlich gelagert sind. Im letzten Abschnitt wird nun gefragt, wie dies in der Öffentlichkeit thematisiert wird und in welcher Form zivilgesellschaftliches Engagement den Problemen entgegenwirkt.

68 Jordan/Vogel/Estrella, Leben und Arbeiten ohne regulären Aufenthaltsstatus.

Großbritannien

Thematisierung von Illegalität: Der gesamte öffentliche Migrationsdiskurs ist stark polarisiert und wird von der Kontroverse um Asylpolitik dominiert. Illegale Zuwanderung wird überwiegend mit Asylmigration gleichgesetzt und periodisch und mit einer gewissen Hysterie in den Medien diskutiert, zumindest seit 2001.[69] Der Diskurs um ›Wirtschaftsflüchtlinge‹ und illegale Arbeit wird von diesem Kontext dominiert. Mitte der 1990er Jahre wurde illegaler Aufenthalt zudem mit Sozialleistungsbetrug assoziiert. Außerdem wird der Politik und den Organen der Einwanderungspolitik regelmäßig ein weitgehendes Versagen vorgeworfen, was schlußendlich auch vom Innenministerium eingeräumt werden mußte.[70] Aufgrund der Polarisierung und der Konzentration auf die Frage des Asyls ist Illegalität in den Organisationen der Zivilgesellschaft ein heißes Eisen. Die Forderung nach einer Amnestie oder einer Initiative zur Unterstützung der britischen ›sans papiers‹ war bisher die Ausnahme.[71] Doch seit 2001 wandelt sich die Sichtweise und damit auch der Ton. Verstärkt ist von Illegalen als Opfern (z.B. von Ausbeutung) die Rede, und nicht mehr nur von der Täterrolle. So hatte eine große britische Tageszeitung vorgeschlagen, und dies ist nicht der erste Vorschlag dieser Art[72], z.B. den Kollaps des Asylsystems durch eine Generalamnestie zu beheben und damit die Voraussetzungen für einen Neustart zu schaffen.[73]

2004 beschäftigte sich die Öffentlichkeit mit der Ausbeutung legaler und illegaler ukrainischer Arbeitnehmer sowie den gefährlichen Arbeitsbedingungen illegaler chinesischer Muschelsammler. Im Vordergrund stand jedoch weniger die Frage des Einwanderungsstatus als vielmehr die prekäre rechtliche Situation der Arbeitnehmer.[74]

Neben der humanitären Argumentation der Zivilgesellschaft gewinnen aber auch rationale ökonomische Argumente an Boden. Demnach wäre eine liberale Vergabe von Arbeitserlaubnissen ein wirkungsvolles Mittel zur Verhinderung von Illegalität.[75] So argumentiert beispielsweise ein Bericht des Industrie- und Handelsministeriums (DTI): »Under the current predominantly prohibitionist immigration regime, it appears the worst of all possible worlds is achieved. Not only are employers in certain sectors faced with la-

69 House of Lords, A Common Policy on Illegal Migration.

70 Home Office, Fairer, Firmer, Faster. A Modern Approach to Immigration and Asylum (White Paper, Cm 4018), London 1998.

71 Franck Düvell, Undocumented Immigrants in the UK. Researching a Taboo, Forschungsbericht, Exeter 1998.

72 Vgl. JCWI, Time for an Amnesty?

73 Independent, 16.9.2002.

74 Migrant Workers Tell of Fears and Suffering, in: The Guardian, 9.3.2004.

75 Home Office, Secure Borders.

bour blockages but also, because the continuing demand for low skill migrant labour can only be met by recourse to clandestine practices, the conditions are created for extreme forms of exploitation and social exclusion. […] Some form of liberalisation is needed to resolve the various tensions between economic, political and social needs.«[76] Mittlerweile hat auch der Gewerkschaftsbund TUC eine neue Linie eingenommen und hinterfragt weniger die Zuwanderung als solche, sondern konzentriert sich auf die rechtliche und soziale Lage der Migranten.[77]

Demnach sind die Regierungsorgane, das Innenministerium, das DTI oder das House of Lords mittlerweile auf eher nüchterne und rationale Betrachtungsweisen eingeschwenkt, gefolgt von der liberalen Presse.[78] Im großen und ganzen verharren aber die Organisationen der Zivilgesellschaft in einer Wagenburg ausschließlich humanitärer Argumente und haben die Chancen eines Diskurses, der die ökonomische Integration hervorhebt, bislang nicht aufgegriffen. Derweil hetzen die populistischen Medien, wie etwa der *Daily Mail* oder der *Express* auch weiterhin gegen Migranten und illegale Zuwanderer, häufig unter der Überschrift des Asylmißbrauchs.

Zivilgesellschaftliche Akteure: Spezielle Initiativen, Beratungsstellen, Hilfsangebote oder Kampagnen für Illegale gibt es nicht. Derartige Angebote sind vielmehr ein stiller Teil der alltäglichen Arbeit zahlloser Selbstorganisationen, ausländischen Kulturzentren, Beratungsstellen oder humanitären Einrichtungen. Kirchenasyl kommt nur in Einzelfällen vor, andererseits bieten etliche Kirchen vor allem im Winter Unterkunft, Verpflegung, Wohnungseinrichtung und Bekleidung für Hilfsbedürftige an.[79]

Da im Grunde alle Menschen Zugang zum Gesundheitssystem sowie zu schulischer Bildung haben, ist es sowohl die Rolle von städtischen Angestellten (Sozialarbeitern, Lehrern, etc.) als auch von Mitarbeitern von NGOs, diesen Zugang im Bedarfsfall durchzusetzen. Besonders hervorgehoben werden muß, daß die vom Staat oder Gemeinden finanzierten Systeme der ›Health Advocats‹ und der ›Refugee Support Teacher‹ sowie der ›Citizen Advice Bureaus‹ und ›Community Law Centres‹ ihre Dienste unentgeltlich und mit großem Engagement anbieten.

Polizeiliche Kontrollen und Razzien am Arbeitsplatz provozieren regelmäßig den Protest von örtlichen Initiativen, von der Handelskammer über

76 Department for Trade and Industry (DTI), Employers and Illegal Migrant Workers in the Clothing and Restaurant Sector, London 2002, S. 31.

77 Trade Union Congress, Gone West – The Harsh Reality of Ukrainians at Work in the UK, London, 8.3.2004.

78 Hierzu s. z.B. ›Green Card Revolution to Fight People Smuggler‹, in: Observer, 30.9.2001.

79 Düvell/Jordan, Immigration Control and Economic Migration Management in the UK.

Antidiskriminierungsbeauftragte und Beratungsstellen bis hin zu antirassistischen Gruppen. Diese Proteste bilden ein starkes Gegengewicht zur Implementierung von Gesetzen. Seit der Ära der ›schwarzen‹ Aufstände in den 1980er Jahren wird eine gewisse Diskretion und Zurückhaltung seitens der staatlichen Organe geübt. In bestimmten Stadtteilen mit einem hohen Anteil ethnischer Minderheiten sind einige Bestimmungen schlichtweg nicht durchsetzbar.[80]

Deutschland

Thematisierung der Illegalität: Nach dem Fall der Mauer hatte es große Befürchtungen vor einer unkontrollierten illegalen Massenzuwanderung aus Osteuropa gegeben. In den 1990er Jahren waren die staatlichen Bemühungen zur Bekämpfung illegaler Einreisen und Aufenthalte ein wichtiges Thema in der Öffentlichkeit. Zur Zeit hat die ›illegale Zuwanderung‹ in der politischen Auseinandersetzung aber keine herausragende Bedeutung, obwohl zwischenzeitlich einige wissenschaftliche Studien und auch politische Stellungnahmen zu diesem Problemkreis vorgelegt wurden.

Nach einer Thematisierung illegaler Zuwanderung Anfang der 1990er Jahre, die mit der Änderung des Asylrechts ihren Höhepunkt und Abschluß fand, ist das Thema Illegalität inzwischen weitgehend aus dem Blickfeld öffentlicher Wahrnehmung geraten. Vor allem Gruppen und Initiativen aus dem linken Spektrum vertreten seit der Asylrechtsänderung unter dem Motto ›Kein Mensch ist illegal‹ die Auffassung, daß es zu einer verstärkten Illegalisierung von Zuwanderung kommt, und forderten »offene Grenzen und ein Bleiberecht für alle«. Diese Position hatte jedoch keinen Einfluß auf die migrationspolitische Debatte. Altfallregelungen als mittelbare Legalisierungen werden gefordert, aber nicht im Kontext von Illegalität diskutiert.

In der Diskussion um das Zuwanderungsgesetz wurde das Thema Illegalität nur am Rande angesprochen.[81] Von der Unabhängigen Kommission ›Zuwanderung‹ wurden Regelungen angemahnt, um den Schulbesuch von Kindern illegaler Eltern zu ermöglichen und die humanitär motivierte Hilfe für Menschen ohne Aufenthaltsrechte ausdrücklich von einer Bestrafung auszunehmen.[82]

Von Wohlfahrtsverbänden, Kirchen und auch von Wissenschaftlern wurde und wird dagegen in eigenständigen, teilweise aber auch gemeinsamen Erklärungen und Initiativen wiederholt darauf aufmerksam gemacht, daß in Deutschland eine beträchtliche Anzahl von Menschen ohne Aufent-

80 Düvell, ›Schwarze‹ Revolten.

81 Zeitschrift für Ausländerrecht und Ausländerpolitik, 22. 2002, H. 5 und 6.

82 Bericht der Unabhängigen Kommission ›Zuwanderung‹, Berlin 2000.

haltsrechte leben und hier Verbesserungen und Erleichterungen nötig sind.[83] Nicht zuletzt auf diese Initiativen ist es zurückzuführen, daß z.B. der Ausschuß für Arbeit, Migration, Gesundheit und Soziales im Abgeordnetenhaus von Berlin eine öffentliche Expertenanhörung durchgeführt hat (2001). Ein informeller Kreis von Kirchenleuten, Sozialarbeitern und Wissenschaftlern hat beim Petitionsausschuß des Deutschen Bundestages eine Petition[84] eingereicht und um Verbesserungen in dem Bereich gebeten. Daneben deutet sich auch in Gewerkschaftskreisen ein vorsichtiger Kurswechsel an, insbesondere in den Arbeitskreisen zur Migration. So forderte z.B. die IG Metall: »auch die Situation der 1,5 Millionen Menschen mit befristeter Aufenthaltsgenehmigung sowie derjenigen *ohne* Aufenthalts- und Arbeitsgenehmigung müsse gelöst werden. […] Die IG Metall ist der Meinung, daß die Legalisierung der Einwanderer, die bisher ohne Aufenthalts- und Arbeitsgenehmigung sind, wie in der EU auch in Deutschland Teil des neuen Migrationkonzepts sein muß. Wichtig ist gleichzeitig die Bekämpfung der Schwarzarbeit und der Ausbeutung von Einwanderern. Nach Meinung der IG Metall bedarf die Legalisierung keiner außerordentlichen Verfahren oder Amnestie, sondern kann schrittweise unter bestimmten Bedingungen wie Arbeitsbeziehungen, familiären Bedingungen, erfolgreicher sozialer Integration, humanitären Gründen u.a. vollzogen werden.«[85] Gleichwohl scheuen sich die Funktionäre offenkundig, auch unter ihren Mitgliedern für solche Positionen zu werben.

Insgesamt kann man festhalten, daß das Thema Illegalität in Deutschland nach 1993 nur noch wenig öffentliche Aufmerksamkeit erweckt hat. Die Diskussion und das Interesse beschränken sich auf einen eher kleinen Kreis von gesellschaftlichen Akteuren. Die politisch einflußreichen Organisationen bemühen sich abseits des öffentlichen Interesses darum, in kleinen Schritten humanitäre Verbesserungen zu erreichen.

Zivilgesellschaftliche Akteure: In den letzten Jahren haben zivilgesellschaftliche Akteure aber auch begonnen, spezielle Angebote für Menschen ohne Aufenthaltsstatus zu konzipieren und durchzuführen, um die sozialen und humanitären Folgen staatlicher Abwehr- und Ausgrenzungspolitik abzumildern. Diese Ansätze konzentrieren sich darauf, die wahrgenommenen Defizite abzumildern, also auf den Bereich der Gesundheitsversorgung, Bildung,

83 Bade (Hg.), Integration und Illegalität in Deutschland; Leben in der Illegalität in Deutschland. Eine humanitäre und pastorale Herausforderung, hg.v.d. Deutschen Bischofskonferenz, Bonn 2001; Bundesarbeitsgemeinschaft der Freien Wohlfahrtspflege e.V., Zur rechtlichen Situation der Ausländer ohne legalen Aufenthaltsstatus in Deutschland. Erklärung der Verbände der Freien Wohlfahrtspflege, 19.4.1999, unveröff. Ms., Bonn.

84 Petition 2000, Petition Problemkomplex Illegalität. Konkrete Hilfen und Verbesserungen, unveröff. Ms.: www.joerg-alt.de

85 Ebd.

Vermeidung von Obdachlosigkeit und rechtlichem Schutz. Bei diesen wenigen und zumeist lokal begrenzten Initiativen handelt es sich um spezialisierte Angebote an Menschen ohne Aufenthaltsrechte:

- So haben Kirchengemeinden ein sogenanntes Kirchenasyl durchgeführt, um auf Verfahrensfehler im Rahmen eines Asylverfahrens hinzuweisen und eine Überprüfung der Entscheidung anzuregen.
- Einige linke Initiativen, aber auch kirchliche Organisationen haben Wohnungen angemietet, um illegalen Zuwanderern in Notsituationen Unterkunft und Verpflegung zu gewähren und ihnen die Möglichkeit zu bieten, in Ruhe den weiteren Lebensweg zu planen.
- In einigen Städten bestehen inzwischen medizinische Anlaufstellen, die illegale Migranten im Falle von Erkrankungen an Ärzte vermitteln, die eine kostenlose Behandlung durchführen (medizinische Flüchtlingshilfe, Malteser Hilfsdienst). Bei schweren Erkrankungen oder Verletzungen stoßen diese Angebote aber an ihre Grenzen.
- Der Luchtenberg-Fonds der katholischen Kirche sammelt Spenden, um auf Antrag Menschen ohne Aufenthaltsrechte in Not zu unterstützen.

Aber überwiegend wird Hilfe für Menschen ohne Aufenthaltsrechte stillschweigend und zusätzlich im Rahmen der niedrigschwelligen Migrationssozialarbeit geleistet. Mitarbeiterinnen und Mitarbeiter der Migrationsberatungsstellen leisten vielfach Hilfe im Verborgenen. Dabei können sie auf die ebenso stillschweigende Unterstützung anderer Institutionen zählen:

- Der Schul- und Kindergartenbesuch von Kindern ohne Aufenthaltsrechte wird dank der persönlichen Entscheidung der Mitarbeiter dieser Einrichtungen ermöglicht, die damit ein persönliches Risiko auf sich nehmen.
- Bei Erkrankungen und Unfällen sind Ärzte bereit, Menschen ohne Aufenthaltsstatus gegen Rechnung oder sogar kostenlos zu behandeln. Auch von einzelnen Krankenhäusern ist bekannt, daß sie illegale Migranten kostenlos behandeln.
- Von Arbeitsgerichten werden Klagen gegen Arbeitgeber auf Auszahlung vorenthaltenen Lohnes angenommen und verhandelt, ohne daß nach dem Aufenthaltsstatus gefragt wird – eine unter Ausländern ohne Aufenthaltsstatus weitgehend unbekannte Möglichkeit, die durch Artikel 3 des Entwurfs des neuen Schwarzarbeitsgesetzes zur Disposition gestellt wurde.[86]

86 Hierzu s. die Kritik bei Norbert Cyrus, Stellungnahme zur öffentlichen Anhörung zum Gesetzesentwurf der Fraktionen SPD und Bündnis 90/Die Grünen, ›Entwurf eines Gesetzes zur Intensivierung der Bekämpfung der Schwarzarbeit und damit zusammenhängender Steuerhinterziehung‹ – Drs. 15/2573 – im Bundestagsauschuß für Finanzen, Berlin, 24.3.2004, unveröff. Ms., S. 13f. Es bleibt abzuwarten, ob die Regelung eingeführt wird und damit tatsächlich alle Gerichte Erkenntnisse über illegale Ausländerbeschäftigung, wie im Entwurf vorgesehen, an die Hauptzollämter

Beide Länder sind durch einen wechselnden Umgang mit dem Thema Illegalität in der öffentlichen Debatte geprägt. Da Ausländer ohne Aufenthaltsstatus auch zu einzelnen Sozialleistungen Zugang haben, waren sie ähnlich wie Asylbewerber in Deutschland in der Öffentlichkeit auch mit dem Mißbrauchsvorwurf konfrontiert. Während in der deutschen Debatte um das Thema Forderungen nach einer elementaren Absicherung von Ausländern ohne Status und ausdrückliche Straffreiheit für humanitäre Unterstützer stehen, sind diese Absicherungen in Großbritannien weitgehend gegeben. In der Mediendebatte scheinen mehr als früher Forderungen nach einer Prävention von Illegalität sowie einer unmittelbaren Legalisierung aufzutauchen, während in Deutschland allenfalls Altfallregelungen für Geduldete gefordert werden, was jedoch nicht im Kontext von Illegalität diskutiert wird. In beiden Ländern gibt es zivilgesellschaftliches Engagement, um Ausländern ohne Aufenthaltsstatus in schwierigen Situationen zu helfen. Anknüpfend an die unterschiedliche soziale Lage geschieht dies in Großbritannien weitgehend unabhängig vom Status im Rahmen von Diensten, die sozial Schwache unterstützen, während in Deutschland zum einen lokal begrenzte spezialisierte Angebote für Menschen in der Illegalität bestehen und zum anderen die Unterstützung im Rahmen niedrigschwelliger Regeldienste typischerweise eine bewußte Auseinandersetzung mit der illegalen Situation beinhaltet.

Von der Abschottungsrhetorik zum pragmatischen Umgang mit illegaler Migration?

Während sich die Europäische Kommission auf eine Kombination aus Eindämmung der Asylmigration, Bekämpfung illegaler Migration und der Öffnung für Arbeitsmigration einigte, nicht zuletzt, um die illegale Wanderung in legale Bahnen zu lenken[87], verfolgen die einzelnen Mitgliedstaaten, wie beispielsweise Großbritannien und Deutschland, unterschiedliche Wege. Der Vergleich verdeutlicht, daß die Definition und Bewertung von Illegalität aufgrund historischer, kultureller und sozialer Besonderheiten recht unterschiedlich ausfällt. Das unterschiedliche Verständnis der Legitimität staatlicher Kontrollen, aber auch die Reichweite und das Niveau sozialer Absicherung führen zu deutlichen Unterschieden im Umgang mit Illegalität und mit den sozialen Lagen illegal Zugewanderter.

Grundsätzlich läßt sich für Deutschland feststellen, daß Ausländer ohne Aufenthaltsstatus von ihrer sozialen Situation und rechtlichen Absiche-

werden weitergeben müssen, die dann als ›öffentliche Stellen‹ die Ausländerbehörden zu informieren haben.

87 Europäische Kommission, Mitteilung der Kommission an den Rat und das Europäische Parlament über eine Migrationspolitik der Gemeinschaft, KOM (2000) 757 endg.).

rung her immer zu den Schwächsten in der Gesellschaft gehören, während es die stärker marktorientierte und weniger bürokratisch integrierte Gesellschaft in Großbritannien ermöglicht, daß Ausländer auch in einer gehobenen Position illegal bleiben oder daß Ausländer ohne Status einen Aufstieg aus der Position der anfänglichen sozialen Schwäche schaffen. Sozial schwache reguläre Einwohner sind deutlich schlechter abgesichert als in Deutschland, aber ihre elementaren Rechte können auch Ausländer ohne Status wahrnehmen.

In Deutschland ist es zur Zeit noch offen, ob ein Zuwanderungsgesetz verabschiedet wird und ob dadurch mehr Alternativen oder mehr Anreize zur Illegalität geschaffen werden. Die alte, zuwanderungsfeindliche Rhetorik ist noch nicht überwunden. In der Praxis gibt es in Deutschland ein keinesfalls lückenloses, aber im internationalen Vergleich dichtes Netz von Kontrollregelungen und Behörden. Die Möglichkeit legaler Beschäftigung von Illegalen wird dadurch nahezu unterbunden. Weil auch Deutsche für fast alles ihren Ausweis oder eine andere Karte wie z.B. die Krankenversicherungskarte vorlegen müssen, ist die Inanspruchnahme grundlegender Sozialleistungen in Deutschland deutlich schwieriger als in Großbritannien.

Aber auch in Deutschland läßt sich hinter der Fassade einer Abschottungsrhetorik ein gewisser pragmatischer Umgang mit unerwünschter Zuwanderung erkennen, etwa mit der Durchführung von Altfall- und Härtefallregelungen. Zivilgesellschaftliche Initiativen bemühen sich darum, daß humanitäre und soziale Standards unabhängig vom Aufenthaltsrecht gelten. Die aktuellen Positionsbestimmungen der Bundesministerien und Initiativen des Gesetzgebers in Deutschland zeigen allerdings, daß der politische Schwerpunkt weiterhin darauf liegt, illegale Einreisen zu verhindern und auf das Problem illegaler Aufenthalte allein mit der Androhung der Ausweisung und Abschiebung zu reagieren.

Großbritannien hat einen sowohl rhetorischen als auch politischen Kursschwenk vollzogen und kommt damit zu einem positiven Verständnis von Zuwanderung und dem Beitrag von Migranten zur gesellschaftlichen Entwicklung. Mit der liberalen Handhabung von Arbeitserlaubnissen werden auch Alternativen zum illegalen Aufenthalt eröffnet. So deuten die jüngsten Reformen der bestehenden Verordnungen auf eine Ausweitung von Rechten, die Verbreiterung von Migrationskanälen, die Ent-Illegalisierung von Migrationsstrategien hin sowie insbesondere auf einen Versuch, geographisch flexiblen Arbeitnehmern dementsprechend flexible Arbeitserlaubnisse und mühelose Antragsverfahren anzubieten. Mehr und mehr Migranten wird eine legale und deshalb menschenwürdige Perspektive ermöglicht. Zeitgleich entfaltet sich im angelsächsischen Sprachraum ein philosophisch-ethischer Diskurs, der die moralische Rechtfertigung von Ausgrenzung durch Einwanderungsrestriktionen und Ausländerpolitik grundsätzlich be-

zweifelt.[88] Er rekurriert auf die Theorie der Gerechtigkeit[89] sowie auf frühere Argumente für offene Grenzen[90], um an das Prinzip der Bewegungsfreiheit zu erinnern. Beide Prozesse sehen sich im Einklang mit der zunehmenden globalen ökonomischen und politischen Integration.

Der systematische Vergleich zwischen Deutschland und Großbritannien zeigt, daß weder strenge Grenzkontrollen noch intensive Inlandskontrollen Illegalität vollständig verhindern können, wenn eine Nachfrage nach illegaler Einreise und Aufenthalt besteht. Deutlich wird aber auch, daß das deutsche Kontrollregime nicht alternativlos ist: Innerhalb der von der Europäischen Union gesetzten rechtlichen Rahmenbedingungen gibt es Spielräume der rechtsstaatlichen Bearbeitung illegaler Zuwanderung, die auch zur Schaffung von Alternativen zu illegalem Aufenthalt und zur Sicherstellung grundlegender humanitärer Standards genutzt werden können.

88 Phillip Cole, Philosophies of Exclusion. Liberal Political Theory and Immigration, Edinburgh 2000; Nigel Harris, Thinking the Unthinkable. The Immigration Myth Exposed, London 2002; s. auch die Beiträge in ACME – An E-Journal for Critical Geography, 2. 2002, H. 2, www.acme-journal.org/contents.html

89 John Rawls, A Theory of Justice, Oxford 1971.

90 Joseph Carens, Aliens and Citizens – the Case for Open Borders, in: Review of Politics, 59. 1987, S. 251–273; Teresa Hayter, Open Borders. The Case Against Immigration Controls, London 2000.

Manon Pluymen

Exclusion from Social Benefits as an Instrument of Migration Policy in the Netherlands

Since the 1990s, under the influence of the globalisation of the trade in goods and services and an increasing international co-operation in Europe, many western European states have started to concentrate on the development of mechanisms of migration control providing an alternative to the classic instruments of external border control.[1] Here, in both the process of policy-making and in that of the implementation of migration policy, a shift towards three directions can be discerned: upward to intergovernmental forums (Schengen, the European Union), downwards to local authorities and local public services, and outwards to private actors, such as carriers and employers.[2]

In the Netherlands, the Linking Act which came into force in July 1998 is the result of this quest for alternative, internal mechanisms of migration control.[3] The Act establishes a link between the lawfulness of the stay in the Netherlands and the immigrants' access to all kinds of social benefits. In order to exclude illegal immigrants from obtaining access to social services and social provisions, the Aliens Act as well as 25 other Acts, concerning social security, housing, education and health care were amended. Implementation officers and professionals working in these areas are responsible for the enforcement of the Act. This makes the Linking Act an example of the ›shifting down‹ manoeuvre.

This article analyses the effects of the Linking Act. First, the question will be examined whether the Linking Act should be perceived as an example of symbolic legislation, that has a limited instrumental function in the

1 James F. Hollifield, Immigration and the Politics of Rights. The French Case in Comparative Respect, in: Michael Bommes/Andrew Geddes (eds.), Immigration and Welfare. Challenging the Borders of the Welfare State, London/New York 2000, pp. 109–133, here p. 111.

2 Virginie Guiraudon, De-Nationalizing Control. Analyzing State Responses to Constraints on Migration Control, in: idem/Christian Joppke (eds.), Controlling a New Migration World, London 2001, pp. 31–64.

3 Act of 26.3.1998, Staatsblad 1998, no. 203.

regulation of illegal migration, but that is nevertheless a very useful tool for politicians to demonstrate to the public that, at the national political level, the matter of illegal immigration is being given serious attention. In addition to this, the article will focus on the implementation of the Linking Act by professionals and implementation officers working in four domains: housing, medical care, the provision of social welfare and education. It will then be assessed to what extent the Linking Act and subsequent exclusionary measures have led to the emergence of informal social networks to provide assistance to illegal immigrants and other categories of immigrants who fall outside the scope of central governmental care. A further question is what the effects of these informal social networks are: Have they minimised the effects of the Linking Act, or do they comply to the national exclusionary rules? In the latter case, the Linkage Act could also be perceived as an example of the shift outwards: placing migration control in the hands of private actors.

This article is based on interviews with implementation officers and professionals and with representatives of support organisations in four medium-sized cities in the Netherlands. Further interviews have been conducted with aldermen and other representatives of these cities.

The Linking Act: More than Symbolic Legislation?

The Linking Act makes the entitlement or access of immigrants to secondary or higher education, housing, rent subsidy, facilities for handicapped persons, health care and all social security benefits – including national assistance – dependent on their residence status. Entitlement to these public services is restricted to foreigners with lawful residence. Only publicly funded legal assistance, imperative medical care and education for children up to the age of 18 years remain accessible to all immigrants (including undocumented ones).

In the parliamentary history of the Linking Act the government stated that the Linking Act is aimed at two achievements. The first is to prevent and to combat illegal immigration and illegal stay. The second is to prevent illegal immigrants from being able to obtain an ›appearance of legality‹ as this would interfere with the possibilities of expulsion of the illegal immigrant.[4] The Act is called the centre-piece of the principle of an ›integrated immigration policy‹. According to the government this principle consists of two elements: a) any person who wants to live in the country should obtain the permission to do so and, b) if this permission is denied and admission is not being granted, the person should leave the country. In the government's line of argument, the principle of this integrated migration policy objects to the

4 Kamerstukken II, 1995/96, 24 233, no. 3, p. 2.

provision of social services and welfare benefits to immigrants who are denied access to the state as this could thwart an effective immigration policy. The government thus attributes an instrumental function to the Act: the limitations to the access to public services should push back illegal migration. However, the symbolic dimension of the Act seemed to outweigh its instrumental function right from the start. At the time the Act was introduced in parliament in 1995, almost all opposition parties and even one of the coalition parties disputed the value and the necessity of the Act.[5] For one reason, various studies had shown that even before the introduction of the Linking Act, just a very small number of welfare provisions were granted unjustly to illegal residents.[6] If illegal immigrants did not use social services, how could a further denial from access to these services effectively prevent these illegal migrants to continue their stay?

This argument takes just one aspect of the Linking Act into account. The Act did not only connect the immigration status to the access of social services, it also denied access to a large group of migrants, who before the introduction of the Linking Act and its definition on the lawfulness of the stay, would still be considered legally present and thus entitled to access to services and benefits. The Linking Act stretched the definition of illegality by abandoning the set phrase of ›illegal stay‹ and by introducing that of ›unlawful stay‹. Unlawful stay, however, also encompassed so-called ›tolerated immigrants‹; immigrants who could not leave the country for technical reasons (e.g. without a laissez passer) or policy reasons (e.g. health issues).

Two recent developments in migration policy, the renewed Return Policy introduced in 2000 and the New Aliens Act of 2001, expand the exclusion to yet other groups of immigrants and to yet other provisions. This time, the central authorities concentrate on the use of withholding reception provisions as a tool of migration control, to invoke the ›voluntary‹ return of asylum seekers.[7] In many cases and for a variety of reasons, rejected asylum seekers do not leave the Netherlands.[8] Until recently these aliens kept the

5 Kamerstukken II, 1995/96, 24 233, no. 4, pp. 4–7.

6 Kamerstukken II, 1988/89, 21 248, no. 2. Heroverwegingsrapport de positie van niet-Nederlanders in Nederlandse stelsels van sociale en culturele voorzieningen, The Hague 1988. Instelling interdepartementale werkgroep, Staatscourant 20.6.1988, no. 1116, p. 1; Rapport Monique Aalberts/Nicolette Dijkhoff, Een andere kijk op de illegalenpopulatie in Nederland, in: Justitiële Verkenningen, 16. 1990, no. 5, pp. 75–95.

7 This development also occurs in other European countries. See: Roland Bank, Europeanising the Reception of Asylum Seekers: the Opposite of Welfare State Politics, in: Bommes/Geddes (eds.), Immigration and Welfare, pp. 148–170.

8 When the Immigration and Naturalisation Service (INS) books immigrants as having left, this can mean that they left under supervision or with a return regulation, that they have been expelled or, in most cases, when the person had left his last known

right to reception provisions as long as they co-operated in the assessment of their identity and nationality, so that the necessary travel documents could be obtained. In the year 2000, however, the government introduced a new and stricter Return Policy.[9] This new policy starts from the assumption that asylum seekers take steps to prepare their return even before a decision on their asylum request has been made. After an irrevocable rejection of the request for admission, the rejected foreigner still has a period of 28 days to return voluntarily. If he has not left after that period, all reception provisions come to an end. As a result of this stricter Return Policy, more asylum seekers than before have recently appealed for accommodation to various municipalities and support organisations after a term of leave of 28 days.

In addition there is an increasing group of asylum seekers which is staying lawfully in the Netherlands, but which is nevertheless not eligible for reception. At the time the interviews for this research were conducted, this was the case for foreigners who had submitted a repeat request for asylum and who were allowed to await the decision on that request in the Netherlands as well as for so-called Dublin claimants. This term refers to asylum seekers with regard to whom the Minister of Justice has submitted or will submit a request for transfer to another state, party to the Dublin Convention[10], as the asylum request has to be submitted in that other country. In November 2002, however, the government clarified the situation of Dublin claimants and opened up the access to central reception facilities for this group again.[11]

These new measures reinforce the regulations – or rather the aim – of the Linking Act in retrospect. The recent measures aim to exclude a broader group of migrants from a wider range of services and reception facilities. As Düvell and Jordan point out, the more restrictive approach on migration has let a wider group of immigrants stranded, either without proper status, or without means of support. As a result, more and more migrants find themselves in the position of irregular migrants, with limited possibilities to access services and shelter.[12]

In the end, the Linking Act seems to be much more than just an example of symbolic legislation. Before the Linking Act was introduced, the exclusion of migrants from access to benefits and services was regulated in a

address, that they have been booked out. See: Kamerstukken II, 2000/01, 19 637, no. 559, pp. 9, 14.

9 Kamerstukken II, 1998/99, 26 646, no. 1.

10 Tractatenblad 1991, 129.

11 Tussentijds Bericht Vreemdelingencirculaire 2002/48, Staatscourant 19.11.2002, no. 223, p. 13.

12 Bill Jordan/Franck Düvell, Irregular Migration. The Dilemmas of Transnational Mobility, Cheltenham 2002, p. 154.

fragmented way. In itself, the link between the residence status and the access to social services established by the Act was nothing new. The National Assistance Act, for example, had always applied this connection. The Linking Act, however, introduced legal residency as the definite criterion for the entitlement to the social security system as a whole. The most important relevance of the Act lies in its spirit. The Act reflects an acceptance of a differential treatment of certain inhabitants in the light of migration purposes. The more recent developments in the exclusion of immigrants elaborate on this acceptance and demonstrate the growing importance attributed to this link as an instrument of migration control.

Implementation of the Linking Act

Various studies have assessed the implementation of the Linking Act in the field of housing, education, health care and social benefits.[13] These studies confirm the idea that illegal immigrants hardly claim social benefits.[14] The same holds true in the area of public housing services. However, since the introduction of the Linking Act the very few claims that still are being made seem to be effectively denied to undocumented migrants, particularly in the fields of social benefits and public housing services. It seems that bureaucrats working in a more organisational structure, like in the area of housing and social benefits, incorporate the Act in their working procedures. This is different for professionals in the field of public health and education. Doctors and teachers tend to let their professional ethics prevail over the regulations of the Linking Act. Doctors, for example, do not put the criterion of imperative medical care into practice. A general practitioner describes the dilemma as follows:

> *»Like, for instance, if someone complains about abdominal pain. I can only tell if this is a case of imperative medical care, after I have examined that person, can't I? Only then I know that it is acute appendicitis, that needs surgery immediately, or that it's just bellyache caused by tension.«*

Nevertheless, for reasons that will be discussed later, the numbers of doctors and teachers who actually offer their services to illegal immigrants are small.

13 Two evaluation studies were carried out by order of the Ministry of Justice. The first one was published in 1999, one year after the Act went into force. The second study was published in 2001. Three more studies on the implementation of the Act in the domain of health care were carried out in 2000–2001. Apart form these studies, a dissertation partly concerning the implications of the Linking Act appeared in 2001: Joanne van der Leun, Looking for Loopholes. Processes for Incorporation of Illegal Migrants in the Netherlands, Rotterdam 2001.

14 Ibid., p. 131.

Bureaucrats working in the area of social services and housing, where implementation officers traditionally are already more accustomed to exclude clients in the course of their daily working procedures, tend to take on a stricter approach to the rules of the Linking Act than professionals like teachers and doctors working in a more individual rights-orientated structure. However, as the next fragment shows, this does not mean that implementation officers do not encounter any problems when excluding clients:

»This whole idea of denying entitlement to welfare benefits, that is not just an issue for aliens, but also for other groups of clients, and it always involves a struggle. It has revolutionised people. It was not the Linking Act that caused this; it was more of a general thing. Earlier on one would just provide the client with an allowance. It would just not happen that that allowance would be discontinued. Well, yes, if one could prove that someone received this really big salary from other sources, but otherwise, no.« (senior legal advisor, Social Welfare Department)

Informal Mechanisms of Inclusion in Response to the National Exclusionary Regulations

In practice, the exclusion imposed by the Linking Act and the new measures of migration control are complemented by informal structures of inclusion. A network of organisations has emerged that provides help to immigrants who fall outside the scope of any form of governmental involvement. Both, local authorities and private organisations for (undocumented) migrants form part of these alternative forms of support.

Private Support Organisations

Support organisations offer a broad variety of activities to support undocumented migrants. Support can consist of social, legal, financial and practical help. Most organisations offer social support with the objective to help undocumented migrants deal with the tensions and insecurities deriving from their unlawful residence. At times, organisations try to work with the migrant on the development of a realistic perception of the future that might involve making the option of return a subject of discussion. With regard to juridical help, some organisations either have the expertise to offer juridical help with procedures themselves or they have connections with lawyers to consult. With practical forms of help, organisations try and facilitate life in illegality, for example by organising cultural activities to provide migrants with a daily schedule. Sometimes, practical help consists of financial help, either to provide the immigrants with clothes or food, or to put the immigrant up for a night or two.

Shortly after the introduction of the Act, it became clear that support organisations also act as intermediaries. In this role of intermediary a direct and an indirect aspect can be discerned. On the one hand, implementation officers and professionals working in the four domains as described are aware of the work done by the support organisations and often, when the decision not to provide assistance seems particularly harsh, the illegal migrant is sent on to these organisations. Thus, the migrant comes into contact with the support organisation without direct interference of the organisation itself. On the other hand, especially in the domain of care and education, many organisations refer illegal immigrants to doctors and schools of which they know that these will render their services. Here, support organisations directly act as intermediaries and make use of their own network. Professionals in the domain of health care and education who fall outside the scope of the organisation's network are often not being asked to render their services. These practices offer an explanation for the fact that health care and education is offered by a small number of professionals working in these domains. Also, most illegal immigrants do not easily appeal to schools, general practitioners or hospitals themselves. Many opponents of the Linking Act pointed out that as all sorts of data containing information on the residence status of the immigrant are being exchanged, illegal immigrants would fear to claim benefits that they are still entitled to. Fear of the information on the residence status being passed on to the Aliens Service, sometimes in fact does produce this effect.

These practices of sending illegal immigrants on to support organisations, who in turn appoint their protégés to several institutions, have created an alternative network of assistance to undocumented migrants.

In most municipalities several support organisations operate next to each other, but since their goals and activities and the group they concentrate on are characterised by a great variety, even among these organisations a conflict of interest can arise. Support organisations sometimes also attribute a political goal to their activities, but their support mostly derives from humanitarian or religious considerations. However, these organisations also apply certain criteria in the decision to provide support. These criteria are often determined by the organisation's historical and ethical background.[15] Some organisations, for example, only offer support to women, or to women with children. Others, mainly the religious initiatives, try and take in every immigrant asking for their assistance.

15 Paulien Mulder, Met het oog op onzichtbaren, in: Markant, 3. 1998. For full text see: www.actioma.nl/project/mensen

Local Authorities

In several cities, local authorities have taken additional measures to limit the effects of the Linking Act on the group of illegal immigrants considered most vulnerable. Especially shortly after the Act went into force, local funds and networks were set up to provide alternative means of support.

Local authorities and support organisations often co-operated in the preparation and enforcement of these ›bypasses‹. For example, in one city it was decided that the local authorities would subsidise one support organisation so that a certain group of undocumented migrants could continue to receive benefits after their claim to social benefits had expired due to the Linking Act. Here, it was felt that the central government had unjustly excluded a specific category of migrants, so the local authorities provided for a transitional arrangement:

> *»These were mainly migrants whose first appeal for asylum had been rejected but for whom the judge had declared that they could await the decision on their appeal in the Netherlands. Before the introduction of the Linking Act, on that basis entitlement to social welfare would arise, that was laid down in the law, that was simply possible. But now, these migrants are all being excluded. So I was not talking about illegals […] no, these were just people who according to the provisions of the Social Security Act were just entitled to receive social welfare.« (implementation officer, Social Welfare Department)*

In other cases, however, the distribution of alternative provisions led to a direct clash between the interests of the local authorities and that of the support organisations involved. In one city where a fund was set up, the local government delegated the administration of the bypass to a social welfare worker, so that four support organisations operating in that city could only indirectly access the financial resources of the fund. This construction enabled the local authorities to supervise and control the activities undertaken by the four organisations, as only the expenses that fell within the scope of the fund's criteria would be covered. Payments would only be made during a short period of time and only to cover expenses made to relieve a life-threatening situation.

Local authorities to some extent want to comply with the Linking Act and do not wish to financially support illegal immigrants for an indefinite period of time. For municipalities, the decision to provide alternative support to migrants is mainly based on two arguments.[16] The first is of an instrumental nature. The threat that homeless illegal immigrants pose to national

16 Cf. Joanne van der Leun/Katja Rusinovic, Illegaliteit en solidariteit. Nieuwe vangnetten in de samenleving, in: Transnationaal Nederland, drieëntwintigste jaarboek socialisme en democratie, Amsterdam 2002, pp. 182–205, here p. 191.

health, public order and safety is often used as an argument for the decision to offer some kind of social benefits. Also, by publicly lending aid ›under protest‹, municipalities try and persuade the government to reverse or change certain aspects of its migration policy. Here, a political goal is being pursued.

»So, yes, on a local level one has to take responsibility. And I do not have any objections against the law, but I do have objections against this kind of enforcement of that law as it amounts to problems. Also, just to show that these problems exist.« (alderman)

Especially under the influence of the above-mentioned changes in migration policy, local authorities tend to resort to this strategy.

Exclusion by Support Organisations and Municipalities

The recent Return Policy and the new Aliens Act have caused many organisations to revise and strengthen the criteria they applied in their assistance of migrants. Whereas shortly after the introduction of the Linking Act illegal immigrants could often count on the assistance of support organisations, especially when it came to temporary lodging, now most of these organisations had to shift their focus on migrants who still, to some extent, have the prospect of obtaining a residence status.

»So there is an absolute rise in the amount of requests and a decline in the possibilities to create an outflow. Which means that we are going to have to put more and more people on the streets. It is just… yes, we are dependent on the policies of this government and with that, we become the derivative thereof. If we think these people do no longer stand a procedural chance, then we won't go and offer them our reception facilities until their old age. So there is always the criterion of how many chances does this person have.« (support organisation with a religious background)

Local authorities have raised a great amount of protest against these recent developments in Dutch migration policy. Since the introduction of the Linking Act, the National Assistance Act no longer provides ground for municipalities to supply immigrants who fall outside the scope of governmental care with social benefits. Under the influence of the new developments in migration policy and in addition to the bypasses set up in reaction to the Linking Act, more local initiatives have emerged with various constructions to offer some relief in particular situations. This relief can consist, among other things, of the establishment of a relief fund, of placing empty buildings at the disposal of people in need, and of establishing a support and information centre.[17]

17 NRC Handelsblad, 22.2.2001; Algemeen Dagblad, 23.10.2000.

In many cities, the local administration delegates the task to realise these alternative forms of reception to support organisations. The local authorities are often only financially involved in these projects. For example, after being confronted with a growing number of churches asking for guidance in their attempts to offer reception in their parishes, one municipality financed a support organisation operating on a national level and has set up a model for providing care. About forty different municipalities have used the criteria of this model for the foundation of their reception facilities.[18] In this model, reception only stands open to immigrants who are legally resident: asylum seekers who have submitted a repeated request for asylum, immigrants who have submitted a request to be granted a residence permit on regular grounds and Dublin claimants. Illegal immigrants will be granted reception only if they are willing to co-operate in the return procedure, or if their medical or mental condition poses a threat to society. In doing so, they act more or less in accordance with the criteria of the national authorities.

As a result of all these local initiatives, an alternative network of centres for the homeless, churches, societal organisations and private persons has emerged, which organises the reception of these migrants.[19] However, especially under the influence of the new and stricter measures, most municipalities and support organisations have started to adhere to internal rules that very much echo the national exclusionary regulations. Both at the central and at the local level there is a growing tendency to provide assistance and shelter only to immigrants who still have a chance to obtain a residence status or to those willing to take measures and return to their country of origin. Albeit involuntarily, in this way support organisations and local initiatives start acting as gatekeepers, too. Where street level bureaucrats keep safe the formal network of the provision of governmental assistance and shelter, local authorities and support organisations additionally act as gatekeepers to the alternative network of assistance. For large groups of immigrants and especially for immigrants without access to networks of friends or compatriots these developments make it very difficult to receive assistance other than that offered within the scope of education and health care. In these two areas the involvement of support organisations remains unaltered and active for all groups of irregular migrants.

Between Disobedience and Compliance

As demonstrated, the Linking Act, as well as the other exclusionary regulations, provide an example of shifting migration control both downwards to those enforcing the Act and out to churches and other support organisations.

18 Trouw, 27.9.2001, 14.1.2002.

19 Algemeen Dagblad, 23.10.2000.

Two dilemmas characterise the discussion on the provision of alternative assistance to migrants. First of all, granting any form of reception at a municipal level causes tension in the administrative relations between central and local authorities. Municipalities take the position that they are lawfully competent to offer reception to rejected aliens, as they have the autonomy to run their own financial household.[20] Apart from that, they legitimise their actions by arguing that the central government does not take up its responsibility of granting reception to lawfully resident migrants, but that the state nevertheless does not manage to expel these migrants effectively. The local authorities feel burdened with the shortcomings of national migration policy, which is mostly a policy of deterrence.[21] As stated before, for local authorities the motive to provide assistance often has a political character: by publicly challenging the consequences of migration policy, the municipalities try and have the government repair the consequences municipalities see themselves confronted with.

Not only do municipalities have to decide whether to show civic disobedience to the national law or to adhere to the rules and accept its consequences, also both municipalities and support organisations have to balance their actions against the costs involved. As has become clear, none of the actors wants to take the financial responsibility for immigrants without any prospect of being able to support themselves at some point. According to the central authorities, the severity of the various Dutch municipal administrators can make or break the severity of the Dutch Return Policy.[22] On the other hand, the local actors acknowledge their dependence on the national regulations. Although the local actions evoke a picture of protest, on closer consideration they show much resemblance and a partial compliance to the national rules.

20 See Article 124, section 1 Dutch Constitution and Article 108 Dutch Municipality Act.

21 Cf. Michael Bommes, Die politische ›Verwaltung‹ von Migration in Gemeinden, in: Jochen Oltmer (Hg.), Migration steuern und verwalten. Deutschland vom späten 19. Jahrhundert bis zur Gegenwart (IMIS-Schriften, vol. 12), Göttingen 2003, pp. 459–480.

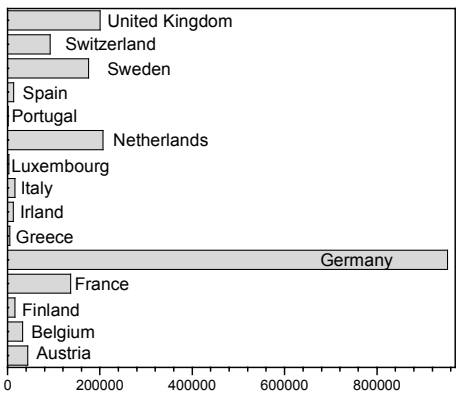
22 Wicher Pattje, Gemeentelijke dilemma's rond de koppelingswet. Een verkenning van de grenzen van de humaniteit, in: Heinrich B. Winter/Avelien Kamminga/Michiel Herweijer (eds.), Een grens gesteld. Een eerste evaluatie van het Nederlandse terugkeerbeleid, Deventer 1999, pp. 29–34.

Claudia Finotelli

A Comparative Analysis of the Italian and German Asylum Policies

The last report published by UNHCR[1] about refugees in Europe showed that the number of refugees in southern Europe is significantly lower than in northern Europe (see table 1). In order to explain such a difference it has been suggested that the asylum systems in southern Europe provide a lower degree of protection-efficiency than those in northern Europe.[2] According to this, northern European countries are more attractive since they provide more legal and social guarantees for asylum seekers. However, a further explanation of such a north-south divide seems to require taking into account the migration regimes in which refugee migration occurs.

Table 1: Refugees and Asylum Seekers 2002 in Europe



Source: UNHCR (ed.), Asylum Applications in Industrialised Countries, Geneva 2002.

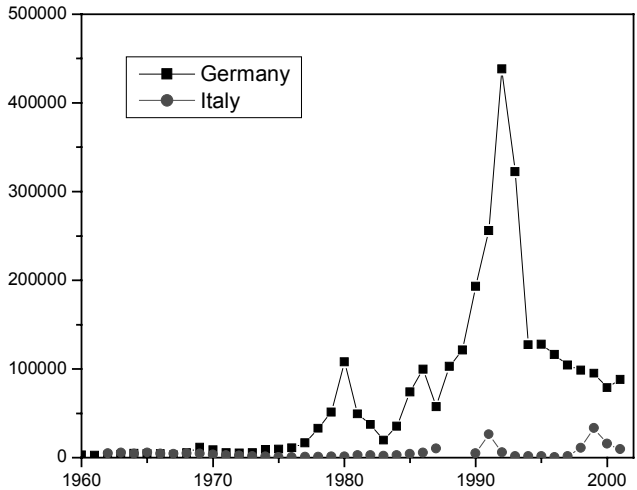
1 UNHCR (ed.), Asylum Applications in Industrialized Countries, Geneva 2002, download: www.unhcr.ch

2 Bernhard Santel, Migration in und nach Europa. Erfahrungen, Strukturen, Politik, Opladen 1995; Dietrich Thränhardt, Where and Why? Comparative Perspectives on Asylum in the OECD-World, in: Jeroen Doomernik/Hans Knippenberg (eds.), Immigration and Immigrants. Between Policy and Reality. A Volume in Honor of Hans van Amersfoort, Amsterdam 2003, pp. 18–41; Denise Efionayi-Mäder et al., Asyldestination Europa, Neuchâtel 2001.

This means that an uneven distribution of refugees should not only be analysed from the perspective of the differences in the asylum systems, but also by considering other inclusionary possibilities offered by the different immigration countries. Consequently, the number of refugees cannot be considered simply as the result of more or less fair and efficient asylum systems, but as a consequence of different immigration models as well.

Germany and Italy have been chosen as comparative terms to carry out this purpose. They have a similar historical, geographical and demographical background, although they show significant differences as far as refugee distribution is concerned (see table 2).

Table 2: Asylum Applications



Source: UNHCR 2002.

In Germany, where the number of refugees is extremely high, the asylum system has been declared as a »highly efficient machinery«.[3] In spite of this, the country's migration policy has been marked over the years by the political denial of being an immigration country and by considering refugees and asylum seekers a migrants' out-group.[4] Conversely, Italy has a low number

3 Thränhardt, Where and why?, p. 20.

4 Christian Joppke, Immigration and the Nation State, Oxford 1998; Dietrich Thränhardt, Inclusie of Exclusie. Discoursen over Migratie in Duitsland, in: Migrantenstudies, 18. 2002, pp. 225–240; idem, Germany: an Undeclared Immigration Country, in: idem (ed.), Europe: a New Immigration Continent, Münster 1996, pp. 198–224; Klaus J. Bade/Michael Bommes, Migration und politische Kultur im ›Nicht-Einwan-

of refugees and it has been strongly criticised for the weak protection provided to them. At the same time, Italy developed inclusion strategies such as regularisations to solve the problem of the increasing number of illegal migrants, showing in this way the acceptance of its new role as an immigration country. This inquiry analyses the asylum systems in the considered countries not only pointing out relevant differences and similarities of the German and Italian asylum policies, but also taking into account their relevance as admission policies. The background idea of this research purpose is that the analysis of admission policies is fundamental to understand the shape and the volume of migration flows.[5] Furthermore, a better definition of convergence and divergence elements of the asylum policy will contribute to evaluate difficulties of positive co-ordination in asylum procedure, especially if we consider the discretionary power embedded in the asylum directive about minimum standards for the reception of asylum seekers[6] as well as the slowness affecting the harmonisation process.[7]

Historical Background

Even if Germany and Italy share a common starting point, i.e. the substantive right of asylum appears in their Constitution, their asylum policies developed quite differently. The constitutional debate on the right of asylum in the two countries corresponded to the attempt to protect the rights of the politically persecuted as an act of »generosity« (in the German case)[8] or of »hospi-

derungsland‹, in: Klaus J. Bade/Rainer Münz (eds.), Migrationsreport 2000. Fakten – Analysen – Perspektiven, Frankfurt a.M./New York 2000, pp. 163–204; Roland Bank, Europeanising the Reception of Asylum Seekers. The Opposite of Welfare State Politics, in: Michael Bommes/Andrew Geddes (eds.), Immigration and Welfare. Challenging the Borders of the Welfare State, London 2000, pp. 148–169.

5 Douglas Massey et al., Worlds in Motion. Understanding International Migration at the End of the Millennium, Oxford 2002, p. 15.

6 Council Directive 2003/9/EC of 27 January 2003 laying down Minimum Standards for the Reception of Asylum Seekers.

7 See at this purpose the debates around the approval of the ›Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third-Country Nationals and Stateless Persons as Refugees or as Persons who otherwise need International Protection‹ (COM (2001) 510 final). As far as the outcome of the harmonisation process see also Ferruccio Pastore, Just Another European Dream? Why Did the Communitarisation of Immigration and Asylum Policies Almost Fail and How We Should Revive It. Paper presented at the International Seminar ›European Migration and Refugee Policy. New Developments‹, Rome, 15 November 2002.

8 Deputy Carlo Schmid, protocol quoted in: Simone Wolken, Das Grundrecht auf Asyl als Gegenstand der Innen- und Rechtspolitik in der Bundesrepublik Deutschland, Frankfurt a.M. 1988, p. 24.

tality« (in the Italian case).[9] In fact, the Constitution fathers in both countries had experienced exile at the time of dictatorship, but the recognition of the right to asylum as a substantive right in both countries did not have the same consequences. In Germany, the constitutional right to asylum was regulated in the Foreigner's Act in 1965, a decision that was the product of a strong »east-oriented« asylum policy.[10] In Italy, Article 10 paragraph 3 of the Constitution remained a »forgotten fundamental right«[11], while the Italian government and the UNHCR promoted the emigration of refugees to third countries according to the device »please come in, but don't stay«[12] so that 75,580 of 89,580 refugees and asylum seekers left Italy between 1952 and 1978.[13] However, the number of refugees in both countries remained very low until the 1970s. The situation changed sensibly in Germany after the recruitment stop of guest workers in 1973. Together with the restriction of the labour migration channel, the number of refugees and asylum seekers increased considerably, a fact which suggested the existence of an »asylum strategy of immigration«.[14] On the other hand, Italy continued with its »emigration strategy for refugees«, in better agreement with its emigration history, almost until it slowly began to convert itself in a new immigration country during the 1980s.

Asylum Law and Asylum Procedure

At the beginning of the 1990s, Italy as a new country of immigration had to face rising numbers of illegal immigrants seeking better economic conditions, while the number of asylum seekers and refugees remained very low. The Aliens Act 39/90 *(Legge Martelli)* was the first comprehensive Aliens Law in Italy because it also covered the question of refugees. Thus, the law contained only one article on this category of migrants. It lifted the geographical limita-

9 Deputy Tommaso Tonello, protocol quoted in: Assemblea Costituente. Atti dell'Assemblea Costituente, Discussioni dal 04.03.1947 al 15.04.1947, vol. III, Rome, Tipografia della Camera dei Deputati, 1947, p. 2719.

10 Ursula Münch, Asylpolitik in der Bundesrepublik Deutschland, Opladen 1992, p. 56.

11 Wolken, Das Grundrecht auf Asyl, p. 32. Actually, Simone Wolken referred this expression to the fundamental right of asylum in Germany converted in a law only in 1965.

12 Christopher Hein, Italy: Gateway to Europe but not the Gatekeeper?, in: Joanne van Selm (ed.), Kosovo's Refugees in the European Union, London 2000, pp. 139–161, here p. 141.

13 ACNUR (ed.), I Rifugiati in Italia. Legislazione, Regolamenti e Strumenti Internazionali in vigore in Italia, Rome, ACNUR, 1980, p. 13.

14 Michael S. Teitelbaum, Political Asylum in Theory and Practice, in: Public Interest, 76. 1984, pp. 74–89, here p. 81.

tion[15] and set a minimum of rules on admission of asylum seekers, recognition, appeal procedures and assistance mechanisms. Moreover, the Act instituted the Central Commission for the Recognition of Refugee *(Commissione Centrale per il Riconoscimento del Rifugiato)*, which had to take the decision about refugee recognition. Nonetheless, the Geneva Convention remained the only legal support for asylum requests, and the question of the enforcement of the constitutional right to asylum, which established one single status and one single procedure for both Convention and Constitutional refugees, remained unsolved. In the case of refugee flows from Somalia, former Yugoslavia and Kosovo the policy makers adopted a case-by-case strategy approving an *ad-hoc* legislation for each group of refugees.[16] The Aliens Act 40/98 *(Legge Turco-Napolitano)* approved during the centre-left government did not contain any reference to refugees and asylum seekers either. In the meantime, the parliament was discussing a separate Asylum Law. Unfortunately, the law project[17] could neither be passed by the Parliament nor by the Senate before the end of the legislature period in March 2001, so Italy is until now the only EU Member State which still has no comprehensive Asylum Law for asylum seekers and refugees. Consequently, the Italian asylum system is based on a low degree of law formalisation corresponding to a high degree of discretionary power as far as the procedure is concerned. This is especially true as far as the performance of the Foreigner Offices *(Questure)* is concerned, which are entitled to issue three-months residence permits for asylum seekers and also to convert humanitarian permits into residence permits for labour purposes.[18]

The German situation at the beginning of the 1990s was very different from the Italian one. Germany registered an increasing number of asylum seekers and refugees, which suggested the idea that the ›asylum crisis‹ of the 1990s was more a German than a European problem.[19] Therefore, the efforts of the German governments were concentrated on the restriction of the admission to asylum procedure, without considering the possibility of creating

15 Before 1990 only European refugees could apply for a Convention Status in Italy, while non-European refugees could only hope to get protection under a UNHCR mandate.

16 Decree of the Italian Ministry of Exterior of 9.09.1992 for Refugees from Somalia; Law no. 390/1992 for Refugees from Former Yugoslavia; Decree of the President of the Council of 12.05.1999 and of 30.12.1999 for Kosovo Refugees.

17 Law Project no. 5381: Norms on humanitarian protection and asylum right *(norme in materia di protezione umanitaria e diritto d'asilo).*

18 This information is based on interviews with Italian authorities and NGOs in November 2002.

19 Giuseppe Sciortino, L'ambizione della Frontiera. Le Politiche di Controllo Migratorio in Europa, Milan 2000.

de iure other immigration channels. Article 16 paragraph 2 of the Basic Law was changed after a long debate which ended with the so-called ›asylum compromise‹ *(Asylkompromiß)* between SPD and CDU in December 1992. The amended Article 16a paragraph 2 stated that asylum seekers who entered from a state guaranteeing protection in line with the Geneva Convention on its territory could not apply for asylum in Germany. The same restriction was foreseen for refugees coming from so-called ›non-persecuting states‹. A further consequence of the refugee flows on the German migration regime was the increasing formalisation of its asylum legislation. The recognition procedure is regulated by the Asylum Procedures Law *(Asylverfahrensgesetz)*. Other forms of refugee-status as the war-refugee status (*Aufenthaltsbefugnis* according to section 32 and section 32a AuslG) or *non-refoulement* rules (the so-called *Duldung*, a suspension of deportation, section 56 AuslG) are regulated by the Foreigner's Law *(Ausländergesetz*-AuslG*)*. The asylum request is considered by the Federal Office for the Recognition of Foreign Refugees *(Bundesamt für die Anerkennung ausländischer Flüchtlinge)*, which has a decentralised structure.

If the formalised structure of asylum legislation in Germany suggests that the room for authorities' discretionary power is narrower than in Italy, there are, however, situations in the German case in which discretionary decisions are possible. This is for example the case of the German Offices for Foreigners *(Ausländerbehörden)*, when they have to decide what kind of *Duldung* they can grant and for how long, or of Offices for Social Assistance *(Sozialämter)* when they decide whether to reduce social assistance or not in individual refugee cases.[20]

Social Benefits

A study of the Swiss Forum for Migration and Population Studies divides welfare assistance for refugees in Europe into three different types: welfare assistance with limited benefits, comprehensive state assistance, and systems with graduated support modalities.[21] According to the model, Italy belongs to the first group and Germany belongs to the second one. In fact, it seems to be this comprehensive welfare assistance, which constitutes a great part of attraction of the German asylum system, consisting of the full guarantee of food, clothing and housing for the duration of the stay. Nevertheless, the results of the Swiss study should be analysed also on the grounds of the Asylum Seekers' Benefits Act *(Asylbewerberleistungsgesetz)*. According to this

20 Hubert Heinold, Recht für Flüchtlinge, Karlsruhe 2000; as well as Georg Classen, Menschenwürde mit Rabatt, Karlsruhe 2000.

21 Denise Efionayi-Mäder, Sozialhilfe für Asylsuchende im europäischen Vergleich, Neuchâtel 1999, download: www.unine.ch/fsm/publicat/recherche/ pdf/14.pdf

law passed in 1993 and renewed in 1997 and 1998, the individual Social Offices can decide whether to provide benefits in kind or in cash. Moreover, in the case of war refugees with a ›tolerated‹ status *(Duldung)* social benefits are reduced to a minimum level if the Social Office considers that the refugee immigrated to receive social benefits or, in case of a planned expulsion or repatriation, seems not to collaborate with the institutions. Welfare provisions for asylum seekers and refugees are financed partly by the Federal States *(Länder)* and partly by local districts *(Kommunen)*, although the redistribution costs often constitute a critical point in their relationship.[22] As the access to work for tolerated refugees and asylum seekers is very difficult, they cannot always provide for their own income.[23] Therefore, asylum seekers and refugees often find themselves in a situation of complete dependency on the state, taking the consequences of an asylum policy which needs to satisfy a moral imperative, but at the same time does not want to favour the integration of refugees.[24]

In Italy, asylum seekers were generally not allowed to work, although they certainly had the possibility to find irregular work, as is the case of most of the illegal migrants living in the country. As far as welfare assistance is concerned, they could apply for a daily assistance grant of LIT. 34,000 (approximately 17 Euro) for the duration of 45 days. The minimum of social benefits guaranteed to refugees in Italy shows how the interest of the policy makers towards asylum seekers has been reduced and can partly explain the unattractiveness of the Italian asylum system.

In 2001, however, an agreement between the Italian Home Office, the UNHCR and the National Association of the Italian Town Councils *(Associazione Nazionale dei Comuni Italiani)* could start a National Asylum Programme *(Programma Nazionale Asilo)*, partly self-financed and partly financed by the European Refugee Funds.[25] The programme foresaw the distribution of asylum seekers on a network of cities with different population providing all-round assistance from food and clothing to Italian courses and prepara-

22 Michael Bommes, Migration – Nationalstaat – Wohlfahrtstaat. Kommunale Probleme in föderalen Systemen, in: Klaus J. Bade (ed.), Migration – Ethnizität – Konflikt: Systemfragen und Fallstudien (IMIS-Schriften, vol. 1), Osnabrück 1996, pp. 213–249; Christina Boswell, Spreading the Costs of Asylum Seekers, York 2001, download: www.agf.org.uk/pubs/pa2001/shtml

23 Asylum seekers and tolerated persons can get a work permit only if there are no Germans, EU-citizens or citizens from visa-free countries applying for the same position. Furthermore, they are not allowed to work during their first year of (legal) residence in Germany.

24 Bommes, Migration – Nationalstaat – Wohlfahrtstaat, pp. 213–249; as well as Thränhardt, Inclusie of Exclusie.

25 Decision of the Council of 28.09.2000.

tion for the hearing in the Central Commission. Asylum seekers would be accepted in the programme if they renounced to the 45-day-contribution and participated regularly in Italian courses offered by the reception centres.[26] Even if for financial reasons the programme could only be implemented for a restricted number of refugees[27], it represented an important change in the Italian attitude towards the asylum question, if taken into account that Italy, in contrast to Germany, never considered itself as an asylum country. Moreover, the obligatory Italian courses show an integration purpose, which is not present in the German case.

Subsidiary Protection and Regularisations

The institutes of subsidiary and the temporary protection represent two other innovative elements in the Italian case. In the period from 1992 to 2000, about 146,000 persons were granted supplementary forms of protection through an *ad hoc* legislation.[28] Refugees with these kinds of permits got the possibility of working and studying and, subsequently, of changing their status of refugee to that of a labour migrant. In this way, those who found work or at least a job offer were allowed to stay in Italy.[29] Even if these forms of protection were far from a juridical status with full guarantees[30], the Italian policy makers showed a high flexibility degree in regulating temporary and subsidiary protection with low interest in refugee's repatriation.[31] This is not the case in Germany, where temporary protection status is strictly related to a contingent need of protection with a consistent interest in sending refugees back to their countries. Approximately 180,000 of 345,000 Bosnian refugees

26 Data and information on the National Asylum Programme (PNA) refer principally to interviews carried out with the representatives of the Central Office of the PNA and four project managers in Florence and Venice in November 2002 and May 2003.

27 The programme received 3,023 refugees between 2001 and 2003.

28 Hein, Italy: Gateway to Europe but not the Gatekeeper?, p. 144.

29 On August 6, 1998 the President of the Council of Ministers issued a directive which allowed all the Foreigner Offices to convert humanitarian permits of former Yugoslavs, Somalis and Albanians arrived between March and June 1997 to Italy into 2-years labour permits. Kosovo refugees got the possibility to convert their temporary protected status into a residence permit after the end of the Kosovo crisis. Nonetheless, the conversion of the humanitarian permit is a discretionary decision of the Foreigner Offices, which in the last two years are more reluctant in taking such a decision.

30 Bruno Nascimbene, La Condizione Giuridica dello Straniero. Diritto Vigente, Padova 1997, p. 170.

31 Routes. Model for Comparing Factors in European Union Refugee Mobility, ed. Istituto di Ricerche Economiche e Sociali Friuli Venezia Giulia (IRES-FVG), Udine 2000, p. 34.

left the country at the end of the war in the context of repatriation programmes, 5,500 have been expulsed and 50,000 emigrated to the USA or Australia. As far as Kosovo refugees are concerned, 85,000 of 180,000 have been repatriated and 11,000 expulsed.[32] In 2001, there were 233,224 tolerated refugees in Germany, most of them, exactly 102,783 from the FR Yugoslavia.[33] They depend on the monthly or even daily renewal of their *Duldung* and get a minimum of social benefits. As tolerated persons represent three per cent of the foreign population in Germany, they constitute an important issue in the German asylum policy. The condition of tolerated refugees in Germany shows a clear tendency to keep most refugees with the status giving the lowest guarantees, an aspect which has already been observed in the case of labour migrants in Italy.[34]

Nevertheless, and even if regularisations are generally withdrawn as far as illegal migrants are concerned, there have been some attempts to regularise tolerated persons in Germany through so-called *Altfallregelungen*. According to the available data 62,000 refugees could regularise their position in 1996, 1999 and 2001.[35] Regularisations in Italy (1990, 1995, 1998 and 2002)[36], however, are based on the ›work-permit-channels‹, which might have also been used by *de facto* refugees and temporarily protected persons.[37] Data on migration in Italy show for instance that Albanians, Romanians and former Yugoslavs constitute some of the biggest migrants' communities in Italy.[38] The same nationalities can be found in the Italian regularisation statistics. On the other hand, former Yugoslavs and Romanians are a big group among German asylum seekers' statistics and among tolerated refugees. This comparison between Germany and Italy suggests that we are not only facing two asymmetric asylum systems, but also two alternative immigration models with different inclusion strategies. From this point of view, a weak asylum system would not necessarily mean a lower degree of acceptance.

32 Bericht der Beauftragten der Bundesregierung für Ausländerfragen über die Lage der Ausländer in der Bundesrepublik Deutschland, Berlin/Bonn 2002, p. 75, download: www.integrationsbeauftragte.de/download/lage5.pdf

33 Data of the German Home Office, 2001.

34 Giuseppe Sciortino, Einwanderung in einem mediterranen Wohlfahrtsstaat: die italienische Erfahrung, in: Uwe Hunger/Dietrich Thränhardt (eds.), Migration im Spannungsfeld von Nationalstaat und Globalisierung (Leviathan-Sonderh. 22), Wiesbaden 2003, pp. 253–273.

35 Bericht der Beauftragten der Bundesregierung für Ausländerfragen, pp. 69–75.

36 Massimo Carfagna, I sommersi e i sanati: le regolarizzazioni degli immigrati in Italia, in: Giuseppe Sciortino/Asher Colombo (eds.), Stranieri in Italia. Assimilati ed esclusi, Bologna 2002, pp. 53–91.

37 Hein, Italy: Gateway to Europe but not the Gatekeeper?, p. 141.

38 Caritas (ed.), Dossier Statistico 2002, Rome 2002.

The Future Perspective

The drafting of new Immigration Acts in the two countries seemed to bring some changes in their migration models. The German Immigration Act (*Zuwanderungsgesetz*; still in discussion) broke with the exclusion strategy of a non-immigration country opening to labour migration and abolishing the *Duldung* (without being clear about the future of tolerated persons). The Aliens Act 189/2002 *(Bossi-Fini)*, though very restrictive both with labour migrants and asylum seekers, institutionalised the National Asylum Programme, which meant the official recognition of being a reception country for asylum seekers. On the other hand, the law also introduces very restrictive measures towards refugees as a quick procedure at the border and the constitution of identification centres for refugees. The new law also foresees the creation of seven commissions on the Italian territory, while the commission in Rome will maintain consulting functions.

These measures, which tried to respond to a European imperative, exaggerate the asylum seekers' phenomenon and show a fundamental contradiction, if we consider that Italy still has one of the lowest rate of asylum seekers in the EU, while approximately 700,000 illegal migrants applied for regularisation in November 2002.

In any case, the delayed approval of the law implementation act of the Aliens Act 189/02 in Italy and the suspension of the *Zuwanderungsgesetz* in Germany still do not allow any conclusion about the future weight of asylum in their migration models.

Robert P. Barnidge and Kazimierz Bem

Politics and Protection in American Refugee Law

Legal scholars often assume that neutral legal language will ensure the impartial application of the law, while in a law that is biased legal language will not be impartially applied. While such assumptions may seem logical to the legal mind, to social scientists clear, express legal language does not predetermine a law's application. They are searching for other, external factors that influence a law's application. Using American refugee law as a historical test for these assumptions, in this article both perspectives will be combined. First, the focus will be on the language of American refugee law. Given legal scholars' assumptions, one must explore the extent to which history validates their assumptions and ask whether fundamental changes in legal language actually meant fundamental changes in practice. Second, the question will be addressed to what extent external, especially foreign policy interests, influenced the practice of American refugee law.

The development of American refugee law can be divided into three phases. American asylum policy immediately after the end of the Second World War was directed towards those who had been persecuted by the Nazis and displaced because of wartime events in Europe. There was no mention of communism during this first phase, and asylum applicants were excluded on very general and non-ideological grounds. This changed during the second phase with the beginning of the Cold War and the emergence of a bipolar world. Refugee definitions were extended to give protection to those fleeing communist countries, and special clauses protected groups fleeing particular countries under communist threat. Beginning around 1950, exclusion clauses explicitly prohibited the entry into the United States of communists and communist sympathisers. Acts were aimed at certain groups defined by geography, ideology, and, in some cases, certain grounds of persecution. These *ad hoc* measures continued for decades until the dawn of the third phase, when the refugee definition in the 1980 Refugee Act was made to correspond with the 1967 United Nations Protocol Relating to the Status of Refugees. In this context, it is important to note that the refugee definition no

longer had geographical or ideological requirements and, by mentioning the five grounds of persecution (race, religion, nationality, membership of a particular social group, political opinion) aligned itself with international legal instruments.[1]

The Period Immediately After the Second World War

With allied advances in Germany and Austria at the end of World War II, millions of desperate and displaced people moved towards the centre of Europe.[2] This movement of people included Jews who had been in hiding during the war and ethnic Germans from Eastern Europe.[3] Described in a US State Department report at the time as »›[one] of the greatest population movements of history taking place before our eyes‹«[4], the situation reached crisis proportions and required decisive and concerted action.

President Truman, responding to the Harrison report[5], issued a directive on December 22, 1945, in an attempt to respond to the problem.[6] The directive ordered the Secretary of State to »establish with the utmost dispatch consular facilities at or near displaced person and refugee assembly centre areas in the American zones of occupation.«[7] Most of those to be aided were central and eastern European and Balkan natives[8], and as a consequence, approximately 27,000 people could come to the US with German or Austrian nationality of a total of up to 39,000 people from Central Europe.[9] To diffuse a possible anti-Jewish backlash, Truman's directive did not explicitly favour Jewish migrants.[10] Nonetheless, by best estimates, 28,000 of the approxi-

1 But see James C. Hathaway, The Law of Refugee Status, 1991, pp. 6–11.

2 See Gil Loescher/John A. Scanlan, Calculated Kindness. Refugees and America's Half-Open Door. 1945 to the Present, New York/London 1986.

3 Ibid., pp. 1f.

4 Ibid., p. 1.

5 Ibid., pp. 4f. In his conclusion, Harrison stated that »many of the Jewish displaced persons […] had no clothing other than their concentration camp garb […] while others, to their chagrin, were obliged to wear German S.S. uniforms […] we appear to be treating the Jews as the Nazis treated them, except we do not exterminate them«. Ibid., p. 4 (citing Report of Earl G. Harrison, reprinted in: Department of State Bulletin 13, 30 September 1945, no. 327, pp. 457–461).

6 Ibid., p. 5.

7 President Truman's Statement and Directive on Displaced Persons, www.ibiblio.org/pha/policy/post-war/451222a.html (last visited July 9, 2002).

8 Ibid.

9 Loescher/Scanlan, Calculated Kindness, note 2, p. 5.

10 Ibid., pp. 5f.

mately 40,000 visas under the directive from spring 1946 through June 1948 were issued to Jews.[11]

Truman's directive seemed to be mostly concerned with alleviating human suffering. Truman, in explaining the directive, stated that »common decency and the fundamental comradeship of all human beings require us to do what lies within our power to see that our established immigration quotas are used in order to reduce human suffering«. He framed the relief effort in an international humanitarian context, emphasising the US's shared »responsibility to relieve the suffering«. Furthermore, he called on Americans not to »close or to narrow our gates«in this »period of unspeakable human distress.« Rather, he urged them to »set an example for the rest of the world in co-operation toward alleviating human misery«.[12] The directive, reflecting the absence of the Cold War at the time, was not couched in ideological language and seemed to be genuinely rooted in humanitarianism. It was bereft of the signs of ideological struggle that began to appear in American refugee law when the world became more obviously bipolar during the Cold War.

The Dawn of the Cold War: Humanitarianism Caught in the Storm of Foreign Policy

The second phase, beginning with the Displaced Persons Act of 1948, was characterised by bluntly anti-communist language that coincided with the beginning of the Cold War. The Displaced Persons Act of 1948[13] was primarily aimed at protecting those who had fled Nazi or fascist persecution and those who were fleeing Soviet persecution. The debate surrounding the Displaced Persons Act reflected the infusion of Cold War calculations into what had hitherto been, at least on its face, a humanitarian issue. For example, House Democrat Ed Gosset »frequently stated that most Jewish DPs [i.e., displaced persons] were communists or potential spies, that they actively supported social revolution in Europe and consequently had nothing to fear from Russian domination, and that they were therefore ›voluntarily displaced persons‹ rather than true refugees.«[14] A consistent theme in the debate favouring passage was that »›we do ourselves and our democracy a

11 Ibid., p. 6 (citing Leonard Dinnerstein, America and the survivors of the Holocaust, New York 1982, p. 263.).

12 President Truman's Statement and Directive on Displaced Persons.

13 The Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (1948).

14 Loescher/Scanlan, Calculated Kindness, note 2, pp. 13f. (citing Remarks of Representative Gossett, A New Fifth Column or the Refugee Racket, in: Congressional Record 93 (July 2, 1947), 8173-76 noting that there were »many subversives among refugees« and that »Trojan horses are offered us on every hand.«)

great deal of good by show[ing] to all the world that we are in truth champions of freedom and that we shall aid all those who rally to our cause.‹«[15]

Lobbying soon began to amend the Displaced Persons Act to change what many regarded as anti-Jewish elements in the act and to better reflect the emerging geopolitical landscape.[16] Changes were enacted into law in 1950[17] that substantially altered the thrust of the act. Under the amended section 2(c), for example, which had previously required that such eligible displaced persons »on or after September 1, 1939, and on or before December 22, 1945, [have] entered Germany, Austria, or Italy«[18], the temporal requirement of December 22, 1945, was extended by over three years to January 12, 1949.[19] Furthermore, the requirement of presence in a western zone on January 1, 1948, in the original act[20] was extended by one year to January 1, 1949.[21] This was in recognition of both significant Jewish migration in 1946 and continuing movement after 1946 of »›political and religious dissenters from the regimes now ruling most, if not all of the eastern European countries, including the Soviet Union.‹«[22] Congressional rhetoric at the time and contemporary asylum law primarily reflected foreign policy and a tense mood fearful of communism, with humanitarian ideals playing a lesser role. For example, Wisconsin's Alexander Wiley, in testimony before the House Judiciary Committee in the spring of 1949, stated that »›[i]f we revise this law speedily and equitably, it will be a real inspiration to all free people. It will be an ideological weapon in our ideological war against the forces of darkness, the forces of communist tyranny‹«.[23]

In this context, it is interesting and instructive that the US refused to sign the 1951 Convention Relating to the Status of Refugees. The US hesitated to embrace the new international refugee regime and expanded UN refugee operations because of the expense, hesitation at what it regarded as a seemingly limitless commitment[24], and fear that an expanded UNHCR's expendi-

15 Ibid., p. 19.

16 Ibid., pp. 21f.

17 Pub. L. No. 81-555, 64 Stat. p. 219 (1950).

18 Pub. L. No. 80-774, § 2(c)(1), 62 Stat. 1009, 1009 (1948).

19 Pub. L. No. 81-555, § 1, 64 Stat. p. 219.

20 Pub. L. No. 80-774, § 2(c)(1), 62 Stat. p. 1009.

21 Pub. L. No. 81-555, § 1, 64 Stat. p. 219.

22 Loescher/Scanlan, Calculated Kindness, note 2, p. 22.

23 Ibid., pp. 23f. quoted in Robert Divine, American Immigration Policy 1924–52, New York 1957, p. 33.

24 Ibid., p. 41. Warren, a US delegate to the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 2–25 July, 1951, in Geneva, expressing the US's reservations, stated that »the development of an unrestricted charter for refugees would involve a certain amount of duplication of effort between the prepara-

tures »might benefit refugees *who were of little political interest to the United States* [emphasis added] and might create more demands for their resettlement in the United States.«[25]

In 1952, the Immigration and Nationality Act (INA)[26] was passed. It did not contain specific provisions for refugees.[27] However, the use of two measures in the original act, withholding of deportation[28] and parole[29], affected aliens seeking protected status.[30] Both mechanisms were in the Attorney General's discretion, and it seems clear that Congress intended that parole be used temporarily and in emergency situations: »The parole provisions were designed to authorise the Attorney General to act only in *emergent, individual, and isolated situations* [emphasis added], such as the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside of the limit of the law.«[31] Not surprisingly, »[t]hese mechanisms were, either explicitly or de facto, used primarily to admit aliens from countries hostile to the United States.«[32]

In the wake of the INA, the Refugee Relief Act of 1953[33] was enacted to further an asylum policy with an emphasis »less on broad humanitarian goals than on giving encouragement and support to anti-communists.«[34] The Refugee Relief Act defined refugee as a stand-alone term and expansively allowed protection for those unable to return to their usual abode due to, among other conditions, »persecution, fear of persecution, natural calamity or military operations«.[35] The act further defined escapee[36] and German ex-

tion of the draft International Covenant on Human Rights and the drafting of the present Convention.« The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees, Amsterdam 1990, vol. 3, p. 381 [A/Conf 2/SR.19 p. 22].

25 Loescher/Scanlan, Calculated Kindness, note 2, p. 41.

26 Immigration and Nationality Act, Pub. L. No. 414-477, 66 Stat. 163 (1952).

27 Deborah E. Anker/Michael H. Posner, The Forty-Year Crisis. A Legislative History of the Refugee Act of 1980, in: San Diego Law Review, 19. 1981, pp. 88f.

28 Section 243(h) of the 1952 Act.

29 Section 212(d)(5) of the 1952 Act.

30 J. Michael Cavosie, Defending the Golden Door. The Persistence of Ad Hoc and Ideological Decision Making in U.S. Refugee Law, in: Indiana Law Journal, 67. 1992, pp. 411–421. A third measure affecting aliens seeking protected status, conditional entry, was not added until 1965; see ibid., pp. 421f.

31 Ira J. Kurzban, A Critical Analysis of Refugee Law, in: University Miami Law Review, 36. 1982, pp. 865–870.

32 Cavosie, Defending the Golden Door, note 34, p. 421.

33 Pub. L. No. 203, 67 Stat. 400 (1953).

34 Anker/Posner, The Forty-Year Crisis, note 31.

35 Pub. L. No. 203, § 2(a), 67 Stat. 400, 400 (1953).

36 Pub. L. No. 203, § 2(b), 67 Stat. 400, 400 (1953).

pellee[37] as sub-categories of refugee, and the definitions for these terms reflected a special concern for those in communist countries.[38] Furthermore, »[s]pecial allotments were provided for Sweden, Iran, and Greece (countries viewed as bulwarks of democracy against Soviet expansionism)«.[39] Accepting refugees from these American allies relieved a burden and underlined the US's interest in accepting refugees from communist-dominated countries.

Changes to the INA in 1957[40] injected another term into American asylum law, refugee-escapee.[41] Refugee-escapee was defined with explicit mention made of aliens having fled or fleeing from communist countries and the Middle East on the grounds of race, religion, or political opinion.[42] On Capitol Hill, it was the plight of those »fortunate enough« to be in communist countries that was heard by lawmakers.

In 1962, Congress passed the Migration and Refugee Assistance Act (MRA).[43] While the act only had a limited effect on the US's admission policy, it again showed the extent to which American refugee policy was intertwined with foreign affairs. The MRA authorised the President to continue to contribute to various international organisations dealing with refugees issues, such as the Intergovernmental Committee for European Migration and the UNHCR.[44] The President could assist those falling under the mandate of the UNHCR, as well as those under his good offices, which was meant to protect mainly those fleeing communism in the Far East.[45] Further, the President could also assist those refugees he designated himself by class, group, country of origin, or area of residence.[46]

The MRA was important for two reasons. First, it was the first time that the term refugee was defined without explicit mention of communism or any other Cold War connotations. The definition used in section 2(b)(3) defined refugees as: »aliens who (A) because of persecution or fear of persecution on account of race, religion, or political opinion, fled from an area of the Western Hemisphere; (B) cannot return thereto because of fear of persecution on

37 Pub. L. No. 203, § 2(c), 67 Stat. 400, 400 (1953).

38 See Pub. L. No. 203, §§ 2(b)-(c), 67 Stat. 400, 400 (1953).

39 Anker/Posner, The Forty-Year Crisis, note 31.

40 Pub. L. No. 85-316, 71 Stat. 639 (1957).

41 Pub. L. No. 85-316, § 15(c)(1), 71 Stat. 639, 643 (1957).

42 Ibid.

43 Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121 (1962).

44 Ibid., § 2 (a) (b).

45 Ivor C. Jackson, The Refugee Concept in Group Situations, The Hague 1999, pp. 90–111.

46 Migration and Refugee Assistance Act of 1962, § 2 (b)(2).

account of race, religion, or political opinion; and (C) are in urgent need of assistance for the essentials of life.«[47]

Thus, the definition closely resembled the refugee definition in the 1951 Geneva Convention.[48] What is more striking, however, is the explicit acknowledgement of the foreign affairs implications of refugee policy. The President could assist refugees when he determined that »such assistance will contribute to the security *or foreign policy interests* [emphasis added] of the United States.«[49]

It is interesting to examine the different groups that have benefited from the parole system at this time. The most commonly cited example is the different treatment given to Cubans fleeing the Castro regime and those Haitians fleeing the dictatorships of the two Duvaliers.[50] Another telling example is the different treatment that the US gave to Jewish refugees from the Soviet Union and those fleeing Latin American countries, particularly right-wing allies of the United States.

The situation was worsening on the Far East front of the Cold War. Despite strong US support, the western-oriented governments in Cambodia, Laos, and South Vietnam fell to communist invaders and insurgents, leading to a new wave of refugees in numbers not seen for years. In response to this, the Indochina Migration and Refugee Assistance Act (IMRAA) was passed in March 1975.[51] Over $155,000,000 was assigned specifically to the needs of refugees from these countries.[52] For purposes of the act, refugees were defined as aliens: »who (A) because of persecution or fear of persecution on account of race, religion, or political opinion, fled from Cambodia or Vietnam; (B) cannot return there because of fear of persecution on account of race, religion, or political opinion; and (C) are in urgent need of assistance for the essentials of life.«[53] In 1976, the IMRAA's coverage was extended to protect those fleeing Laos.[54]

What was different between the US's treatment of Indochinese and eastern European refugees was that, in the former case the US downplayed

47 Ibid., § 2 (b) (3) (A), (B).

48 See 1951 Convention Relating to the Status of Refugees Article 1A (2) .

49 Migration and Refugee Assistance Act of 1962, § 2 (b) (2).

50 For Cubans, see Loescher/Scanlan, Calculated Kindness, note 2, pp. 61–67. For Haitians, see Janice D. Villiers, Closed Borders, Closed Ports. The Plight of Haitians Seeking Political Asylum in the United States, in: Brooklyn Law Review, 60. 1994, p. 841.

51 The Indochina Migration and Refugee Assistance Act of 1975, Pub. L. No. 94-23, 87 Stat. 87 (1975).

52 Ibid., § 2 (a).

53 Ibid., § 3.

54 Pub. L. No. 94-313, 90 Stat. 691 (1976).

their flight from communism and, instead, repeatedly underlined humanitarian considerations, thousands of people, former American allies, languishing in refugee camps, for whom the US had a moral and humanitarian obligation to assist. While their number was large, and they were not always welcomed with open arms, the US went to pains to resettle as many of them as possible.[55]

What seems clear about the refugee acts passed in the 1970s was that that they continued the earlier practice of adopting legislative acts aimed at specific refugee groups sympathetic to the US. Ideological and foreign policy considerations continued to be factors, but they were not the sole factors. The US's treatment of the Indochinese indicated that humanitarianism, although still subordinate to foreign policy considerations, was playing an increasingly important role in the refugee debate.

The 1980 Refugee Act and the Attempt for Ideological Neutrality

The Refugee Act of 1980[56], hailed by one member of Congress as »›one of the most important pieces of humanitarian legislation ever enacted by a United States Congress‹«[57], resulted from this debate. It reflected emerging themes in its recognition that »principled, humanitarian considerations must inform refugee selection procedures [and] that the expediency of perceived, short-term foreign policy interests should not be the exclusive or even primary criteria in refugee admission policy, nor should politicised decision making dictate asylum determinations.«[58] The act made two major changes in refugee policy, a new definition of the term refugee and »an admissions system that would allow both flexibility and usable standards through systematic consultations between Congress and the executive branch.«[59]

Unlike previous acts, the Refugee Act defined refugee in ideologically neutral terms that did not evidence a foreign policy allegiance or persuasion.[60] By so doing, Congress brought the US definition of the term into con-

55 Loescher/Scanlan, Calculated Kindness, note 2, pp. 140–146.

56 Pub. L. No. 96-212, 94 Stat. 102 (1980).

57 Carolyn Patty Blum, A Question of Values. Continuing Divergences Between U.S. and International Refugee Norms, in: Berkeley Journal of International Law, 15. 1997, p. 38; Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in various sections of 8 U.S.C.).

58 Anker/Posner, The Forty-Year Crisis, note 31, pp. 88f.

59 Tahl Tyson, The Refugee Act of 1980. Suggested Reforms in the Overseas Refugee Program to Safeguard Humanitarian Concerns from Competing Interests, in: Washington Law Review, 65. 1990, pp. 921–923.

60 Pub. L. No. 96-212, § 201(a), 94 Stat. p. 102.

formity with the US's obligations under the United Nations Protocol Relating to the Status of Refugees, which it had signed over a decade before.[61] The act also established a consultation process between the President and Congress in the formulation of yearly admissions ceilings[62], which had to be »justified by humanitarian concerns or [be] otherwise in the national interest«[63] and retained the Attorney General's parole authority – »the Administration presently views the parole power as a way of admitting up to 2,000 aliens each month who do not fit the refugee definition.«[64]

Although the Refugee Act contained a comprehensive, ideologically neutral definition of refugee, at the same time, the Cold War was still being fought. In 1980, Fidel Castro decided to let go people dissatisfied with his regime. The US received them in the famous Mariel boatlift, altogether more than 130,000 people.[65] In 1981, General Wojciech Jaruzelski crushed Solidarity, the Polish opposition movement, and declared martial law in Poland. This, in turn, caused thousands of Poles to seek refuge in the West, including the US.

Despite the act's ideologically neutral refugee definition, foreign affairs considerations continued to exert an influence.[66] The Immigration and Naturalization Service (INS) still perceived the granting of refugee status as a move inherently hostile to the government of the applicant. Therefore, the INS was cautious not to grant it to asylum seekers from countries allied with, or at least not opposed to, the US. For example, five years after the act's passage, 59 per cent of the Romanian, 46 per cent of the Russian, 57 per cent of the Czechoslovakian, and 73 per cent of the Libyan applicants received political asylum, while less than 15 per cent of the Pakistani, 1 per cent of the Guatemalan, 1 per cent of the Haitian, and 3 per cent of the Salvadoran applicants received asylum.[67] The statistics seem to suggest that applicants from states hostile to the US were much better positioned to receive protection than those from states allied with the US. In this context, it is important to note that the cases for protection may have been much stronger for the

61 Tyson, The Refugee Act of 1980, note 63, p. 924 (citing 8 U.S.C. § 1101(a)(42) (1988)).

62 Elizabeth Kay Harris, Economic Refugees. Unprotected in the United States by Virtue of an Inaccurate Label, American University Journal of International Law & Policy, 1993, no. 9, pp. 269–272; Tyson, The Refugee Act of 1980, note 63, pp. 922–925; Barnaby Zall, The U.S. Refugee Industry. Doing Well by Doing Good, in: David E. Simcox (ed.), U.S. Immigration in the 1980s. Reappraisal and Reform, Boulder 1988, pp. 258f.

63 Pub. L. No. 96-212, § 201(b), 94 Stat. pp. 104f.

64 Tyson, The Refugee Act of 1980, note 63, p. 925.

65 Loescher/Scanlan, Calculated Kindness, note 2, pp. 170f.

66 Villiers, supra note 54, p. 902.

67 Ibid.

Romanian, Russian, Czechoslovakian, and Libyan applicants than for those applicants from Pakistan, Guatemala, Haiti, and El Salvador but even in cases when the applicants' allegations were similar, the rates of asylum varied substantially.[68] To quote one author: »Salvadorans who claimed to have been arrested and imprisoned, to have had their lives threatened, or to have endured torture, received asylum in 3 per cent of the cases while Poles with similar stories were approved 55 per cent of the time and Iranians were approved in 64 per cent of the cases. From 1980 to 1986, 76 per cent of the asylum grants went to applicants from three countries that the United States opposed: Iran, Poland and Nicaragua, whereas applicants from El Salvador won less than 3 per cent during this period.«[69]

The late-1980s saw humanitarianism become increasingly important. No doubt encouraged by those critical of the »ghosts of foreign policy«[70], the attitude towards refugees began to change, and foreign policy considerations, while still present, became more and more balanced with humanitarian principles. In 1989, for example, Congress passed the Lautenberg Amendment[71], which established a prima facie eligibility for refugee status for Laotians, Vietnamese, Cambodians, and Soviet religious minorities, Jews, Evangelical Christians, Ukrainian Catholics, and Orthodox Christians. There is little doubt that foreign policy considerations played a role in its adoption, as most of the countries of origin covered were communist. It found root, however, in the humanitarian principle that groups suffering severe persecution and in need of assistance deserve the US's protection. It is important to note that the Lautenberg Amendment was severely criticised for reintroducing the discriminatory policies of the 1950s and 1960s.[72] The same can be said about the 1996 amendments to the Refugee Act of 1980[73], which, while affording protection to victims of forced population control programmes in China, may have been a political statement against an American enemy couched in humanitarian language.[74]

68 Ibid., pp. 902f.

69 Ibid. citing Sarah Ignatius as a collaborator of: National Asylum Study Project. An Assessment of the Asylum Process of the Immigration and Naturalization Service, Cambridge-Allston 1993.

70 Ira J. Kurzban, Restructuring the Asylum Process, in: San Diego Law Review, 19. 1981, p. 102.

71 Foreign Operations, Export Financing and Related Programs Appropriations Act, Pub. L. No. 101-167, 103 Stat. 1195 (1989) § 599D (b).

72 Cavosie, Defending the Golden Door, note 34, p. 438.

73 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, § 601 (1996).

74 See Thomas Spijkerboer, Gender and Refugee Status, Aldershot 2000, p. 122.

The Language of Law and Law Itself

American refugee law has always been characterised by tensions between humanitarian and foreign policy and ideological considerations. In the three phases discerned, these tensions played out differently. American refugee policy was never wholly humanitarian or ideological. On the contrary, law phrased in humanitarian language was influenced by political considerations, while law in bluntly political wordings, was at times still informed by humanitarian considerations. One might argue, for example, that the US's assistance of Hungarians after 1956 furthered both humanitarian ideals and Cold War interests. The explicitly neutral language of the Refugee Act of 1980, furthermore, was manipulated when it furthered American foreign policy interests. Besides the foreign policy interests, as we have seen, internal policy factors played a role also, e.g. immediately after the Second World War, president Truman had to reckon with possible anti-Jewish backlash, which led him not explicitly favour Jewish refugees etc.

The history of American refugee policy entails lessons for both, legal scholars and sociologists. When assessing the reasons behind policy change, one must look at the law's language, its context, and how it has been later interpreted and implemented and be careful not to be misled. It seems that asylum policy at this time, given these considerations, was neither solely humanitarian nor completely concerned with foreign policy. Fundamental changes in legal language do not necessarily entail fundamental changes in policy. As the present description of American refugee policy shows, although the interests of foreign policy have always had a huge impact on the law, humanitarian considerations have had an important influence also. Over time, from the late 1980s humanitarianism became increasingly important and at times, humanitarianism and foreign policy interests went hand in hand. International refugee law became more and more important. The Refugee Act of 1980 was conform to the obligations under the UN Protocol relating to the Status of Refugee, that the US had signed more than a decade before. Hence, neutral or humanitarian legal language is not without meaning for the practice refugee policy.

Regulation of Family and Labour Migration

Anne Walter

The New EC Directive on the Right to Family Unification

In the past, pursuant to Community Law, family members who are third-country nationals could only have access to Member States, when the sponsor as an EU citizen exercised his or her right to free movement of persons (*Grundfreiheiten* – basic freedoms).

However, Community Law did not contain relevant regulations for third-country nationals and their families. Therefore, in principle, family members of third-country nationals had no European based right to access a Member State of the EU for personal – i.e. family – reasons. Only national law systems opened this ›immigration path‹. This is now changing.[1] Since October 2003, a common legal basis for the ›immigration path‹ of family reunification exists on the European level: the Council Directive on the right to family reunification. At its meeting on 27 February 2003, the Council defined a general approach[2] based on the last proposal of the Commission.[3] The new Directive was formally adopted on 22 September 2003 and entered into force as from 3 October 2003.[4]

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1 This article is dated October 2003.

2 Council doc. 6912/03. For the Council docs: http://register.consilium.eu.int/utfregister/frames/introfsDE.htm. The general approach has been strongly critised by the Parliament, see the final report doc. PE 319.245 of 24 March 2003, A5-0086/2003, http://www.europarl.eu.int/meetdocs_all/committees/committeeslist.htm. The fact that the Council has not awaited the publication of this report and thus decided without taking the Parliament's opinion into consideration significantly highlights the Parliament's weak position in this legislative procedure (Consultation procedure).

3 The European Commission submitted the first proposal in December 1999, COM (1999) 638, O.J. 2000, C 116/66 of 26 April 2000. In the second version of October 2000, COM 2000 (624), O.J. 2001, C 62/99 of 27 February 2001, the amendments the European Parliament brought up were included. Based on discussions in the Council, the Commission proposed a third version of the Council Directive in May 2002, see COM 2002 (225), O.J. 2002, C 203/136 of 27 August 2002.

4 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, O.J. 2003, L 251/12 of 3 October 2003. The common EU immigration policy does not apply to Denmark, which has decided to opt out of Title IV of the Treaty

However, the question arises whether the Directive can be described as fulfilling the political consensus of Tampere, in which the existing rules for EU citizens were declared as a measure to this Directive. The conclusions of Tampere establish the goal to provide long-term residents with »equal obligations and rights« comparable to those of EU citizens in order to promote integration.

Immigration of Family Members of Long-Term Residents – Restriction

The first purpose of the Directive is to determine the conditions under which family members of a third-country national residing lawfully in a Member State can enter and reside in that Member State.[5] The family unit shall be preserved both for family relationship that arose before or after the sponsor's entry.[6] Most of the regulations of the Directive concern conditions for entry into a Member State. Different criteria will apply to refugees.[7]

A precondition is that the sponsor resides lawfully in the territory of a Member State and has »reasonable prospects of obtaining the right to permanent residence«.[8] Therefore, all immigrants on a temporary stay (asylum seekers, temporary and subsidiary protection) are excluded from this Directive.[9]

However, residence status is not the only limitation to the scope of the Directive. Another one lies in the definition of the family itself: what is behind the notion of family members? In this case, the notion of family was reduced to the European model of the nuclear family. This means that Member States shall authorise the entry and residence of the sponsor's spouse and minor children of the sponsor and of his or her spouse (including adopted children and children in the custody of the spouse). In the case of shared custody, admission is only discretionary and needs the consent of the other person sharing custody.[10] For both, spouse and children, age limits are possible.

establishing the European Community. The United Kingdom and Ireland decide on their involvement on a case-by-case basis (possibility of an ›opt-in‹). In the case of this directive on family reunification, the United Kingdom and Ireland did not opt in. See recitals 17 and 18 Directive 2003/86/EC.

5 Art. 1 Directive 2003/86/EC.

6 Art. 2 lit. d) Directive 2003/86/EC.

7 See Chapter 5 of the Directive. Member States may confine the application of this Chapter to refugees whose family relationships predate their entry, Art. 9 para. 2 Directive 2003/86/EC.

8 Art. 3 para. 1 Directive 2003/86/EC.

9 Art. 3 para. 2 Directive 2003/86/EC.

10 Art. 4 para. 1 lit. a - d) Directive 2003/86/EC.

Member States may require the sponsor and his or her spouse to be of a minimum age, the maximum of which can be 21, before the spouse is able to join him or her, in order to ensure better integration and to prevent involuntary marriages.[11] In general, minor children must be below the age of majority set by the law of the Member State concerned (in general 18 years) and must not be married. An exception to the above-mentioned procedure exists if a child is older than 12 years and arrives independently from the rest of his or her family. In this case, the Member State may, by way of derogation, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by the existing national legislation on the date of implementation of this Directive (probably not later than 2005).[12] This exception was prescribed by the German Immigration Act *(Zuwanderungsgesetz)*, which is presently under consideration in the conciliation committee *(Vermittlungsausschuß)*. With regard to this provision, the following clause was added to the Preamble of the Directive: »The possibility of limiting the right to family reunification of children over the age of 12 whose primary residence is not with the sponsor, is intended to reflect the children's capacity for integration at early ages and shall ensure that they acquire the necessary education and language skills in school.«[13]

Another special provision allows Member States to request that applications concerning family reunification of minor children must be submitted before the age of 15, as provided for by the existing national legislation on the date of implementation of this Directive. If the application is submitted after the age of 15, the Member States, which decide to apply this derogation, shall authorise the entry and residence of such children on grounds other than family reunification.[14] With regard to further family members, such as the sponsor's and spouse's dependent father, mother, or adult children, who are because of sickness dependent on the sponsor or the spouse, the Member State only may authorise their entry and residence.[15] Unmarried partners and their children are also included in this category of relatives. These unmarried partners must be duly attested to as a stable long-term relationship or registered partnership in the relevant national law. In addition, during the last negotiations, a new subparagraph was included which provides that Member States may decide that registered partners are treated equally as

11 Art. 4 para. 5 Directive 2003/86/EC. This age limit shall not apply to the children of refugees, Art. 10 para. 1 Directive 2003/86/EC.

12 Art. 4 para. 1 subpara. 2 and 3 Directive 2003/86/EC.

13 Recital 12 Directive 2003/86/EC.

14 Art. 4 para. 6 Directive 2003/86/EC.

15 Art. 4 para. 2 Directive 2003/86/EC.

spouses with respect to family reunification.[16] In the case of a polygamous marriage, when the sponsor already has a spouse living with him or her on the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse. In this circumstance, Member States may also limit the family reunification of minor children of a further spouse and the sponsor.[17]

In relation to the provision concerning unmarried partners, the following clause was added to the Preamble of the Directive[18]: »Where a Member State authorises family reunification of these persons[19] this is without prejudice of the possibility, for Member States which do not recognise the existence of family ties in the cases covered by this provision, of not granting to the said persons the treatment of family members with regard to the right to reside in another Member State, as defined by the Directive on the status of third-country nationals who are long-term residents.«[20] In each case, when examining an application, the Member States shall have due regard to the best interests of minor children.[21]

The Member State may require that the sponsor provide evidence of accommodation regarded as normal for a comparable family in the same region, sickness insurance in respect of all risks normally covered and stable

16 Art. 4 para. 3 Directive 2003/86/EC.

17 Art. 4 para. 4 Directive 2003/86/EC. In relation to this provision and initiated by the French delegation the following clause was added to the Preamble of the Directive: »The right to family reunification should be exercised in proper compliance with the values and principles recognised by the Member States, in particular with respect to the rights of women and of children; such compliance justifies the possible taking of restrictive measures against applications for family reunification of polygamous households.« See recital 11 Directive 2003/86/EC.

18 Recital 10 Directive 2003/86/EC.

19 First-degree relatives in the direct ascending line, adult unmarried children, unmarried or registered partners as well as, in the event of a polygamous marriage, minor children of a further spouse and the sponsor.

20 The reason for this was that southern Member States saw a problem in the mobility of unmarried partners allowed to enter and reside in the Member States concerned, see Council doc. 13968/02, 8. With regard to the right for long-term residents to reside in other Member States, see the initial proposal of the Commission for a Council Directive concerning the status of third-country nationals who are long-term residents, COM (2001) 127 of 13 March 2001. On 5 June 2003, the ministers of justice and home affairs agreed on this Directive, Council doc. 10501/03. The new status of a ›long-term resident‹ will allow the person concerned, under certain conditions, to move from one Member State to another, maintaining the rights and benefits granted in the first Member State without being required to go through all the procedures that new immigrants are subject to. However, the Directive has not yet been formally adopted.

21 Art. 5 para. 5 Directive 2003/86/EC. The reference to the Convention of the Child in this provision was deleted; see the discussion in Council doc. 8491/01, 9, 11.

and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned.[22] Furthermore, the initial proposal contained a prohibition of discrimination in this respect.[23] This prohibition, which was addressed to the Member States, was deleted; instead, the third-country national's obligation to meet integration measures has been introduced. Member States may require third-country nationals to comply with integration measures in accordance with national law.[24] With regard to refugees or family members of refugees, the integration measures may only be applied after family reunification.[25] These personal and economic conditions may be checked after the family has been reunified, if the family members' residence documents are up for renewal.[26]

Waiting periods of two and exceptionally three years can be required between the submission of an application and the issue of a residence permit.[27] The administrative process of nine months can be extended without limits.[28]

It should now be obvious that the above-mentioned regulations, i.e. the restrictive notion of a family, categories and levels of protection for different

22 Art. 7 para. 1 Directive 2003/86/EC. In principle, this provision shall not apply to refugees, Art. 12 para. 1 subpara. 1 Directive 2003/86/EC. See the exceptions Art. 12 para. 1 subpara. 2, 3 Directive 2003/86/EC.

23 Art. 9 para. 2 COM (1999) 638 (second proposal) provided for: »The conditions relating to accommodation, sickness insurance and resources provided for by paragraph 1 may be set by the Member States only in order to ensure that the applicant for family reunification will be able to satisfy the needs of his reunified family members without further recourse to public funds. They may not have the effect of discriminating between nationals of the Member State and third-country nationals«. The final text contains in the Preamble a general remark in this respect, but without reference to the criteria of nationality: »Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation«, see recital 5 Directive 2003/86/EC.

24 Art. 7 para. 2 subpara. 1 Directive 2003/86/EC.

25 Art. 7 para. 2 subpara. 2 Directive 2003/86/EC.

26 Art. 16 para. 1 lit. a) Directive 2003/86/EC. »…where the conditions laid down by this Directive are not or are no longer satisfied; When renewing the residence permit, where the sponsor has no sufficient resources without recourse to the social assistance system of the Member State, as referred to in Article 7(1)(c), the Member State shall take into account the contributions of the family members to the household income.«

27 Art. 8 Directive 2003/86/EC. This provision shall not apply to refugees, Art. 12 para. 2 Directive 2003/86/EC.

28 Art. 5 para. 4 Directive 2003/86/EC.

types of family members, long waiting periods and proceedings, and high economic requirements, make the continuing separation of families likely. Moreover, the chance to modernise European law governing unmarried partners was missed. In comparison to the regulations for EU citizens, the conditions for the access of family members of third-country nationals as laid down in the Directive are less liberal and not comparable to the spirit of Tampere. Thus, it is inconsistent with the second intention of the Directive.

Residence of Long-Term Residents – Integration

The second purpose of the Directive is of political nature and concerned with the facilitation of the integration of third-country nationals. In the Preamble of the Directive, the Commission argued that the presence of the family and the right to live together with the reunited family members especially promotes the integration of the sponsor: »Family reunification is a necessary way of making family life possible. It helps to create socio-cultural stability facilitating the integration of third-country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty.«[29]

From the legal point of view, integration means, in the case of EU citizens, the application of the principle of equal treatment. This is different in the Directive for third-country nationals. The regulations of residence relevant to the integration of family members are limited to residence status and access to the labour market, but even these were watered down. The definitive recital provides: »The integration of family members should be promoted. For that purpose, they should be granted a status independent of that of the sponsor, in particular in cases of break-up of marriages and partnerships, and access to education, employment and vocational training on the same terms as the person with whom they are reunited, under the relevant conditions.«[30] Accordingly, Member States may set a waiting period of up to 12 months before authorising access to the labour market[31], and they may restrict access to employment by ascending relatives or adult children indefi-

29 See also in the adopted text recital 4 Directive 2003/86/EC.

30 See recital 15 Directive 2003/86/EC. In contrast to the initial text of the recital, two restrictive changes were introduced. First, the granting of the independent status was limited »in particular [to] cases of break-up of marriages and partnerships«. Second, with regard to access to education, employment and vocational training the clause »under the relevant conditions« was added.

31 Art. 14 para. 2 Directive 2003/86/EC. The reason for this addition is German and Austrian objections; see the discussion in Council doc. 5881/03, 18 and Council doc. 6585/03, 18.

nitely.[32] In addition, family members of third-country nationals gain the chance to obtain a permanent residence permit only after five years[33], a period marked by long-term insecurity. This is problematic, since family life needs a long-term perspective and a stable residence.

A ›New‹ European Law on Family Reunification?

As a result it can be observed that the Directive can no longer be ›criticised‹ to entail a total harmonisation like the initial proposal.[34] On the contrary, it is rather a minimum harmonisation. This is a problem from a political as well as from a legal point of view. First, the Directive creates a different status between EU immigrants and third-country nationals concerning the possibility of enjoying family live.[35] This ignores the integration policy intended in Tampere. Second, this method of flexibility maintains different regulations in the Member States. Therefore, it is not a real harmonisation. Third, the goal of the national instruments included in the Directive is different to that of the European perspective of immigration and integration. The limitation of legal rights to members of the nuclear family, the modification of the age limit, economic requirements, the obligation of integration measures, increased obligation to produce supporting documents, longer proceedings, the introduction of a two/three years waiting period, and a precarious residence status are all instruments in the spirit of the national Aliens Law (*Vreemdelingenrecht* or *Ausländerrecht*) designed to hinder and limit immigration. This does not lead to reunification but rather to separation of families and, thus, will create a situation unfriendly to foreigners desiring to be integrated in the Member States. In addition, the danger that Member States lower their standards to meet the minimum European level of the Directive increases,

32 Art. 14 para. 3 Directive 2003/86/EC.

33 See the possible limits on obtaining autonomous status in Art. 15 para. 1 subpara. 2, para. 2 and para. 4 Directive 2003/86/EC.

34 Unabhängige Kommission ›Zuwanderung‹, Zuwanderung gestalten, Integration fördern, Berlin, July 2001, p. 192.

35 This difference will be intensified after the implementation of the recently agreed reform of the existing rules for EU citizens based on the initial proposal of the Commission, COM (2001) 257. On 22 September 2003, the Council of Ministers (Competitiveness (Internal Market, Industry and Research)) reached political agreement (Council doc. 12585/03) on a European Parliament and Council Directive on the right of EU citizens and their family members, whether EU or non-EU nationals, to move and reside freely within the territory of the Member States in the new legal and political environment entailed by citizenship of the Union. The Directive abolishes the obligation for EU citizens to have a residence permit and facilitates the installation of the family, whether EU or non-EU nationals. The European Parliament is now expected to examine the text in a second reading (Co-decision procedure).

especially after the stand-still clause of the third proposal of the Commission[36] has been deleted.

From a legal point of view, some provisions of the Directive, especially those concerning the age limit for children and waiting periods, are problematic with regard to the fundamental right of protection of family life as laid down in Article 8 ECHR, an Article applicable to immigrants[37], to which the Community committed itself.[38]

Finally, it has to be concluded that the said Directive on the Right to Family Reunification for third-country nationals sets only distinctly low standards for family protection. It appears that the ›European spirit‹ contained in the original approach of the Commission disappeared in the course of the negotiations due to pressure from individual Member States. Therefore, this Directive can no longer be called a ›new‹ European law of family reunification. The huge amount of ›exported‹ national law does not provide for equal treatment of third-country nationals with EU citizens. This Directive then does not equal the spirit of Tampere.

36 Art. 3 para. 6 COM 2002 (225).

37 However, the European Court for Human Rights (ECHR) ruled in the past in a »state-friendly« way and denied in general a right of reunification. The decision Sen v. the Netherlands of 21 December 2001 (No. 31456/96) could be a sign of a change in this position, although it is a rare example.

38 See also the specific reference in recital 2 Directive 2003/86/EC.

Sarah van Walsum

The Dynamics of Emancipation and Exclusion. Changing Family Norms and Dutch Family Migration Policies

Since Dutch nationality law was first introduced in the early nineteenth century, family norms have played a role in determining the parameters of the Dutch nation, next to or in combination with principles of territory and/or ethnic belonging. Both parental descent and marriage have formed important ports of entry into the Dutch nation. The question of how, for whom and to what extent parental descent and marriage have formed such a port of entry has been answered differently in different historical contexts. This article explores how Dutch family migration law has changed over the past four decades, a period that has witnessed revolutionary changes within Dutch family norms, triggered by, among other things, the ›second wave‹ in women's emancipation and the sexual revolution.

The question addressed is how changes in Dutch family norms have been reflected in rules that facilitate or hinder the establishment of transnational family units within the Netherlands. The term ›transnational family‹ can be defined as follows: family units formed by Dutch nationals or by legally resident immigrants with a foreign (marriage) partner and/or (step-) child. As the liberalisation of Dutch family norms has had its most immediate and most marked effect on nationality law, that area of law shall be discussed before immigration law is brought into the picture.

The Impact of Changing Family Norms upon Dutch Law

Changes in Dutch family norms have been clearly reflected in Dutch family law. In the course of the 1970s, non-marital relationships in the Netherlands gradually came to be treated on a par with marriage[1], while unwed mothers and illegitimate children lost much of their stigma.[2] Family relationships

1 Anne M. van de Wiel, Samenleven buiten huwelijk. Over het juridisch lot van concubine en concubijn in binnen-en buitenland, Deventer 1974.

2 Nora Holtrust, De geschiedenis van de afstandsmoeder. Dikke bult, eigen schuld, in: Carla van Splunteren (ed.), Publiek geheim. De privatisering van het vrouwenleven, Amsterdam 1995.

came to be seen more in terms of contractual arrangements between free and equal individuals, and less in terms of the strictly regulated and religiously sanctioned hierarchical institution of the 1950s and 1960s.[3]

In the course of the 1980s and 1990s, the right to respect for family life, as guaranteed by Article 8 of the European Convention of Human Rights, proved a powerful instrument for unmarried and divorced fathers. By appealing to this fundamental human right, they acquired the right to recognise children born out of wedlock even when the mother refused permission, gained visiting rights automatically after divorce or separation and could share custody and parental authority with a child's mother outside of marriage without the intervention of the court.[4]

In Dutch nationality law, preserving the unity of the male-headed family remained a dominant principle until 1985. The assumption was that Dutch men should be able to build up a future, including family life, in their country of nationality. Consequently, their wives and children had easy access to admittance, to protected status and, ultimately, to Dutch citizenship. Dutch wives and (step-)children who joined the family of a foreign male, however, were assumed to have joined his nation and, if necessary, to follow him ›back home‹. In fact, up until 1965, a Dutch woman automatically lost her Dutch nationality upon marrying a foreigner. So while Dutch men enjoyed the security that immediate access to Dutch nationality was provided for their family members, namely the unassailable right to enter and reside in the Netherlands, Dutch women ran the risk of having their foreign family members deported or refused entry. Up until 1965, they actually faced that same risk themselves.[5]

In 1985, Dutch nationality law was reformed, eliminating all forms of sexual discrimination. In terms of nationality law, marriage now had the same consequences for men as for women. Married and also unmarried couples were treated more equally. Not only the spouses, but also the unmarried partners of Dutch citizens came to enjoy a (modest) advantage when applying for naturalisation. Moreover, Dutch mothers could now pass on their nationality to their children at birth, on the same basis as Dutch fathers.

Dutch immigration law did not react as promptly to changing family norms as did Dutch nationality law. As a result, although Dutch women

3 Gerrit Kooy, Gezinsleven en recht in naoorlogse Nederland, in: RM Themis, 4. 1997, pp. 123–129.

4 See for example: Nora Holtrust, Aan moeders knie. De juridisch afstammingsrelatie tussen moeder en kind, Nijmegen 1993; and: Caroline Forder, Legal Establishment of the Parent-Child Relationship. Constitutional Principles, Maastricht 1995.

5 Betty de Hart, Maria Toet en andere verhalen. De gehuwde vrouw en de constructie van de natiestaat, in: Tijdschrift voor Sociale Geschiedenis, 25. 1999, no. 2, pp. 183–206.

marrying a foreigner could keep their Dutch citizenship after 1965, it would take until 1979 before their foreign family members were granted the same rights under immigration law as the foreign family members of Dutch men. By the same token, up until 1979 foreign men and children coming to the Netherlands to join a foreign woman who had settled there did not enjoy the same rights under Dutch immigration law as the family members of a male immigrant.[6] Differences between married and unmarried couples also remained greater in immigration law than in nationality law. It would take until the end of the millennium before the most salient aspects of this form of inequality would be resolved.

Equal Treatment Through Levelling Down

By now, in the early years of the twenty-first century, equal treatment of men and women and of married and unmarried couples has to a large extent been realised, both in nationality and immigration law. However, these reforms have had their price. In the end, the equal treatment of men and women in Dutch nationality and immigration law has not resulted in more security for Dutch women with foreign family members, but in a levelling down: of men with regard to women; of married couples with regard to unmarried couples; of Dutch citizens with foreign family members with regard to immigrants with foreign family members.

For example, until 1985, the foreign family members of Dutch men had easy access to the unassailable right to residence provided by Dutch nationality. After 1985, Dutch men's foreign wives and step-children had to apply for naturalisation on the same basis as the foreign family members of Dutch women. However, a special status still applied to all the family members of Dutch citizens and permanently settled immigrants, protecting them against deportation on whatever grounds as long as the family bond lasted. Since January 1994, however, no foreign family members enjoy any such protected status any longer.

A second example involves the relationship between parents and children. While Dutch mothers can now pass on their nationality to their children at birth on the same basis as Dutch fathers, a foreign mother's marriage to a Dutchman no longer paves the way to the admittance of her children. Between 1982 and 2002, the policies regarding the admission of (step-)children as well as the rules regarding their naturalisation have been modified.

6 Margaret Chotkowski, Baby's kunnen we niet huisvesten, moeder en kind willen we niet scheiden. De rekrutering door Nederland van vrouwelijke arbeidskrachten uit Joegoslavië, 1966–1979, in: Tijdschrift voor Sociale Geschiedenis, 26. 2000, no. 1, pp. 76–100; Betty de Hart, Onbezonnen vrouwen. Gemengde relaties in het nationaliteitsrecht en het vreemdelingenrecht, Amsterdam 2003.

The net result has been that (step-)parents who, for whatever reason, have delayed applying for family reunification and who have, in the meantime, left their foreign (step-)children in the care of their family abroad, are assumed to no longer have a family bond with those children. Under present policies, children will only be admitted if they have been separated from their parent(s) for less than five years.[7] And since children can now only share in the naturalisation of a parent *after* they have been legally admitted to the Netherlands[8], even the naturalisation of a parent will not confer the right to enter the country legally to (step-)children who have been separated for more than five years from their parent(s).

A third example deals with income requirements that apply both with regard to the admittance of (marriage) partners, and to the admittance of children. Since 1 April 2004, no distinction is made any longer between married and unmarried couples but, at the same time, Dutch citizens can no longer be exempted from these requirements. Thus we see that not only the distinctions between men and women and between married and unmarried couples have disappeared, but also the privileges of Dutch citizens with foreign family members vis-à-vis newly admitted foreigners. The only significant remaining advantages enjoyed by Dutch citizens is that their (marriage) partners can apply for naturalisation after a shorter period of residence than other immigrants, and that objections related to public safety weigh less heavily against the admission of their (marriage) partners than against those of foreign immigrants.[9]

Diverging Family Norms

During the past few decades, feminist lawyers in the Netherlands have been lobbying – without success – to have visiting rights, custody and the right to shared parental authority explicitly linked to demonstrated day-to-day care. While formal equality between men and women has been reached in Dutch family law, substantive inequalities persist within Dutch society. Women still possess fewer positions of power than men, work less hours and earn less per hour. Feminist lawyers worry that, unless the substantive implications of

7 Tussentijds Bericht Vreemdelingencirculaire 2002/4. Exceptions can be made for children who would otherwise be left without sufficient care and for children who could not be located sooner due to extreme circumstances such as war.

8 Article 11 of the Dutch nationality law of 1985 stipulated that children follow in the naturalisation of their parents, depending however on certain conditions. An administrative circular of 31 March 1992 introduced as a general condition that the child must have been admitted to the Netherlands.

9 Betty de Hart, Onbezonnen Vrouwen. Gemengde Relaties in het Nationaliteitsrecht en het Vreemdelingenrecht, in: Nemesis, 3. 2003, pp. 54–62.

women's caring responsibilities are somehow accounted for in family law, the growing protection of family life against state interference will benefit fathers more than mothers.

The Dutch legislature, however, has ruled that proof of effective care should not be a criterion for entitlement to parental rights.[10] In this they have followed Dutch court decisions that making parental rights dependent on actual involvement in day-to-day care amounts to discrimination.[11] Consequently, divorced or separated fathers are entitled to parental rights irrespective of the amount of financial support that they provide for their children or the extent of their involvement in day-to-day care. Only under very exceptional circumstances will they be denied visiting rights or the right to shared parental authority.

While feminist lawyers have expressed their disappointment over these developments[12], mainstream human rights lawyers have been positive in their reactions. In their view, fathers and mothers are rightly being treated as mature adults, capable of making their own choices and decisions in the best interests of their children. »It is undesirable to impose stereotypes upon the parents […] Furthermore, a child's needs are not static but dynamic and disparate. In short, a legal response to the concern expressed by [feminist authors; S.v.W.] would necessarily involve an intensified regulation of custody, when what is needed, in the interests of being able to respond to the individual needs of each child, is greater de-regulation.«[13]

The prospect of policing the involvement of parents in the care of their children has, then, been rejected in Dutch family law. But as we saw above, in Dutch immigration law Dutch authorities are actually required to control the extent to which parents have been involved in the day-to-day care of their foreign (step-)children. What is more, since Dutch civil law was changed in 1994, anyone in the Netherlands wishing to marry a non-EU spouse must have his or her marriage motives screened by public officials ahead of time. That is to say, he or she must convince both immigration officials and the authorities charged with conducting civil law weddings that the marriage is motivated by affection, and not (solely) by the wish to provide the foreign spouse entry into the Netherlands. At the same time, however, in Dutch society in general, government investigation into the nature of a rela-

10 Kamerstukken II, 1996/97, 23 714, no. 11, p. 12. See also: Eric J. Nicolai, De Juridische Positie van de Niet-Verzorgende Ouder na Echtscheiding, in: Nederlands Juristen Blad (NJB), 15. 1998, pp. 695–699, here p. 696.

11 See for example: Hoge Raad 21 maart 1986, NJ 1986 585; 588.

12 See for instance: Carla van Wamelen, De eerbiediging van een zorgrelatie. De rol van zorg bij echtscheiding, in: Nemesis, 3. 1996, pp. 76–82.

13 Forder, Legal Establishment, p. 405.

tionship between cohabiting adults has become increasingly taboo. This has been particularly evident in the field of Dutch social security law.[14]

When it comes to the enjoyment of the freedoms protected by Article 8 of the European Convention, men may be more equal than women; single nationality Dutch families are definitely more equal than transnational ones.

Towards a More Ethnically[15] Motivated Mode of Exclusion

This normative discrepancy between Dutch family law and Dutch immigration law parallels the ideological distinction that is presently being drawn between Dutch ›autochthons‹ and ›non-western allochthons‹. The terms ›autochthon‹ and ›allochthon‹ were first introduced in the 1970s to distinguish between Dutch citizens of European origin and those (former) Dutch citizens who had, in the 1950s and 1960s, been repatriated from the former Dutch colony of the Dutch East Indies, now Indonesia.[16] Later, the term ›allochthon‹ was also used to refer to foreign immigrants.

By the early 1980s, however, this term was replaced by the term ›ethnic minorities‹, which fitted better in the then dominant ideology of a multicultural society in which the relative social disadvantage of certain ethnic groups was primarily attributed to economic rather than to cultural factors. But by the early 1990s, culture once more came to be viewed as a possible significant cause of social disadvantage. The focus of integration policies now shifted away from disadvantaged ethnic groups to those individuals of foreign origin who might lack the necessary skills and moral qualities required to succeed in an increasingly competitive, market-oriented society. The terminology of ›allochthons‹ and ›autochthons‹ was re-introduced.[17]

14 See for example: Wilhelmus Bouwens, Het gezin in de sociale zekerheid, in: RM Themis, 4. 1997, pp. 155–164; and Mies Westerveld, Comment on Centrale Raad van Beroep 3 oktober 2000, in: Nemesis, 5. 2001, pp. 29–32.

15 I use the term ›ethnicity‹ in the same sense as Anthias. That is to say, I perceive ethnicity as an identity which, within a specific historical context, is attributed to a specific group of people, or which that group attributes to itself. What characterises an ethnic group is not the fact that all its members take part in a specific culture, but that they are all assumed to share a common origin. Cf. Floya Anthias, Ethnicity, Class, Gender and Migration. Greek-Cypriots in Britain, Hants 1992, pp. 11–32.

16 Hilda Verwey-Jonker (ed.), Allochtonen in Nederland. Beschouwingen over de gerepatrieerden, Ambonezen, Surinamers, Antillianen, buitenlandse werknemers, Chinezen, vluchtelingen, buitenlandse studenten in onze samenleving, The Hague 1971.

17 Presently, in official documents the term ›allochtoon‹ refers to people who reside in the Netherlands but who were born outside of the Netherlands, or who were born in the Netherlands but who have one or more parent born outside of the Netherlands. The term ›autochtoon‹ refers to people born inside or outside of the Netherlands, of

At the same time the Dutch government's attitude towards immigration was also shifting. Immigration as such was no longer considered as problematic. Only certain forms of immigration needed to be restricted, namely those involving foreigners who were unlikely to adapt easily to Dutch society.[18] In line with this reasoning, it has become common practice to distinguish between ›western allochthons‹, such as EU-citizens, who are assumed to be able to adjust easily to Dutch society, and ›non-western allochthons‹, typically originating from Third-World countries, who are assumed not to adapt easily.[19]

This attitude is not limited to policy papers. It is also reflected in public discussions regarding cultural differences in the Netherlands, immigration and integration policies. What is striking is that, in the context of this debate, Dutch culture in particular and ›western culture‹ in general are seen to be exemplified by the liberal and secular norms that currently shape Dutch family law: universal human rights, equal treatment of men and women and individual freedom. In contrast to these norms, the cultural norms of non-western immigrants, and of Islamic immigrants in particular, are perceived, again according to a selective caricature, to be religiously inspired, patriarchal, and with no place for the emancipated woman, representative of modern western liberalism. Frequently cited examples of deviant non-western norms are: arranged marriages, codes of shame and honour, double standards regarding the sexuality of men and women, an overly lenient attitude towards the upbringing of young boys and an overly restrictive attitude towards the upbringing of young girls.[20] These assumed ethnic differences, and the desire to prevent ethnic deviance, can serve to legitimate the policing of family relations in the context of immigration law.

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parents who were both born in the Netherlands; cf. Silvia Dominguez Martinez et al., Integratiemonitor 2002, Rotterdam 2002, p. 9.

18 See for example the policy paper: Integratie in de context van immigratie, Kamerstukken II, 2001/02, 28 198, no. 2. This shift in thinking was also evident in the earlier policy paper: Nota integratiebeleid etnische minderheden of 1994, Kamerstukken II, 1993/94, 23 684, no. 2. For a discussion of this document see: Sarah van Walsum, De schaduw van de grens. Het Nederlandse vreemdelingenrecht en de sociale zekerheid van Javaanse Surinamers, Deventer 2000, pp. 114–117.

19 An explicit distinction is made between western and non-western allochthons in a recent publication issued by the Dutch national Bureau of Statistics (CBS), Allochtonen in Nederland, Voorburg 2001.

20 See for example: Sawitri Saharso, Over de grens. Zwarte, migranten- en vluchtelingenvrouwen in het debat over multiculturaliteit, in: Rikki Holtmaat (ed.), Een Verdrag voor alle Vrouwen. Verkenningen van de betekenis van het VN-Vrouwenverdrag voor de multiculturele samenleving, The Hague 2002, pp. 41–56; Renée Römkens, Over cultuurbarbarij gesproken. Geweld tegen vrouwen en het debat over multiculturaliteit, in: Rikki Holtmaat (ed.), Een verdrag voor alle vrouwen, pp. 29–40.

Concern for Ethnic Cohesion Versus Concern for Family Life

While family migration law used to delineate the nation along the lines of gender and legal family bonds, present distinctions run along the lines of ethnicity and family relations defined as much in cultural as in legal terms: in addition to a marriage certificate, one must provide proof of romantic affection; in addition to a child's birth certificate, one must provide proof of direct involvement in day-to-day care.

Where the concern to protect the integrity of the male-headed family previously led to a line being drawn *between* transnational families – leading to the inclusion of those transnational families that were headed by a Dutch male and the exclusion of those that were not – the present concern to protect the integrity of the Dutch ethnic identity has led to a line being drawn *through* transnational families – leading to the inclusion of those foreign family members who are viewed as ethnically similar to the ›autochthonous‹ Dutch, and the exclusion of those who are not.

Significantly, other aspects of Dutch immigration law also target foreign family members of non-western origin more emphatically than those of western origin. Visa requirements, for example, are on the whole stricter for family members originating from Africa, Asia or South America than for those originating from Europe, North America or Australia. Also, increasingly strict income requirements indirectly discriminate against family migrants from Third-World countries. As it turns out, those people living in the Netherlands who have family members in, or originating from, non-western nations are mostly ›autochthonous‹ Dutch women or ›non-western allochthonous‹ men and women.[21] On the whole, these groups will have more difficulties meeting strict income requirements than ›autochthonous‹ Dutch men because they earn less and are less likely to have permanent employment. Autochthonous Dutch men for their part, who on the whole have the best job security and earn the highest salaries and hence can most easily meet strict income requirements, generally have foreign family members in, or originating from, western nations.[22]

In this light, it is also interesting to note that proposals have been made to restrict the admittance of children older than 12 years of age who are considered unlikely to integrate successfully into Dutch society. Similarly, plans to limit the admission of foreign partners are also being motivated in terms of

21 Carel Harmsen, Cross-cultural Marriages, in: Maandstatistiek van de bevolking, 47. 2001, no. 12, pp. 17–20.

22 Saskia Keuzenkamp/Ko Oudhof, Emancipatiemonitor 2000, The Hague 2000, chapter 4; and Jacobus Dagevos, Rapportage Minderheden 2001. Deel II: Meer werk, The Hague 2001, p. 57.

›integration risks‹.[23] The most far-reaching proposal so far has been to require foreign family members to pass language exams in their country of origin, before allowing them to enter the Netherlands on the basis of family reunification and to require them to pass a citizenship exam before they can receive a definite status.[24]

A number of recent judgements by the European Court of Human Rights pose interesting challenges to this new ethnic mode of distinction. In these decisions, the European Court has integrated family norms previously explicated in family law decisions into decisions regarding family reunification. Particularly the notion that states must allow parents and children the freedom to enjoy each other's company has been emphasised.[25] Moreover, this recent jurisprudence stresses the need to respect the right of both married and unmarried couples to be able to continue to cohabit, even when issues of immigration and/or public order are at stake.[26] In the eyes of the European Court, certain core-rights protected by Article 8 of the European Convention of Human Rights are not ethnically determined, but apply universally and must be respected, even when immigration control is at issue.[27] Thus restrictive family migration policies, and the assumed ethnic differences that they are based on, can be limited by international human rights law and its underlying assumption of universalism.

Reconciling Emancipation with Exclusion: an Exercise in Contradiction

While men and women have acquired at least formal equality within Dutch family law, and while national and international courts have explicated a space of freedom from state involvement within family relations, the developments within immigration law have been less emancipatory. Although formal equality has been reached between men and women, this has been achieved through levelling down or reducing the security of Dutch men with foreign family members rather than increasing that of Dutch women. In the process, most of the privileges that (male) Dutch citizens previously enjoyed

23 Strategisch akkoord Balkenende I, 26.06.2002. Similar arguments have also been put forward in the recently published Directive of the European Council on the Right to Family Reunification, Official Journal of the European Union, 3.10.2003.

24 Miljoenennota, The Hague 2003, chapter 3.7: Immigratie en Integratie.

25 ECHR 11 July 2000, Ciliz vs. The Netherlands, RV 2000/20; ECHR 21 December 2001, Sen vs. the Netherlands, RV 2001/24.

26 ECHR 2 August 2001, Boultif vs. Switserland, JV 2001/254.

27 Sarah van Walsum, Artikel 8 EVRM als toetsingskader voor het Nederlandse vreemdelingenrecht, in: Frank van Ommeren/Sjoerd Zijlstra (eds.), De rechtsstaat als toetsingskader, The Hague 2003, pp. 159–172.

vis-à-vis newly arrived immigrants when it came to establishing family life in the Netherlands have been eliminated. Moreover, as the principle of protecting family unity has become less prominent, the scope for state interference in transnational family relations has increased, involving the policing of the relationship between (marriage) partners, and between parents and children. The former concern for the integrity of a family headed by a Dutch male has given way to a present concern for the ethnic integrity of the Dutch nation. As the explicitly differentiating role of gender has lessened, the differentiating role of ethnically labelled skills and norms has become more pronounced.

Indirectly, however, gendered family norms do continue to play a role. Not only do the substantive positions of men and women in Dutch society continue to differ. Ethnic differences are actually being drawn along lines defined by perceived differences in gendered family norms. Dutch ethnic identity is seen to be exemplified by equality between the sexes and a high level of freedom for men and women in determining how to fulfil their mutual commitments and their responsibilities towards their children. By contrast, non-western immigrants are assumed to still adhere to traditional, religiously determined patriarchal family norms, providing little space for individual responsibility.

As the Dutch government becomes more explicit in naming the defence of national cultural identity as one of the main goals for immigration policy, it also raises more barriers against establishing family units in the Netherlands with (marriage) partners or children originating from non-western countries. Recent international jurisprudence indicates, however, that these barriers raise serious questions in the sphere of universal human rights. The irony is that the normative identity that Dutch family migration policies are meant to defend is exemplified by the very freedoms that those policies threaten to undermine.

Holger Kolb

Covert Doors: German Immigration Policy between Pragmatic Policy-Making and Symbolic Representation

The ›Green Card‹ has been the latest chapter of German immigration policy. On July 31, 2003 the ›decree on work permits for highly qualified foreign information and communication (ICT) technology specialists (IT-ArGV)‹, commonly called ›Green Card‹, was supposed to expire. A few days earlier, however, the government extended the validity of this scheme until December 31, 2004.[1] In the public as well as in the media, the ›Green Card‹ is often regarded as an important contribution to get down to the nitty-gritty and to establish a more objective discussion.[2] Slogans like »Kinder statt Inder« (»children instead of Indians«) and »mehr Ausbildung statt mehr Einwanderung« (»more training instead of more immigration«) used by Jürgen Rüttgers, the CDU gubernatorial candidate of Northrhine-Westphalia, were intended to improve the party's showing in the May 2003 election in North Rhine-Westphalia. The conservative front-runner Rüttgers tried to rely on a general repeating mode of reciprocal action between party competition and policy on foreigners in the election campaign for the diet election in North Rhine-Westphalia. In contrast to a similar campaign, which was successfully applied in Hesse one year earlier, this one failed.

Therefore many commentators of German immigration policy regard the ›Green Card‹ as an indicative of a paradigmatic shift in German immigration policy. For the first time, xenophobic elements in an election campaign proved unsuccessful. This article intends to carry out a more comprehensive analysis of the ›Green Card‹ itself, as well as of its function within the context of German immigration policy. First, the substantive output of the ›Green Card‹ has to be analysed. Empirical analysis shows that the new recruitment scheme of the ›Green Card‹ is outnumbered by other possible ways of mobility which have barely been featured in public and scientific discussions,

1 Art. 1 of the first decree to amend the decree on work permits for highly qualified foreign information and communications technology specialists, 16 July 2003. Bundesgesetzblatt (BGBl.) I, 2003, p. 1471.

2 For example Heribert Prantl, in: Süddeutsche Zeitung, 30 July 2001, p. 4.

namely the company-internal labour markets of multi-national corporations. Second, an analysis of the legal design and implementation procedure of intra-company cross-border mobility proves to be interesting for the classification of the ›Green Card‹ within the context of German immigration policy.

Three Years ›Green Card‹ in Germany – Much Ado about Nothing?

The comparatively small number of recruited ICT specialists is often cited as the most important result of the ›Green Card‹ measure and thus interpreted as evidence for the poor performance of Germany in the world-wide »war for talents«.[3] Until the end of July 2003 only 14,876 work permits had been issued on the basis of the IT-ArGV. The former maximum quota of 20,000 permits as well as the much higher estimations by business associations[4] concerning the shortage of experts have not been reached. Another conspicuous statistical trend, however, has been neglected almost completely in scientific and public discourse. Data differentiated according to company size show that the IT-ArGV has mainly been used by small and medium-sized enterprises (SME). Companies with more than 500 employees have made use of only 25 per cent of the ›Green Card‹ permits. This is even more surprising considering that the 20 biggest companies of the ICT sector generate about 70 per cent of its business volume.[5] A more detailed data analysis demonstrates that the IT-ArGV is mainly used by SME. Although multinational corporations (MNC) are gaining an increasing market share in the ICT sector, enterprises of this size make only limited use of this recruitment scheme.[6] This preliminary data analysis shows that significantly sized companies do not have to rely on the recruitment scheme, although, like their competitors

3 Title of a study by the consulting firm McKinsey from 1996. Cf. Martina Fromhold-Eisebith, Internationale Migration Hochqualifizierter und technologieorientierte Regionalentwicklung. Fördereffekte interregionaler Migrationssysteme auf Industrie- und Entwicklungsländer aus wirtschaftsgeographischer Perspektive, in: IMIS-Beiträge, 2002, no. 19, pp. 21–41; Ralph Greifenstein, Die Green Card: Ambitionen, Fakten und Zukunftsaussichten des deutschen Modellversuchs, Bonn 2001, pp. 33, 38; Johann Welsch, Wachstums- und Beschäftigungsmotor IT-Branche Fachkräftemangel, Green Card und Beschäftigungspotenziale, Bonn 2001, p. 71.

4 The Institute of the German Economy (IW) estimated that 50,000 to 75,000 vacancies had to be filled in the short term. Cf. Helmut E. Klein, Informationswirtschaft: Green Card als erste Hilfe, in: IW-Kontakt, 2. 2000, p. 1.

5 Statistical data from BITKOM (http://www.bitkom.org).

6 Cf. Holger Kolb, Einwanderung und Einwanderungspolitik am Beispiel der deutschen ›Green Card‹, Osnabrück 2002, p. 73; idem/Uwe Hunger, Von staatlicher Ausländerbeschäftigungspolitik zu internationalen Personalwertschöpfungsketten?, in: WSI-Mitteilungen, 4. 2003, pp. 251–256, here p. 254.

among the SME, they are obliged to find ways of efficiently allocating human resources. At first glance this discrepancy is confusing. In early research projects on the ›Green Card‹ the contradiction between the market importance of MNC and their usage of the IT-ArGV could not be solved. In the final report of their research project, Rolf Jordan and Klaus Geiger state a need for further research and for clarification as to why especially MNC have scarcely used the ›Green Card‹ and which alternative routes and channels of recruitment could be available to companies of that size.[7] This article takes up this task.

Intra-Company Labour Markets as a Central Tool for In-Firm Personnel Policy

The key to the answer is the growing importance of internal, cross-border labour markets within individual companies. Their significance as an institutional channel for the allocation of human resources has been discussed in British literature on highly skilled migration for quite a long time.[8] Thus, multinational corporations which operate production plants and administration facilities in most countries of the world constitute intra-company cross-border labour markets. These labour markets are more important for the allocation of human resources in multinational corporations than the IT-ArGV. ICT companies in Germany that possess the structural preconditions for internal allocation do not use the ›Green Card‹ as a politically institutionalised channel for recruiting labour power. Rather, international migration in the ICT sector seems to be dominated by migration on the basis of intra-company labour markets. This kind of mobility fulfils the need for a task-driven, flexible use of staff resources within these organisations. To underline the importance of intra-company mobility it is necessary to compare the two recruitment schemes available to MNC (see table): the IT-ArGV, on the one hand, and intra-company schemes, on the other hand. This will also contribute to answering the question posed by Geiger and Jordan. With the exception of the first months of the year 2000[9], a significant and continuous shift from the

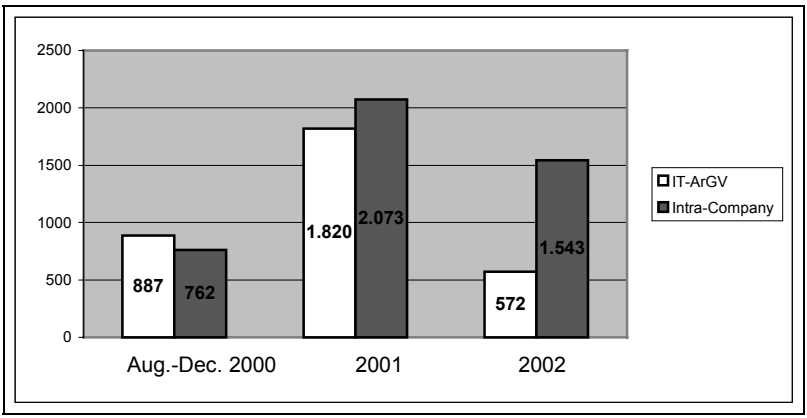
7 Ralf Jordan/Klaus F. Geiger, Hochqualifizierte Arbeitsmigranten in Deutschland. Zur Entwicklung des ›Green Card‹-Verfahrens in der Bundesrepublik (Universität/GH Kassel, Fachbereich 05/Gesellschaftswissenschaften, Working Paper, 12. 2002), p. 27.

8 Cf. among others John Salt, High Level Manpower Movements in Northwest Europe and the Role of Careers: An Explanatory Framework, in: International Migration Review, 4. 1983, pp. 633–652; Allan M. Findlay, New Technology, High-Level Labour Movements and the Concept of the Brain Drain, in: The Changing Course of International Migration, Paris (OECD) 1993, pp. 149–159.

9 The IT-ArGV was set up on August 1, 2000. Therefore only these months are taken into consideration for the comparison between the two schemes.

external recruitment instrument IT-ArGV to internal labour market allocation schemes becomes apparent.[10] As a first result it should be pointed out that multinational corporations – the most important enterprise size in the sector – have not relied on the newly created recruitment scheme ›Green Card‹. Enterprises of this size dispose of intra-company, cross-border schemes.[11] The overwhelming support for the introduction of the new recruitment scheme as the declared reaction to the labour market needs of a growing industry was driven by symbolic politics[12] rather than by empirically based economic needs of the new industries.

Table: Comparison of Recruitment Possibilities in the ICT Sector



Source: Zentralstelle für Arbeitsvermittlung (ZAV), Bundesanstalt für Arbeit (BA), own calculations.

10 Due to the statistical methods of the Federal Labour Office statistical distortion may be possible in that the number of IT-ArGV approvals granted to MNC is higher than in reality. It is questionable whether companies with little more than 500 employees have already established company-internal labour markets. For the set-up of these labour markets only companies with much more than 500 employees can be considered. So a significant part of the ›Green Card‹ approvals has not been granted to MNC, but to companies without sufficient intra-company labour markets. This possible statistical distortion, however, only adds to the effect. The statistical evidence is thus not weakened.

11 The IT-ArGV, however, proves to be the only recruitment scheme for companies that have not yet set up intra-company labour markets. Thus, enterprises of these sizes use the IT-ArGV disproportionately to their market importance.

12 Especially the label ›Green Card‹ indicates the rather symbolic character of the scheme. The American eponym ›Green Card‹ provides a unlimited work and residence permit including the possibility to naturalise. The German ›Green Card‹ is designed similar to the American H-1B-Visa.

The Legal Design of Intra-Company Personnel Transfers: the Abolishment of the Labour Market Test

The preceding chapter demonstrated that company-internal recruitment schemes in the German ICT sector are more important for MNC than the external recruitment scheme IT-ArGV. According to this, the legal design of these measures should be examined in the next chapter. Indications for the actual meaning of the ›Green Card‹ are to be found in the context of German immigration policy.

Following the onset of the oil crisis at the beginning of the 1970s and the resulting recession, a recruitment ban was implemented in 1973 to stop further immigration of workers. This recruitment ban is still in force today. Thus, work permits generally cannot be granted to non-EU-foreigners. Article 10 paragraph 2 of the Foreigners Act (*Ausländergesetz*, AuslG), however, authorises the federal ministry of the interior to adopt legal ordinances – with the consent of the second chamber, the *Bundesrat* – regulating and restricting the conditions under which foreigners are allowed to take up paid employment in exceptional cases. Therefore, on the basis of the ordinance governing stays for employment purposes (*Arbeitsaufenthalteverordnung*, AAV)[13], work permits can be granted in spite of the existing recruitment ban.[14] In this context, the ordinance on exceptional regulations concerning exceptions from the recruitment ban (*Anwerbestopp-Ausnahmeverordnung*, ASAV) and one part of an already existing Article of the ordinance on the granting of work permits (*Arbeitsgenehmigungsverordnung*, ArGV) gain special relevance. The relatively unknown amendments of Article 4 paragraphs 7 and 8 ASAV and no. 2 of Article 9 ArGV enable transnational corporations to use their cross-border internal labour markets as an allocation tool for highly skilled labour. Article 4 paragraph 7 ASAV arranges the grant of work permits for up to two years to employees of internationally operating companies if the employment is based on international intra-corporate staff exchange. Article 4 paragraph 8 ASAV extends the maximum period of stay for employees of internationally operating companies to up to three years if the employment is indispensable for the planning and realisation of projects abroad. Article 9 no. 2 ArGV enables executive staff of internationally operating companies to take up work in Germany without a work permit for a maximum period of 5 years.[15] These regulations create a fast and unbureaucratic path of cross-border, intra-company labour allocation. When looking at the situation more closely, it

13 BGBl. 1990 I, 2994.

14 Günter Renner, Ausländerrecht, Munich 1999; Art. 10 AuslG, Rn. 10, p. 22.

15 For more details see Bundesanstalt für Arbeit, Arbeitsgenehmigung für neu einreisende ausländische Arbeitnehmer, Nuremberg 2001, pp. 24–26, 40.

becomes evident that company-internal mobility schemes are legally privileged compared to other exceptions regulated by the ASAV. Article 4 paragraphs 7 and 8 ASAV are exempt from the otherwise obligatory labour market test[16] meant to guarantee the priority of Germans on the labour market *(Inländerprimat)*. Article 9 no. 2 ArGV generally nullifies the obligation to obtain a work permit. Thus, intra-company mobility is exempt from the recruitment ban altogether, even if the sending unit of the company is located in a non-EU foreign country. For multinational corporations with intra-company, cross-border labour markets, the possibilities of the ASAV and the ArGV open up an alternative to external recruitment. These enterprises therefore rely on intra-company mobility schemes rather than on the ›Green Card‹.

Despite the assumed paradigmatic change in German immigration policy that was suggested by heated debates about the ›Green Card‹ and highly skilled migration in general, there already exists a pragmatic and flexible recruitment instrument for multinational corporations, which, however, has been almost completely ignored in public and academic discussion. The existence of ›covert doors‹[17] into Germany provides indications for the interpretation of the importance of the German ›Green Card‹. This point will be discussed later.

In addition to the low publicity of intra-company mobility schemes, further conclusions concerning the administrative handling of German labour migration policy can be drawn from the implementation procedure of these instruments. Article 4 paragraphs 7 and 8 ASAV and Article 9 no. 2 ArGV have only been added to the already existing decrees ASAV and ArGV on September 17, 1998 – 10 days before the *Bundestag* elections – and are among the last official acts of the minister of labour Blüm (CDU). A remarkable irregularity, however, is the lack of implementation of this amendment to the ASAV in the AAV. Usually, every regulation concerning work permits necessitates an equivalent in the legally superior right of residence.[18] However, there has been no adjustment of the law of residence in order to allow for the amendments to the labour law. Thus, the *Bundesrat*, which only has a say in matters of residence law, could be bypassed. The institutions responsible for the creation of these ›covert doors‹ were the bureaucracy of the ministry of labour in its function as a policy maker as well as the federal office of labour as the relevant implementation authority.

16 Ibid., p. 35.

17 Virginie Guiraudon speaks of »gilded doors«. Cf. Virginie Guiraudon, Policy Change behind Gilded Doors. Explaining the Evolution of Aliens' Rights in Contemporary Western Europe (1974–1994), Cambridge, MA 1997.

18 Cf. Carola Lammers, § 10 AuslG. Aufenthaltserlaubnis zur Arbeitsaufnahme, in: Verwaltungsblätter für Baden-Württemberg, 1995, no. 4, pp. 129–134, here p. 130.

Looking Backstage – ›Green Card‹ Immigration Policy in a ›Non-Immigration‹ Country

The silently created opportunities for international personnel transfers via ASAV and ArGV and their unagitated implementation through administration procedures far removed from party politics both point to the mechanisms of German immigration policy. The metaphor of a stage helps to reconstruct German immigration policy between the two poles of »appellative denial« and »pragmatic integration«.[19] On this stage the famous play ›Germany is not an immigration country‹ has been performed for decades. Keeping with this metaphor, the ›Green Card‹ can be understood as the most recent staging of this play. The practically oriented administrative bodies have been prepared for pragmatic solutions for a long time and have integrated immigration policy and labour migration issues in corporate structures without attracting political or public attention. The heated debate about the new ›Green Card‹ on the main stage of the play ›Germany is not an immigration country‹ proves to be a rather symbolic measure to present feigned political alternatives.[20] From a material perspective the regulations created and implemented backstage and the pragmatic administrative implementation by the German Federal Labour Office for job placement are more important. These solutions, which are unspectacular in comparison with the ›Green Card‹, have been developed by the bureaucracy and are barely known in the public arena. They aim at fulfilling the needs of political pragmatism that is being obstructed by political programmatic discourses. New problems have been solved by an adjustment of existing structures and by the maintenance of existing organisational routines on a bureaucratic level.[21] Immigration policy has been gradually integrated into routine tasks. This is why labour migration policy as a *pars pro toto* as well as immigration policy in general take place outside of political market cycles. The concrete problem of a non-existing legal opportunity providing a quick and unbureaucratic way to transfer employees of multi-national corporations from one country to

19 Klaus J. Bade/Michael Bommes, Migration und politische Kultur im ›Nicht-Einwanderungsland‹, in: Klaus J. Bade/Rainer Münz (eds.), Migrationsreport 2000. Fakten – Analysen – Perspektiven, Frankfurt a.M./New York 2000, pp. 163–204.

20 Cf. ibid., p. 175. Modes of symbolic action meant to demonstrate the capacity to act and make decisions, but being of limited consequence can be observed in many case studies in German immigration policy. A role model of this discrepancy was the law to promote the return of foreigners of the newly elected CDU-CSU/FDP-government in 1983. Except for windfall gains, the substantial output of this law was nearly undiscernible. Cf. Klaus J. Bade, Ausländer – Aussiedler – Asyl, Munich 1994, pp. 58ff.

21 Cf. Bade/Bommes, Migration und politische Kultur, p. 171.

another and to optimise the allocation of operational human resources[22] was solved on the basis of the described pattern. Beyond party politics and discussions about Germany being an immigration country or not, solutions were found shortly before an important election and without awakening public awareness. This was done by adjusting the legal (ASAV/ArGV) as well as the organisational and administrative infrastructure (Zentralstelle für Arbeitsvermittlung, ZAV).

It has become evident that as far as labour migration is concerned, Germany as a »non-declared immigration country«[23] behaves similar to other »declared« immigration countries.[24] Symbolic productions like the ›Green Card‹ reveal the different modes of policy presentation, as opposed to its production. Policy-making is rather loosely associated with policy presentation. The bureaucracy of the Federal ministry of labour acts independently of political symbolic debates and integrates labour migration in standardised administrative procedures hidden from public attention. The ›Green Card‹ is only the latest example of these ›symbolic policy presentations‹ in the German immigration policy.

22 Before the implementation of the regulations for intra-company transfers, multinational corporations only could make use of Art. 5 no. 2 ASAV. This regulation requires not only a labour market test, but also the proof of a »public interest«. Therefore this procedure usually takes about three months.

23 Dietrich Thränhardt, Germany – An Undeclared Immigration Country, in: idem (ed.), Europe. A New Immigration Continent. Policies and Politics in Comparative Perspective, Münster 1992, pp. 167–194.

24 The abolishment of the labour market test is a frequently used procedure to boost admission procedures for highly skilled migrants in many European countries. For a compilation of the measures of the most important OECD countries cf. Gail McLaughlan/John Salt, Migration Policies Towards Highly Skilled Foreign Workers, Report for the Home Office, London 2002.

Tessel de Lange

Tripartite Agreements on Labour Migration. The Case of the Health-Care Sector in the Netherlands

In 2002 the Dutch Employment Organisation granted only 442 work permits for migrant workers in the health-care sector, mainly for nurses.[1] This low number does not lead one to expect that the arrival of these migrant workers would cause a lot of commotion. Yet their arrival caused a lively debate in the Dutch media and parliament. The temporary admission of health-care workers to the Dutch labour market is regulated by a tripartite agreement between the government, unions and employers, the CAZ *(Convenant Arbeidsvoorziening Zorgsector)*. The Dutch government intends to use *convenants* more frequently in the future as an instrument to manage migration. Thus, private actors may be involved more often in managing migration.

This article will briefly explain the *convenant* in Dutch law and the pro's and con's of the instrument that have been identified in legal studies on *convenants*. It will then discuss the use of tripartite agreements in managing migration and finally describe the process leading to the signing of the CAZ in 2000 and its application. What can be learned from the information currently available on the CAZ for the future use of the *convenant* as an instrument to manage migration?

The *Convenant* in Dutch Law

Since the 1980s *convenants* made between the government and private actors, such as unions and employers, have become frequent in the Netherlands. *Convenants* are for instance used in environmental law, labour law and in the field of education. Those in favour of *convenants* argue that private actors will feel more inclined to comply with the result of their own negotiations than

1 This includes contract extensions. In 1999, 106 work permits where issued for nurses, 123 in 2000 and 329 in 2001, all figures probably include contract extensions. Source: Annual Reports on the Wet arbeid vreemdelingen (WAV) of the Dutch labour authorities for those years.

with a law imposed on them without their direct involvement in preparing such a law.[2] That is one reason for governments to encourage private actors to participate in *convenants*. It is generally accepted that private actors are not likely to agree with a *convenant* if they do not somehow benefit from it. However, *convenants* have also been criticised on the matter of the legal position of third parties. It has been argued that the government should take third parties' interests into account during *convenant* negotiations, or should enable them to present their point of view. But it may be difficult for the government's negotiators to set aside their own objectives if they run counter to third parties' interests. Other criticism relates to the limits of what can be agreed upon in a *convenant*. Its clauses may not conflict with a law or other rules of higher ranking. Also, it is often uncertain what happens if a party to a *convenant* does not comply with it. That raises the question whether *convenants* are legally binding or just ›gentlemen's‹ agreements. These issues will be addressed when describing the use of the CAZ in practice.

Tripartite Agreements for Managing Migration

By the end of the 1980s, the *convenant*, as a tripartite agreement between the Dutch Employment Organisation, unions and employers, had made its way into managing temporary labour migration. Lahav describes similar arrangements in Germany and the United States, mostly involving seasonal workers.[3] Reference can also be made to the Seasonal Agricultural Workers' Scheme (SAWS) which is operative in the United Kingdom. This scheme enables migrant workers to be recruited by SAWS operators, who are private actors that recruit workers for their own farms or on behalf of other farmers. The scheme is governed by a ›Code of Practice‹ between the Home Office and the operators. Another example involving private actors can be found in the construction business in the Canadian province of Ontario. Citizenship and Immigration Canada (CIC), Human Resources Development Canada (HRDC) and the Greater Toronto Home Builders' Association entered into a Memorandum of Understanding covering the temporary employment of 500 migrant workers in shortage occupations.[4]

2 Hendrik Jan de Ru, Convenanten tussen overheid en maatschappelijke organisaties, behoefte en rechtvaardiging, in: idem/Frank Julius van Ommeren (eds.), Convenanten tussen overheid en maatschappelijke organisaties, The Hague 1993, pp. 1–28.

3 Gallya Lahav, Immigration and the State. The Devolution and Privatisation of Immigration Control in the EU, in: Journal of Ethnic and Migration Studies, 24. 1998, no. 4, pp. 675–694, here p. 687.

4 Tessel de Lange/Stijn Verbeek et al., Arbeidsimmigratie naar Nederland, The Hague 2003.

As Lahav points out, »the rationale of these types of programmes, involving mostly seasonal workers, is to increase control through organisation and diffuse benefits.«[5] She lists the benefits for all involved. Migrants benefit because they receive the opportunity to obtain skills and earn money. The states from which these migrants come benefit from remittances and a more highly skilled work force. According to Lahav the receiving state reduces illegal migration, the costs of border control and legal procedures for possible deportation and can also benefit from the taxes and social welfare contributions of the migrant workers. Finally, the employers benefit in the cases described by Lahav because of lower wages and the fact that there is no risk of heavy fines imposed for employing illegal migrants. As will be shown in the following passage, Lahav's presentation of the benefits of this kind of programmes does not fully apply to the Dutch tripartite agreement in the health-care sector.

The Dutch Health-Care *Convenant* (CAZ)

In 1999 a court ruling was given for a health-care institution that had applied for a work permit for a South African nurse. The court held that, as there was evidently a shortage of nursing staff on the Dutch labour market and the institution complied with all legal requirements for such a permit, the employment authorities had to grant the requested permanent work permit.[6]

The legal requirements cited by the court are specified in the Dutch act on the employment of immigrants, the WAV *(Wet arbeid vreemdelingen).* Under the WAV the employer must obtain a work permit before the migrant worker can take on his job in the Netherlands. If the employer has no work permit, sanctions can be imposed against the employer. When applying for the work permit the employer must prove that (1) a vacancy was reported to the employment authorities at least five weeks before the application and (2) he has conducted a recruitment search for an employee on the local and on the European Economic Area (EEA) labour market. If this search does not produce any results a work permit will be granted. The maximum duration of the work permit is three years. After three years of legal residence as an employee the migrant worker can be employed without the requirement of a work permit.

Facing increasing labour market shortages in the health-care sector, the Dutch employment authorities, employers and unions entered into negotiations to deal with the labour shortages in a more structural way. Foreign

5 Lahav, Immigration and the State, p. 687.

6 Rechtbank Den Haag zittingsplaats Haarlem 2 July 1999, Rechtspraak Vreemdelingenrecht 1999, no. 72.

health-care workers would be admitted temporarily in anticipation of the availability of newly trained, qualified Dutch workers. In May 2000 the negotiations resulted in a tripartite agreement on the recruitment and admission of non-EEA nurses, the CAZ.[7]

The preambles of the CAZ refer to the shortage on the Dutch labour market in the health-care sector, as the court had done in its decision. It could be expected that the employer organisations, backed by a clear court decision and evident shortages, would have negotiated a more liberal policy on admission than under the existing WAV. However, this was not the case. The government had wanted – in order to prevent ›brain drain‹ from the sending countries – nurses not to be recruited from countries having a shortage of nurses. However, the WAV does not provide for such a restriction. The government had also wanted the nurses to be admitted for a maximum period of two years. A rotation system was introduced under which the nurses would have to leave the Netherlands for at least one year before being eligible for a second term of two years, thus never getting free access to the Dutch labour market and never being able to obtain a permanent residency status. The WAV only allows for such a rotation system in cases of clear abuse of the work-permit system. Furthermore, the CAZ provided no procedural benefits for employers: they still had to report the vacancies and conduct a recruitment search for at least five weeks prior to applying for the work permit. In addition to the legal requirements for obtaining a work permit under the WAV, employers agreed to provide language courses for the nurses before their arrival in the Netherlands. Employers also agreed to participate in sectoral training programmes for national employees. As a result, the CAZ did not liberalise the admission procedure for employers. On the contrary, it imposed more obligations. Moreover, the *convenant* denies migrant workers the right to a permanent residency status. One positive element for the employers and the unions, who represented the interests of national workers, was that they agreed on financial support from the government for projects initiated by health-care institutions to lessen the shortages on the national health-care labour market.

As pointed out above, according to Lahav's analysis of temporary programmes in the form of tripartite agreements, one of the benefits for the receiving state is to reduce illegal migration. Given the importance of health-care work it is unlikely that many foreign nurses were illegally employed. However, they were probably employed under different trainee schemes which were not intended for filling regular vacancies. The Dutch employment authorities have been aware of the abuse of these trainee schemes for many years, and the CAZ can be seen as a means of reducing this abuse. It

7 Staatscourant 2000 no. 141 and Staatscourant 2002 no. 19.

can be assumed that the Dutch government has been troubled by the court's decision that it could not reject permanent work permits for health-care workers because of the labour market situation. As the government aimed at a restrictive immigration policy, it needed an instrument to prevent ›masses‹ of health-care workers from coming in. Parliament feared more than 7,000 migrant nurses would have to be admitted. For the government, the benefit of the *convenant* is that it generally increases the commitment of employers to the norms of a restrictive immigration policy. As ensuring the temporariness of what is intended to be temporary labour migration is one of the most difficult aspects of the temporary schemes, it can be argued that the government assumes that employers will comply with the temporariness of migrant labour more willingly if they themselves have previously agreed on it.

The sending states were to benefit from the CAZ as the health-care workers were not to be recruited from sending states that faced shortages of health-care workers themselves, such as Surinam. The rotation system would have to benefit the sending states as well. As the migrant workers would not be able to obtain a permanent residency status in the Netherlands, they would eventually return to their home countries with better skills, the government claimed. However, the CAZ did not include any arrangements on remittances or payment of part of the salary upon the migrant's return to the sending state.

The migrant workers were not officially represented by a specific migrant organisation or by a representative from their country of origin. As future employees they were represented by the Dutch labour unions, or supposed to be represented by them. However, it has been argued that unions tend to represent the interests of national employees.[8] The migrant workers did benefit from the programme because it enabled them to work in the Netherlands. While the district court had decided that migrant health-care workers could be employed permanently given the sectoral labour market shortages, the CAZ only granted a temporary right to work in the Netherlands. One can conclude that the skilled migrant health-care workers would have been better off with just the WAV and that their right to a permanent status was violated by the CAZ negotiators. This may be different if migrant workers are recruited for low or unskilled labour, because work permits are rarely granted for that kind of work under the WAV.

What were the benefits for the employers in the health-care sector? It is doubtful that the recruitment of migrant health-care workers has enabled employers to deal with their staff shortages. In 2002 no more than 442 work permits were applied for, while at the beginning of that year over 15,000 va-

8 Judith Roosblad, Vakbonden en Immigranten in Nederland (1960–1997), Amsterdam 2002.

cancies in the health-care industries existed. As the number of illegal migrant workers in the health-care sector is expected to be low, fear of sanctions against the employers would not have been great. Most work-place controls are aimed at industries employing mainly unskilled (illegal) migrant workers. Also, no wage benefits were agreed upon. The migrant nurses had to receive the same salaries as national workers and equal taxes and social welfare contributions had to be paid. One reason for employers to enter into the CAZ could have been the financial consequences: additional financial aid from the government for training national workers. This financial aid may explain why the employers agreed to a more restrictive admission policy with no procedural benefits. Also, accepting these more restrictive rules may have had the advantage of certainty; had they awaited legislation from the government to restrict the influx of migrant health-care workers, no one would have known in advance what the rules would be like. The employers may have also overlooked the negative aspect of the rotation system, which was immediately criticised by lawyers.[9] The rotation system was criticised for being unpractical: the day an employer and foreign employee would want to continue their working relationship beyond the restricted time-frame, so is the argument, the government, possibly pressured by parliament, would accommodate the wishes of the employer and decide to let the migrant worker stay. Finally, lawyers criticised the CAZ as being in conflict with the WAV; no legal system allows the setting aside of statutory law by agreements or policy measures.[10] Either the negotiators representing employers were not aware of this aspect or they did not mind a more restrictive policy, especially on the extension of work permits, as this would only possibly become a problem in the future. The negotiators may have concentrated on securing their short-term benefits as long as financial aid was given and certainty existed on what the rules would be like. Further research on the *convenants* and the reasons for employers to agree to them may provide answers to these questions raised by the CAZ.

9 Kees Groenendijk/Robyn Barzilay, Verzwakking van de rechtspositie van toegelaten vreemdelingen (1990–2000), Utrecht 2001, pp. 43f. on the rotation system. A legal basis for the rotation system is provided for under the WAV, Art. 9 sub g, but can only be used when both employer and employee are abusing the WAV. See on the CAZ: Tessel de Lange, Buitenlandse werknemers, in: Arbeidsrecht, 10. 2001, pp. 3–13, here p. 4.

10 Eke Gerritsma, Weigering tewerkstellingsvergunning in verband met tekort verpleegkundigen in Suriname, in: Migrantenrecht, 6. 2002, p. 171.

The CAZ in Practice

In spite of the lawyers' criticism, the CAZ seemed to be accepted by all parties involved. Employers organised language courses for the migrant health-care workers and did not appeal the granting of non-extendable temporary work permits. However, during a review of the CAZ in 2002 it became clear that employers tended to feel obliged to comply with the CAZ, although they wondered if the clause on non-recruitment from certain countries to prevent ›brain drain‹ did not violate a migrant worker's right to leave his country (under section 12(2) of the International Convention on Civil and Political Rights). Employers also doubted that the temporariness of the employment was in compliance with the WAV.[11]

Even though employers had voiced these doubts, a first group of nurses from the Philippines ended their two-year term of employment in the Netherlands in December 2002. Their employers complained in the media that they could not keep their appreciated Philippine staff members and that the nurses had to leave the Netherlands. But they did not return to the Philippines as more highly skilled workers. According to press reports the nurses all got jobs in the UK, where foreign nurses are admitted without a labour market test being required for sectoral shortages, and where they can eventually obtain a permanent status.[12] The question is why the employers complained, but did not oppose the CAZ restrictions in court.[13]

Four out of five IT companies that have been interviewed stated that they never considered going to court in work-permit cases. They argued that they dealt frequently with the officials working for the employment authorities when in need of work permits. These companies wanted to maintain a good working relationship with the employment authorities. Court proceedings against the employment authorities were not regarded as desirable, even if employers knew they had a strong case. Employers would rather comply with the applicable requirements. The employers in the health-care sector may have felt the same way. This is also reflected by the CAZ review, in which employers made policy recommendations to the government, hoping the government would develop a less restrictive admission policy for health-care workers. Apparently the employers preferred making recommendations to pressuring the government in court proceedings.

11 Frits Tjadens/Hans Roerink, Arbeidsmigratie door verpleegkundigen naar Nederland, Utrecht 2002, pp. 13f.

12 De Lange/Verbeek et al., Arbeidsimmigratie.

13 Dan maar naar Engeland, in: Trouw, 14 December 2002.

The End of the CAZ?

However, as the Philippine nurses went to the UK, two health-care institutions invoked their rights under the WAV in court in the beginning of 2003. The first case concerned a Polish nurse who had been admitted to the Netherlands for one year under a temporary trainee scheme. After completion of that traineeship, the health-care institution obtained a work permit for her under the CAZ. When extension of this work permit was denied, the health-care institution took the employment authorities to court. The employer argued that the CAZ could not set aside the WAV, so that a permanent work permit should be granted. The employment authorities defended the CAZ and the rotation system as a part of the restrictive Dutch immigration policy. The employment authorities argued that the CAZ constituted applicable law as the unions and employer organisations had not urged the employment authorities to abolish the CAZ. The court held that the WAV could not be set aside by the *convenant*. If the WAV enables an employer to obtain a permanent work permit, and the employer has sufficiently demonstrated why he needs a migrant worker, a permanent work permit must be granted.[14] The employment authorities complied; the permanent work permit for the Polish nurse was granted. However, in a second court case, the district court in The Hague ruled that the CAZ, as it had been incorporated into the general policy of the employment authorities, was not in conflict with the general idea of the WAV, being, according to the court, a restrictive immigration policy.[15] This employer did not present his case in as much detail as the employer of the Polish nurse did. Neither judgement has been appealed.

The Haarlem court's decision that the CAZ could not set aside the WAV raises at least two interesting points on the use of tripartite agreements as instruments to manage migration. Firstly, the court implicitly plays an important role in defending the rights of unrepresented third parties, in this case the migrant worker. Secondly, attention has to be drawn to the employment authorities arguing (in short) that as long as unions or employers have not terminated the tripartite agreement, it can replace existing law. Whatever the merits of this line of argumentation, it reveals the legal character of a *convenant*: it is an agreement, and if one of the contracting parties wants to set an end to the agreement, it can do so. The CAZ does not provide for sanctions imposed on a party for terminating the agreement. There may be several reasons why employers have refrained from terminating the CAZ, such as fear

14 Voorzieningenrechter Rechtbank Den Haag zp. Haarlem 5 March 2003, AWB 03/1857, in: Jub 2003, p. 261.

15 Rechtbank Den Haag 24 March 2003, AWB 02/49786.

of losing sectoral subsidies and the desire to keep a good working relationship with the employment authorities. As a result the CAZ still stands.

Future Use of *Convenants*

The fact that the CAZ could have been, but was not, abolished as a result of the Haarlem court's decision, leads to a final and more general question: whether agreements between the government and employer organisations as an instrument of regulating temporary labour immigration have a future. The question becomes even more urgent now that the Dutch government intends to increase the use of *convenants*. For that purpose parliament has accepted a proposal to amend the WAV giving the *convenant* a legal basis.[16] The amendment of the WAV should result in allowing the employment authorities more discretion in refusing work permits to employers who do not comply with the requirements laid down in a *convenant*. This is probably the government's answer to court rulings such as the one given in Haarlem. Furthermore, the government convinced parliament that these *convenants* should be favoured over legislation as the *convenant* is a more flexible instrument to manage temporary migration in those sectors facing a temporary shortage of national workers. If the *convenants* include clauses on financial support for employers, employers and the unions can be expected to use this instrument for managing labour market shortages, and for that purpose, it may be a suitable instrument.

But is the *convenant* a fortunate choice as an instrument to manage migration from the migrant's perspective? The answer to this question would presumably be yes, if the *convenant* opens an opportunity for legal employment for migrant workers that would otherwise be employed illegally or not at all. If *convenants* create a more liberal migration programme, clauses ensuring that the migrant workers return home or at least will not be too inclined to stay in the Netherlands permanently may still be of benefit to migrant workers.

Employers may not have a problem with temporary employment at first, especially if the migrant workers are employed in unskilled jobs. But there are two reasons why employers might reconsider entering into *convenants* with the government. Firstly, if the foreign employee does not leave the Netherlands, the employer may be excluded from the right to obtain work permits for migrant workers in the future. Thus, the employer becomes responsible for the migrant worker leaving the country. This is a clear benefit to the government as presented in Lahav's analysis: through the tripartite agreements the government tries to shift its responsibilities in the field of

16 Kamerstukken II, 2001/02, 28 442, no. 1–2.

immigration control to the employer. But an employer cannot easily control the movements of former employees. Secondly, if the employer prefers that the migrant worker stay, the question arises which economic need will prevail: the need to obtain the financial aid from the government for long-term employment projects or the need to employ a capable migrant worker?

Managing Temporary Labour Migration

This article has shown that it is not entirely clear what the legal consequences of a *convenant* are. This is shown by two court decisions on the CAZ and doubts voiced by employers on its legal effects. To solve some of these open issues the government is currently amending the WAV, giving the *convenant* a legal basis so that agreements made with employers and unions will stand in court. At least two issues that remain unsolved are the non-representation of third parties (the migrant workers), and the consequences of termination of the agreement by any of the parties at any point in time.

The conclusion may be that the CAZ mainly benefits the Dutch government in achieving a restrictive migration policy and shifting part of its control tasks to employers. Further, the CAZ tries to protect countries suffering from ›brain drain‹ by providing that employers may not recruit in these countries. Employers seem to benefit from financial aid given for the training of local staff and from certainty on what the rules will be like. Employers and migrant workers alike have little benefit from the regime agreed on in the CAZ because it constitutes a less liberal migration programme than the law does.

Finally, this case study of a tripartite agreement on labour migration shows that employers may prefer a good working relationship with the employment authorities over court proceedings, even though employers know they will win in court or believe that they have a strong case. Given such an attitude of employers, more *convenants* on temporary labour migration can be expected. It remains to be seen what degree of temporariness will be achieved.

Discourses on Integration and Naturalisation

Betty de Hart

Political Debates on Dual Nationality in the Netherlands (1990–2003)

In 1991, the Dutch government of Christian Democrats (CDA) and Social Democrats (PvdA) abolished the renunciation demand for naturalisation. As from January 1, 1992, immigrants who wished to acquire Dutch nationality were no longer required to renounce their first (original) nationality. However, in 1997, after years of debate in parliament, the renunciation demand was reinstalled.

This article discusses the development of the Dutch law and policy concerning multiple nationality.[1] It describes the parliamentary debate on dual nationality and the renunciation demand. More pertinently, it analyses the arguments that have been used both in favour and against the idea of dual nationality for immigrants.[2] On what grounds was the renunciation demand abolished and how was its re-instatement defended? Was this development a result of changing ideas on citizenship or did other factors play a role?

›Ethnicisation‹ and Dual Nationality

Scholarship on citizenship often assumes a linear development towards more acceptance of dual nationality. Joppke nuances this assumption and claims that citizenship is subject to counteracting ›de-ethnicisation‹ and ›re-

1 This article is based on research that I concluded within two research projects: ›Dual Nationality: Changing Perspectives on Individual and State‹, which is part of the programme ›Transnationality and Citizenship: New Approaches to Migration Law‹, co-ordinators Kees Groenendijk, University of Nijmegen and Thomas Spijkerboer, Free University Amsterdam, financed by the Netherlands Organisation for Scientific Research (NWO) in the Netherlands; and ›Multiple Citizenship in a Globalising World‹, financed by the VolkswagenStiftung in Germany; principal researcher and co-ordinator Thomas Faist, University of Applied Sciences Bremen/Germany. The overall project is concerned with Germany, Sweden, Poland, Turkey and the Netherlands.

2 The subsequent amendments of law also enlarged the possibility of dual citizenship for Dutch emigrants. This issue will not be discussed here.

ethnicisation‹ processes.[3] He defines de-ethnicisation as the process of facilitating the access to citizenship, through liberalised naturalisation procedures or through adding *ius soli* elements. The state opens up its membership to newcomers and breaks through the closed system of affiliation-based membership of ›ethnic‹ citizenship. Joppke mentions dual nationality as one of the elements of the above-mentioned de-ethnicisation. But at the same time, he argues that dual nationality can also point to a development of a certain re-ethnicisation on the part of the sending states. Re-ethnicisation refers to the process of ethnic inclusion.

Joppke argues that nationality law may be subjected to both de- and re-ethnicisation processes at the same time. In his opinion, immigration requires states to de-ethnicise, so as to facilitate access to citizenship for immigrants, in the knowledge that not doing so would violate fundamental liberal-democratic principles. In contrast to this, Joppke postulates that emigration leads to a process of re-ethnicisation, as it often provides incentives for states to retain links with members abroad. The ›sending‹ state is able to maintain bonds with the emigrant community, with which it feels it shares common ancestry and common destiny, as well as material interests. European states that are subject to both immigration and emigration pressures most often respond symmetrically, tolerating dual nationality for both emigrants and immigrants. Joppke goes on to argue that the political left generally supports de-ethnicisation in citizenship rules, while the political right is in agreement with the idea of a certain re-ethnicisation.

The Dutch political debates on dual nationality provide a test case for Joppke's assumptions. The question raised is how and why ideas about citizenship have affected the Dutch policy concerning dual nationality. As will be demonstrated initially, from the end of the 1980s, access to citizenship law and dual nationality for immigrants were subject to a process of de-ethnicisation. In later years, from the second half of the 1990s, it was subjected to a re-ethnicisation process. The latter was made possible by the development of a – what I call – *ethno-republican concept of citizenship*, uniting both liberal-democratic principles and an ethnic conception of nationhood, which entailed the assumption of cultural assimilation.

For the purpose of this article ethnicity can be defined as »a process of never ending and contradictory formation of social groups, where borders between ›us‹ and ›them‹ are demarcated.« Ethnicity is a combination of self-definition (subjective identity) and definition by others (social identity).[4] In

3 Christian Joppke, Citizenship between De- and Re-Ethnicization (Russel Sage Working Papers, 204), 2003.

4 Pamela Pattynama, Etnocentrisme en waarheid, in: Margo Brouns/Mieke Verloo/Marianne Grünell (eds.), Vrouwenstudies in de jaren negentig. Een kennismaking vanuit verschillende disciplines, Bussum 1995, pp. 211–234.

this article the emphasis will be on the definition by others. Ethnicity frequently involves the ascription of a notion of common descent and ethnic groups are often ascribed a certain distinct culture.[5]

The fact that the ethno-republican concept of citizenship was developed was not only the result of changing ideas on citizenship, but also of party politics and political traditions.[6] The new concept of citizenship helped the building of a new consensus between the political left and right, after their earlier consensus on integration of immigrants had broken down.

Upholding the Renunciation Demand (1985–1990)

In 1985, the Netherlands amended its Nationality Law and ratified the 1963 Strasbourg Convention on the reduction of cases of multiple nationality and on military obligations in cases of multiple nationality simultaneously.[7] Although the above-mentioned Convention was aimed at the prevention of multiple nationality, the Nationality Law of 1985 resulted in a growing incidence of multiple nationality. It allowed dual nationality both for children of mixed marriages and for second and third-generation immigrants, who obtained a right of option on Dutch nationality.[8] Nevertheless, the government explicitly expressed itself against multiple nationality in case of naturalisation. A migrant who wanted to naturalise had to waive the original nationality. During the parliamentary discussion the State Secretary of Justice Korte-van Hemel (of the conservative liberal VVD) presented three arguments supporting this renunciation demand. Firstly, dual nationality would lead to legal insecurity. Secondly, it would lead to a situation in which there existed an inequality between immigrants, who could possess dual nationality, and Dutchmen, who automatically lost Dutch nationality upon naturalisation in a foreign country. Her third and most important argument was that immigrants who wished to naturalise should be obliged to choose the country with which they most associated themselves.

The social democrat PvdA, the progressive liberal D'66 and the small left-wing parties questioned the relevance of the renunciation demand. They thought it unjustified that some immigrants would be allowed dual nationality, while other immigrants would be required to renounce their original

5 Floya Anthias/Nira Yuval-Davis, Racialised Boundaries: Race, Nation, Gender, Colour and Class and the Anti-Racist Struggle, London 1992, p. 27.

6 Adrian Favell, Citizenship and Immigration: Pathologies of a Progressive Philosophy, in: New Community, 23. 1997, pp. 173–193.

7 Kamerstukken II, 16 946 (ratification of the convention) and Kamerstukken II, 16 947 (citizenship law).

8 The option right entails the acquirement of nationality through a simple and unilateral declaration, free of costs.

nationality. They saw dual nationality as the legal expression of the immigrants' bond with two countries, and part of their identity. The majority of parliament, however, opposed dual nationality and rejected amendments to revise it.

The Nationality Law of 1985 upheld the renunciation demand, except in cases where this »cannot reasonably be expected« (Article 9 paragraph 1 sub b). In practice, a policy was developed that allowed for a number of exceptions. Renunciation was not expected of people who could not waive their former nationality because their government did not allow it (such as Moroccans, one of the major immigrant groups in the Netherlands). A further exemption was given where renunciation would result in the loss of inheritance or property rights in the country of nationality (this applied to Turks, the other major immigrant group in the Netherlands). Exceptions such as these were dealt with rather leniently, something that resulted in around 40 per cent of all naturalised immigrants in this period (1985–1990) retaining their original nationality.

Abolishing the Renunciation Demand (1990–1991)

The renunciation demand came under discussion again at the end of the 1980s. In 1989, the advice council WRR (Scientific Council for Government Policy), in its report on minority policy, recommended that dual nationality for immigrants should be allowed.[9] The WRR held as a starting point that social integration of immigrants required an improvement of their legal position. Hence, the council thought that naturalisation should not be made more difficult than strictly necessary. The council thought that legal and emotional reasons of immigrants not to renounce (yet) the old citizenship should not be disregarded. The council recommended that consideration should be given to the ›real objections‹ of people from ›some Mediterranean countries‹ and that the Dutch position towards the Treaty of Strasbourg should be reconsidered.

The WRR report played an important role in opening up the discussion on dual nationality. Initially, the Lubbers III government (1989–1994) consisting of PvdA and CDA rejected the council's suggestion to allow dual nationality. The government agreement underlined the importance that was attached to stimulating long-term immigrants to obtain Dutch nationality without too much hassle, although it did not advocate dual nationality. The government pointed at the legal objections to dual nationality and stated that exceptions could only be made in individual cases. After questions in parliament, the government revised its position in the ›Memorandum on multiple

9 Wetenschappelijke Raad voor het Regeringsbeleid, Allochtonenbeleid, The Hague 1989, pp. 93–96.

nationality and voting rights for immigrants‹.[10] In this memorandum the government proposed the total abolishment of the renunciation demand. The government saw the renunciation demand as a barrier impeding the naturalisation of immigrants, as this demand met with immigrants' emotional objections, especially a perceived sense of betrayal or breach with the country of origin. It is important to note that the government still did not fully support dual nationality, describing its policy more as a shift from the *prevention* to the *limitation* of dual nationality. Since naturalisation was now perceived as the adequate means to further integration, this also meant that voting rights for immigrants would not be expanded to the provincial and national level. In this sense, the memorandum was a compromise between CDA and PvdA, the CDA giving up its earlier objections against dual citizenship in exchange for the social democrats surrendering their desire for an extension of voting rights for immigrants. Furthermore, the government rejected proposals for the introduction of a special law to ensure the equal treatment of immigrants. Immigrants who wanted full equal treatment were thus still required to naturalise. In this way, the government not only advocated dual nationality, but also rejected the so-called denizen-status for immigrants.[11]

The government proposal met with resistance in parliament.[12] The conservative liberal VVD and the small protestant parties resisted dual nationality altogether, although the VVD did favour a relaxation of the naturalisation procedure. The Christian Democrats had serious doubts and were divided on the issue from the start. In 1990, the CDA spokesman for minority policies Krayenbrink stated that he did not in principle have any objections to the idea of dual nationality, only to claim less than a year later that the CDA had always held the opinion that dual nationality was highly problematic. The party favoured relaxation, but not abolishment of the renunciation demand. In the same period, the CDA party journal published an article supporting plans to abolish the renunciation demand.[13] Thus, although in parliament, the CDA expressed sympathy for the problems that the renunciation demand caused for individuals, the party was also concerned with conflicts of loyalty, and saw it as the government's responsibility to protect immigrants from such conflicts. The other government party, PvdA, advocated dual nationality as an instrumental means of integration, but also pointed at the inequality between immigrants: some can posses dual nationality, others cannot. The

10 Notitie meervoudige nationaliteit / Kiesrecht voor vreemdelingen, Kamerstukken II, 1990–1991, 21 971, no. 14.

11 Yasemin Nuhoglu Soysal, Limits of Citizenship. Migrants and Postnational Membership in Europe, Chicago 1994.

12 58e vergadering vaste commissie voor het minderhedenbeleid, 9 september 1991.

13 Nieuwsblad voor Migranten, Pleidooi voor afschaffing afstandseis, in: CDA-blad, 3 October 1991.

PvdA expressed time and again the opinion that, as the world had changed as a result of globalisation processes and of migration, the mixing of loyalties and the development of ties with more than one country had become possible.

A compromise solution that appealed to both the PvdA and the CDA was finally formulated in a motion put forward by the MP's Apostolou (PvdA) and Soutendijk-van Appeldoorn (CDA).[14] The two parties interpreted the compromise motion in different ways. The CDA regarded it as giving a confirmation that the renunciation demand still existed, but would in future be applied more leniently, whilst the PvdA considered it the individual decision of each immigrant to hold on to or renounce his or her original nationality. The State Secretary of Justice Kosto (PvdA), seeing no difference between the government memorandum and the aforementioned motion, agreed with the interpretation of PvdA MP Apostolou. With these different interpretations, the motion was accepted by PvdA, CDA, D'66 and Green Left. The abolishment of the renunciation demand was introduced by a change of policy with immediate effect, and awaited the necessary amendment to the Dutch Nationality Law. As from January 1, 1992, immigrants were no longer required to renounce the first nationality.

The new policy affected the major immigrant groups in the Netherlands in separate ways. The change of policy seemed important to the Turkish immigrants; something shown by the increasing numbers of this group that chose naturalisation after the policy was introduced. In contrast, for Moroccans it was not so important, Dutch nationality law having already exempted them from the renunciation demand as a result of the Moroccan government's refusal to allow the renunciation of Moroccan citizenship. For people from the former Dutch colony of Surinam nothing had changed either as they lost their Surinamese nationality automatically at the moment of acquiring Dutch nationality.

Discussion of the Amendment of the Nationality Law (1992–1997)

The government put forward a bill that would formalise the new policy of 1992. In the clarification of the bill the Lubbers III government regarded nationality as an expression of connection to a country, not of undivided loyalty. Thus, a person could have a bond with more than one country. Relations with a country could be political, social, economic, cultural and emotional. The government expressed a rather vague notion of nationality and nationhood by stating that »The question whether and to what extent these

14 Kamerstukken II, 1991–1992, 21 971, no. 19.

relationships have to exist cannot be answered in general terms. Which rights and obligations have to be connected to the possession of Dutch citizenship cannot be answered either«.[15] Since the government did not perceive nationality in ideological terms, this left room for a highly instrumental view of dual nationality. Since renouncing the original nationality was assumed to be one of the major objections of immigrants against naturalisation, allowing dual nationality would further naturalisation, while naturalisation was seen as furthering integration. These interests of integration and minority policy were considered more important than the prevention of dual nationality.

However, during the years of parliamentary discussion, opposition to dual nationality grew stronger and the policy of 1992 became increasingly contested, with the CDA and VVD expressing their objections against dual nationality more and more explicitly. They saw the rising numbers of naturalisations not as a sign of success of the new policy, but as proof that abolishment of the renunciation demand had made the former into a paper formality. For them, it allowed naturalisation for people with a very weak bond with the Netherlands. Naturalisation should not be a means, but the crowning of a completed integration process. The VVD feared that immigrants would make instrumental use of dual nationality and would collect nationalities as if they were diplomas or credit cards, allowing them to ›shop around‹ for the best offer.

On the opposite side were PvdA, D'66 and Green Left, that saw dual nationality as a means to further integration. However, this instrumentalist view of dual nationality focussed not so much on the political participation as the cultural and social integration of immigrants. The Green Left was the only political party that put forward the interest of political participation regularly, although until 1997 PvdA and D'66 still upheld their wish for extension of voting rights for immigrants.

Dual nationality came to be seen increasingly as an expression of ethnic and cultural identity. Left-wing parties and the Christian Democrats expressed sympathy for the emotional and cultural problems that immigrants faced renouncing their original nationality. This led to a certain *culturalism*.[16] Culture was perceived as essentialist, primordial, homogeneous, objective and connected to the common descent of a certain group. The attitude of immigrants towards dual nationality was thus explained by their ethnic and cultural background. This can partly be understood by the fact that the discussion on dual nationality started within the context of the Dutch government's ›minority policy‹. Minority policy has always focussed on minority

15 Kamerstukken II, 1992–1993, 23 029, no. 6, p. 5.

16 Saskia Tempelman, Duiken in het duister. Een gematigd constructivistische benadering van culturele identiteit, in: Migrantenstudies, 15. 1999, no. 2, pp. 70–82.

groups that have been perceived as culturally ›different‹.[17] Even the PvdA and Green Left, who tried to present a more dynamic view of cultural identity, regarded the wish expressed by many immigrants to maintain their original nationality as being related to their cultural identity. Bonds with the Netherlands were described as social, economical and political, while the bonds with the country of origin were described as cultural, emotional and religious. Hence, dual nationality became a cultural issue and seemed only of importance for certain non-western groups with a distinct culture, this not being the case, or being the case to a lesser extent, for other groups.

Finally, although reluctantly, the Second Chamber accepted the bill. But in the Senate, opposition was even stronger, something explainable by several factors. The first factor lies in the political process. The VVD and CDA held the majority of the Senate. Since the CDA had become an opposition party in 1994, they no longer felt committed to the compromise they had reached some years earlier with the PvdA in the Lubbers government. The second factor was the growing media attention. For the first time since the political discussion on the renunciation demand had started, the media had started to pay attention to the outcome of the debate. This attention focused on the political process, with the ›shift‹ or ›turn‹ of the CDA gaining a lot of attention and being heavily criticised. Further to this, politicians used newspapers to take the political discussion into the public field with the publication of opinion-based articles.

The issue thus became more public than before at the same time that the stakes for politicians became ever higher. The outcome of this discussion was further influenced by the publication of the 1996 annual report on minorities by the Social Cultural Planning Bureau (SCP).[18] In two pages dedicated to naturalisation, the SCP report published statistics showing a considerable rise in the number of naturalisations since 1990, this being especially the case for Turks. The report questioned the assumption that naturalisation could be used as an indicator of the integration of immigrants. Naturalisation was the result of a balancing of advantages and disadvantages and had little

17 Jan Rath, Minorisering: de Sociale constructie van ›etnische minderheden‹, Amsterdam 1991.

18 Sociaal Cultureel Planbureau, Rapportage minderheden 1996. Bevolking, arbeid, onderwijs, huisvesting, Rijswijk 1996. The SCP was installed by the government in 1973, with the aim of performing studies that provide information that will support the development of effective policies. The pages on naturalisation were based on an earlier study by the Wetenschappelijk Onderzoek and Documentatiecentrum (WODC) on naturalisation (1993), which was published after the renunciation demand had already been abolished. The WODC report did not receive any attention at the time. Also cf. Ruud van den Bedem, Motieven voor naturalisatie. Waarom vreemdelingen uit diverse minderheidsgroepen wel of niet kiezen voor naturalisatie, Arnhem 1993.

to do with feelings of connection or social integration in Dutch society. The report was referred to frequently by politicians during the debate in 1996. The opponents of dual citizenship saw their objections confirmed by the findings that immigrants, although not feeling Dutch, were still allowed to naturalise. This then appeared to confirm their thesis that naturalisation had become too easy. Amongst the advocates of dual citizenship, the Green Left criticised the starting points of the SCP report and claimed that feeling Dutch was not the same as feeling connected to Dutch society. The government denied that it was necessary to feel Dutch in order to become Dutch.

As the resistance to dual nationality grew, the first Purple government of PvdA, VVD and D'66 (1994–1998) was required to define the meaning of nationality and citizenship in a more explicit fashion. It resulted in renewed foundations of a bill the contents of which had not been revised. Although the State Secretary of Justice, Schmitz (PvdA) still defended the proposed abolition of the renunciation demand, this was done with considerably more restraint than before. The State Secretary said that dual nationality should not be automatic and that a sole nationality was preferable. Immigrants should thus not choose dual nationality without good reason and the authorities had to make sure that the choice for dual nationality was a conscious and explicit one, although they did not evaluate the immigrants' motives for retaining the original nationality.

In an attempt to overcome objections raised in the Senate, the State Secretary submitted a proposal that would allow the immigrant to sign a written declaration describing his or her motives for wishing to retain the first nationality. The VVD and CDA did not want to discuss this, since it did not change their objections to the bill. Finally, in 1997, the Secretary of State withdrew the bill in both chambers. The renunciation demand was re-installed the same year. However, the circular that re-installed the renunciation-demand contained an even larger number of exceptions than before 1992. These exceptions applied to the majority of those immigrants who were naturalised.

Re-Installing the Renunciation Demand (1997–2001)

After the government had withdrawn the bill allowing dual nationality, a new bill was drawn up and sent to parliament. It contained a limited relaxation of the renunciation demand, which included the categories of the Second Protocol of the Treaty of Strasbourg (partners and children of mixed marriages and second-generation immigrants). In defence of the new bill, the government used mainly the same arguments that had been used earlier in

support of the abolishment of the renunciation demand, but this time in order to defend a relaxed ›renunciation-unless‹ policy.[19]

During the period in which the new bill was being discussed, the major political parties developed a more restrictive attitude towards naturalisation in general, especially concerning the required knowledge of Dutch language and society. They underlined the importance of Dutch nationality explicitly and in ethnic and cultural terms. The CDA, for example, expressed the opinion that Dutch nationality was something to be proud of and should not become a throwaway or consumption article. One had to feel Dutch. The CDA stressed the importance of loyalty and voted against the bill, because they thought that the stricter standards for naturalisation were still too low. VVD and D'66 put forward a motion proposing that any time spent serving in a foreign army would lead to the loss of Dutch nationality, something that had been abolished in 1985. Discussion on the language requirement resulted in a strict test of Dutch language skills and knowledge of Dutch society. Finally, the bill was accepted and came into force on April 1, 2003. Although dual nationality is still possible in many cases, access to Dutch nationality has become more difficult. Hence, the discussion on dual nationality, which started with the intent to improve the legal position of immigrants, resulted in the development of a new Nationality Law that deteriorates this legal position in several respects.

How can this development be explained? The major political parties were moving towards a new consensus on integration, after the agreement on minority policy that had existed in the 1980s had broken down during the 1990s. Starting in 1991, with the famous Luzern speech by the political leader of the VVD, Bolkestein, Dutch minority policies had become more and more contested. The idea that emerged was that ethnic minorities had both been treated too liberally and had been ›pampered‹ without any demands having been made against them. The discussion was continued in a heightened atmosphere after Paul Scheffer's article on the ›multicultural drama‹ in 2000, this being even more so after 9/11 and the emergence of the populist Fortuyn party. In this period the Purple government developed an – what I call – ethno-republican concept of citizenship:

> »*Citizenship means having part and participating in Dutch society as an autonomous person. Immigrants are offered enough possibilities to use their rights and to fulfil their social obligations, but they have to prove themselves. They have enough room to develop their identity and to express their religious beliefs and convictions about life, within the framework of our country. It can be expected of them to contribute actively to this modern, open and dynamic society. […] Every resident of the country has to respect the fundamental values of society, as laid*

19 Kamerstukken II, 1999–2000, 25 891.

down in the constitution, laws and rules and the generally accepted opinions of society. The values are carried by all citizens and codified again and again through the democratic decision making processes.«[20]

This ethno-republican concept of citizenship entailed an emphasis on the rights and duties of both active citizenship and loyalty to the Dutch constitutional state. I call this the republican aspect. The ethnic aspect refers to the condition that citizens have to feel Dutch, as well as the assumption that immigrants from non-western cultures, because of their ethnic and cultural background, do not possess the necessary qualities to be good citizens. They have to learn what being a good citizen, and fulfilling the rights and duties connected to Dutch citizenship, is all about. Thus according to this paradigm, the task of the Dutch government is to require immigrants to learn the capacities of a good citizen and to take on their individual responsibilities. Integration was something that no longer had to be encouraged, but should be demanded of the immigrants. This does not go together with tolerating dual nationality. Hence, the Purple government (VVD, D'66, PvdA) rejected suggestions to reconsider the renunciation demand, as made once again by the WRR in 2001 and by the Council for Public Administration in the same year.[21]

The abstract idea of ethno-republican citizenship helped to overcome divisions between the political left and right and to build a new political consensus on minority policies.[22] In this way the policy of ›renunciation-unless‹, albeit with a number of exceptions, was accepted at the same time that access to naturalisation was restricted.

The fact that the still relatively liberal policy of dual nationality could be preserved and that the government did not choose an even more restrictive policy, may be attributed to the influence of the PvdA, which was the constant factor in the subsequent governments in the period under consideration. The PvdA in parliament had the same spokesman over the years (MP Apostolou, of Greek descent and probably a dual citizen himself), someone who genuinely advocated dual nationality and tried to reach the maximum result under the circumstances. But the acceptance of this relatively liberal policy came not only from the Social Democrats, but also from the VVD and CDA. Although there was discussion on some exceptions, such as for financial damage and military service, on the whole the policy was accepted by the major parties. Furthermore, the discussion was limited to dual nationality

20 Government Memorandum ›Integratie in de Context van Immigratie‹, Kamerstukken II, 2001–2002, 28 198, no. 2, pp. 55, 60.

21 Wetenschappelijke Raad voor het Regeringsbeleid, Nederland als immigratieland, The Hague 2001.

22 Favell, Citizenship and Immigration, p. 177.

in case of naturalisation, while dual nationality through birth or ›option‹ was largely taken for granted. Although the VVD voted against the ratification of the Second Protocol of the Strasbourg Convention and even pushed for the re-instalment of the renunciation demand in its ›full glory‹, they never really resisted the liberal exception policy and did not really oppose dual nationality in case of birth or option. The CDA went even further, both supporting the Second Protocol and accepting dual nationality for the categories that were mentioned in the Protocol. Thus, both VVD and CDA accepted the reality of large numbers of dual citizens.

Thus, the question is whether in the end anything had really changed. Naturalisation rates rose considerably in the years after dual nationality was accepted in 1992. After the renunciation demand had been re-installed in 1997 naturalisation rates did not drop, with the exception of Turks. As before, most naturalising immigrants retained their original nationality. Between 1995 and 1997 more than 80 per cent of the naturalised citizens retained the former nationality. In 2000, after the renunciation demand had formally been reinstalled, still 77 per cent of the immigrants retained their original nationality.[23] Based on this small decrease of three per cent, one might suggest that politicians had spent ten years fighting windmills.

Dual Nationality and the Re-Ethnicisation of Citizenship

The Dutch case shows that immigration does not necessarily lead to the de-ethnicisation of citizenship, in contrast to what Joppke assumed. In the Netherlands, the initial trend towards de-ethnicisation was replaced by a subsequent trend towards re-ethnicisation. This becomes apparent not only from the re-instalment of the renunciation demand, but also from the stricter requirements of Dutch language and knowledge of Dutch society, as introduced by the new Nationality Law which came into force in 2003. The Dutch case also shows that re-ethnicisation may very well go together with liberal democratic precepts, as formulated in the ethno-republican concept of citizenship.

This leads to the question whether acceptance of dual nationality for immigrants is necessarily a form of de-ethnicisation. Over the years dual nationality came to be seen as a cultural issue. The wish of immigrants to retain their original nationality was explained by both opponents and advocates of dual nationality as being down to the cultural identity of the former. Such an emphasis on culture as a factor in dual nationality could be per-

23 Anita Böcker/Dietrich Thränhardt, Einbürgerung und Mehrstaatigkeit in Deutschland und den Niederlanden, in: Uwe Hunger/Dietrich Thränhardt (eds.), Migration im Spannungsfeld von Globalisierung und Nationalstaat (Leviathan Sonderh. 22), Wiesbaden 2003, pp. 117–134.

ceived as an ethnic conception of citizenship, although one that led to acceptance of dual nationality. In this way, ethnic conceptions of citizenship may lead to both acceptance and rejection of dual nationality.

Furthermore, the question is whether allowing dual nationality really breaks with the closed circuit of ›ethnic‹ citizenship, as Joppke suggested. In the period under discussion, a distinction was made between so-called ›autochthons‹ and ›allochthons‹.[24] Naturalising immigrants became Dutch nationals, but they remained ›allochthons‹, and were ascribed a distinct ethnic descent and culture. Hence, they still did not belong to the Dutch ›Us‹.

In spite of the growing opposition, in practice the policy on dual nationality did not really change, or even become more liberal, allowing as it did for further exceptions since 1997. The change was not so much a change of policy, but rather a change of discourse that supported more or less the same policy of ›renunciation-unless‹.

This raises the question whether the discussion was just about populist or symbolic politics. Some actors (such as the PvdA, the Green Left and the Turkish immigrant organisation SIOT) have suggested that the position of the VVD and CDA was governed by populism and symbolic politics. One argument could support this suggestion: both parties accepted a policy that would lead to a large number of dual citizens, although verbally they opposed dual nationality. This could be seen as symbolic politics: sending a message to voters that the parties were tough on immigrants. But the attitude of both parties can probably best be described as pragmatic, since to a large extent dual nationality could not be prevented (e.g. if the home countries refused to allow renunciation).

This does not mean, however, that polemics and populism were entirely absent from the Dutch political debate. More generally, the issues of immigration and integration became subjects of polemics and populism. The discussion on dual nationality should be seen as part of this more general debate. The new consensus seems to be that integration-based policies had failed and a new and ›firmer‹ handling of ethnic groups was necessary.[25] The hardened approach towards immigrants, however, can also be explained by the more general rise in popularity of neo-liberal ideas throughout the 1990s. The new emphasis on obligations instead of rights is not limited to immigrants, but also extends to criminality, social security, public order etc.

24 The term ›autochthons‹ refers to people born inside or outside the Netherlands, whose parents were both born in the Netherlands. The term ›allochthons‹ refers to inhabitants of the Netherlands, born inside or outside the Netherlands, of whom at least one of the parents is born outside the Netherlands.

25 Baukje Prins, Het lef om taboes te doorbreken. Nieuw realisme in het Nederlandse dover multiculturalisme, in: Migrantenstudies 18. 2002, no. 4, pp. 241–254.

The discussion on dual nationality resulted in somewhat more explicit conceptualisations of citizenship and national identity. The general Dutch scholarly standpoint is that the Netherlands has no elaborated concept of nationhood or national identity. That does not mean that it does not exist, but that it remains rather implicit. As several authors point out, the »Dutch national identity has no name, it exists especially in the denial«.[26] Thus, what is Dutch is considered to be normal, universal, and self-evident. This ›empty‹ concept of citizenship and nationhood left room for a swaying policy and for an instrumentalist approach to the subject of dual nationality.

The rediscovery of the ›citizen‹ in Dutch politics, as in the above-described ethno-republican concept of citizenship, was above all about the citizen as a *moral being*, more than as a political participant.[27] This moral citizen fits with a long Dutch tradition of education of citizens to community and morality, including immigrants.[28] In the ethno-republican concept of citizenship universal values of human rights, responsibility, self-sufficiency and tolerance are used as norms that can either include or exclude immigrants. The debate on dual nationality is an example of this.

26 Raad voor Maatschappelijke Ontwikkeling, Nationale identiteit in Nederland. Internationalisering en nationale identiteit, The Hague 2003, p. 9.

27 Sjaak Koenis, Het verlangen naar gemeenschap. Over moraal en politiek in Nederland na de verzuiling, Amsterdam 1997, p. 20.

28 Rath, Minorisering: de sociale constructie van ›etnische minderheden‹.

Ines Michalowski

Integration Programmes for Newcomers – a Dutch Model for Europe?

In the late 1990s, the Netherlands, Finland, France and Denmark[1] set up programmes to promote the quick integration of legal newcomers. Austria followed in 2003, while the legislation on integration drafted in Flemish Belgium and Germany has (for different reasons) not yet been implemented. The planned and existing integration programmes mainly consist of language courses, vocational training and information about social and cultural customs of the host society. Astonishingly, the integration programmes that exist and are planned for the future (here especially in France and Germany) converge towards a common ›Dutch model‹, while the Netherlands themselves are now looking to Denmark for inspiration on immigration and integration policy. The Dutch programme is an attractive ›export product‹ because it not only tackles the problems experienced in other EU Member States but also operates with a structure apparently built on reliable mechanisms of control and monitoring. Yet, the experience in the Netherlands has shown that the implementation of a full integration and reception programme requires a strong financial and political investment, which states and governments are not always willing to provide.

This article first explores why different European countries chose integration programmes as a centrepiece of their integration policy. After a short presentation of the integration programmes in France, the Netherlands and Germany, two main characteristics of the programmes – limited objectives and a complex structure of control mechanisms – will be discussed as an attempt to make integration ›administrable‹. This growing control of migrants' social integration opens the floor to various political ambitions that will be analysed in the last part of this contribution. A comparison of integration programmes throughout Europe shows that the (political) objectives of the programmes can vary widely, depending on whether they are shaped by governments as a measure to support immigrants, as a public policy directed

1 Sweden set up a reception and integration programme for immigrants as early as in the 1970s. Today, the programme is only obligatory for migrants who receive social benefits. Because of its non-obligatory character and understanding of integration as equal rights and non-discrimination, Sweden's programme differs from the others.

towards the assimilation of migrants or even as a mechanism of immigration control.[2]

Integration Programmes: a Remedy to the Integration Crisis

In different European countries and particularly in France, the Netherlands and Germany, integration programmes have been presented as a solution to the ›integration crisis‹ that has been perceived from the 1990s[3] onwards and mainly been attributed to a deficient, i.e. too compliant and vague integration policy in the 1970s and 1980s.[4] Although integration policy is not new, public attention only focused consistently on the issue in the 1990s.

Large debates on ›the failure of integration‹ came up in the Netherlands and furthered the breakdown of the Dutch multicultural consensus while doubts on the efficiency of the Dutch integration policy have become so important that politicians and practitioners called for a Dutch *Süssmuth Kommission*.[5] Especially the analysis that the integration of migrants has been more successful in Germany »where no specific integration policy has been led« than in the Netherlands »where this has been the case«[6] provoked numerous discussions. While some understood the analysis as the success of liberalism

2 Grete Brochmann/Tomas Hammar (eds.), Mechanisms of Immigration Control. A Comparative Analysis of European Regulation Policies, Oxford 1999.

3 Hans Mahnig isolates four principal factors to explain why the presence of migrants has become an overall political issue: 1) economic recession led to the perception of migrants as a financial burden for the state; 2) especially in France and the UK, urban riots where many young second-generation migrants took part led to the fear that migrants might endanger social peace; 3) racist attacks against migrants that took place in all western European countries caused the same fear; 4) news on the dramatic situation of some migrants have been perceived as a public scandal. Cf. Hans Mahnig, Die Debatte um die Eingliederung von Migranten oder was ist das Ziel von ›Integrationspolitik‹ in liberalen Demokratien?, in: Swiss Political Science Review, 7. 2001, no. 2, pp. 124–130.

4 The Dutch parliament has asked for a broad research on ›the reasons why integration has failed in the Netherlands‹. Parliamentary public documents that relate to the Commission in charge of the hotly debated research are classified under the number (Kamerstukken II) 28 689 and can be found at www.overheid.nl

5 Anita Böcker/Dietrich Thränhardt, Erfolge und Mißerfolge der Integration – Deutschland und die Niederlande im Vergleich, in: Aus Politik und Zeitgeschichte. Beilage zur Wochenzeitung Das Parlament, 23.6.2003, pp. 3–11; see also Anita Böcker/Kees Groenendijk, Einwanderungs- und Integrationsland Niederlande. Tolerant, liberal und offen?, in: Friso Wielenga/Ilona Taute (eds.), Länderbericht Niederlande. Geschichte – Wirtschaft – Gesellschaft, Bonn [2004].

6 This analysis has been proposed by the Dutch researcher Ruud Koopmans who, at that period, was working in Germany. Ruud Koopmans, Zachte heelmeesters. Een vergelijking van de resultaten van het Nederlandse en Duitse integratiebeleid en wat de WRR daaruit niet concludeert, in: Migrantenstudies, 18. 2001, no. 2, pp. 33–44.

over social assistance, others challenged it: the comparability of categories as *allochtonen* (persons who have at least one foreign parent) and *Ausländer* (persons without a German passport) is not evident. In addition, general dispositions such as the overall migration scheme, the economic situation in the two countries and the role of general institutions such as the German system of apprenticeship *(Lehrlingswesen)* may be more decisive for the successful integration of migrants than the presence or absence of specific integration policies.[7] This discussion on the efficiency of specific policies for migrants gains special attention at a moment where the successive Dutch governments consider the privatisation of the ›integration market‹ and the end of state-organised integration measures.

In France, public debates on integration have focused on the urban crisis (schools, housing, violence) and on the religious confrontation with the Islam (the 1998 ›headscarf affair‹). As further causes to the ›integration crisis‹, practitioners identified the absence of a clear, guiding state policy of integration and the tendency of existing specific integration measures to keep migrants in dependence. The introduction of an integration programme and the announcement that French policy would adapt to the Dutch model (that has a particularly pragmatic and rational reputation) represents a clear cut with former integration policy. In Germany, the debate on immigrant integration has crystallised around violent racist attacks on foreigners, the changes in German nationality law, the refusal of dual nationality, the claim for a German *Leitkultur* and the government's plans to openly introduce elements of regular labour migration (German ›Green Card‹ and *Zuwanderungsgesetz*). Some of these debates influenced a speech entitled ›Without fear and daydreams‹, that federal president Johannes Rau delivered in May 2000. Rau advocated a realistic approach to the issue, i.e. an approach that takes account of the situation of foreigners in Germany as well as the fears and preoccupations of the German population. He also pleaded for a law for the regulation of integration.[8] Even if Rau's speech has a ›realistic‹ note, it is much more balanced than Dutch ›new realism‹[9] – a discourse that leans against the taboos of political correctness and clearly lays out problems that arise between the Dutch and the *allochtonen* (foreigners).

Thus, obligatory integration programmes for migrants have emerged in several EU Member States at a moment when integration was supposed to

7 Anita Böcker/Dietrich Thränhardt, Is het Duitse integratiebeleid succesvoller, en zo ja, waarom? Een reactie op Koopmans, in: Migrantenstudies, 19. 2003, no. 1, pp. 87–92.

8 Johannes Rau, Berliner Rede. Ohne Angst und Träumereien, speech held on 12 May 2000 in Berlin.

9 This genre of Dutch discourse on minorities has been isolated and analysed e.g. by Baukje Prins, Het lef om taboes te doorbreken. Nieuw realisme in het Nederlandse discours over multiculturalisme, in: Migrantenstudies, 18. 2002, no. 4, pp. 241–254.

have failed and public attention had focused on the issue. The ›failure‹ has been partly attributed to states and governments that came to be held responsible for the integration of migrants. Integration programmes then were the ›best and only‹ solution for responsible European governments since the programmes mark a clear and visible, innovative change of integration policy. At the same time, the programmes respond to the currently very popular claim that migrants have *rights and duties*[10] in their host societies.

Integration Programmes in EU Member States

Integration programmes profoundly transform the field of integration from a loosely controlled societal and individual process to a public policy of integration that requires implementation. This asks for strong organisational skills because new actors have to be introduced and collaborations set up. In this task, many governments are attracted by and refer to a ›Dutch model‹ that has been characterised as pragmatic and rational. Copying the Dutch programme, several European countries have come up with similar approaches based on the conclusion of a contract and »a personal interview where the level of qualifications, education, practical experiences, and language skills is examined. On the basis of this interview it is decided which components the integration programme should consist of. In general the three main components of integration programmes are first and foremost language training, which is considered a very important element, secondly orientation courses and thirdly occupational integration measures or vocational training.«[11] Some of these characteristics of integration programmes in the Netherlands, Germany and France will be presented next.

In the Netherlands, the *Wet Inburgering Nieuwkomers* (WIN) was passed in September 1998, obliging all[12] newcomers to participate in an integration

10 This dichotomic motto is frequently used in France *(droits et devoirs)*, in Germany *(fördern und fordern)* and in the Netherlands *(rechten en plichten)* as an expression of a new approach to integration. For a critical discussion of obligatory integration see Alfons Fermin, Verplichte inburgering van nieuwkomers, Utrecht 2001.

11 This report had been presented before the Commission Communication on Immigration, Integration and Employment (COM (336) final) was published. The information for the Communication was gathered through questionnaires on integration policy that the Member States were asked to fill in. France is mentioned neither in the report nor in the Communication since it did not hand back the questionnaire. For further information see Helene Urth, Draft Synthesis Report on Policies Concerning the Integration of Immigrants, by the European Commission, presented at the Discussion Roundtable of the Bertelsmann Foundation ›Migration and Integration in an Enlarged European Union‹, Brussels, 10.3.2003, pp. 38–52.

12 The definition of a target group is a rather complex juridical task: variables such as country of origin (European nationals and nationals of countries, with which the receiving country has concluded specific treaties are excluded *per se*) and residence

programme. The programme consists of an average of 600 hours of language tuition and civic education, the conclusion of an individual integration contract and aims, among other things, at the migrant's participation in the labour market. The WIN also foresees the personal accompaniment of the newcomer, who is admonished with sanctions such as the reduction of social benefits or the attribution of financial fines if s/he does not comply with the obligations. The charge of implementing the programme lies (at least today) with the municipalities, which are obliged (until 2004) to contract with the regional education centres, ROC (*regionale opleidings centra*) for the language courses of *newcomers*. Since 2000, the Dutch programme for newcomers has been complemented through a special policy for *oudkomers* – former newcomers who risk a backlog because of unemployment and a lack of linguistic skills. For *oudkomers*, every municipality contracts private enterprises and/or ROCs to propose individual trajectories. This system has been privatised from the beginning and allowed gaining some experience for the forthcoming changes in the *newcomer*-trajectories. The privatisation of the language course offer against the actual monopoly of the ROCs and a fusion of the budgets for *nieuwkomers* and *oudkomers*-integration programmes have been the most realistic and consensual part of the spectacular plans on integration presented by the *Balkenende II* government.[13]

Germany has a long experience with language courses and professional training for ethnic German *Aussiedler* who arrived en masse after the break-up of the Soviet Union. Despite the fact that the language course programme for the integration of *Aussiedler* has been considered successful for quite a long time, it has barely been mentioned in recent European discussions on integration programmes, not even in Germany where the *Zuwanderungskommission*[14] has pleaded for a programme following the ›Dutch model‹. This lack of attractiveness can be explained through the fact that *Aussiedler* have been perceived as a specific German question on the European level, while in Germany the preferred treatment of *Aussiedler* as ethnic Germans in contrast

status are relevant. In the Netherlands, special programmes are elaborated for *imams* even if they only reside and work in the country for a limited period.

13 Besides privatisation, the new Dutch government plans to require a first part of language learning to take place in the countries of origin and to require a basic language test as a condition to obtain permission to immigrate to the Netherlands. Once immigrated, the newcomer shall be obliged to pay for further integration courses out of his/her own pocket. Only part of these costs shall be refunded after the newcomer has finished the course. For a critical assessment of the possibilities for ›integration‹ in countries of origin, see Van de Bunt, Inburgering in het land van herkomst, Amsterdam, 18.6.2003.

14 The Commission on immigration, presided over by Rita Süssmuth, presented its report and propositions for a new, progressive law on immigration, integration and asylum in July 2001.

with third-country nationals is progressively considered out-of-date. Also, the draft proposal for the *Zuwanderungsgesetz*[15] plans a common integration programme for *Spätaussiedler* and third-country nationals consisting of language courses adapted to the individual skills and knowledge of the migrant and divided into two phases: a first course delivers basic knowledge of the German language (approximately 300 hours) while a second course aims at perfection (approximately 300 hours). In addition, an orientation course (approximately 30 hours) shall inform about culture, history, law and order in the German host society and allow the newcomer to get a basic understanding of social and political structures. In spring 2003, the Christian-Democrats presented their amendments to the *Zuwanderungsgesetz.* One of the changes they propose is to link the acquisition of a permanent residence permit to the *successful* participation in the integration programme and to reduce, at the same time, the required level of language skills.

Such requirements and sanctions were far away from the French programme called *Plate-Forme d'Accueil* (reception platform), that was introduced in 1998, based on the idea of gathering numerous essential services for newcomers in one location: organisations and services specialised for migrants as well as institutions of common law such as social security, employment agencies, schools or even NGOs and local action groups. The platforms are organised by the Office for International Migration (OMI), which is also in charge of a medical examination necessary for a first residence permit in France. Simultaneously with the obligatory medical exam, the newcomers are ›invited‹ to the platform.[16] The platform – in connection with the medical examination – lasts for half a day. The newcomers receive a quick introduction to the political, cultural and social life in France, followed by a film that presents a ›red track for successful integration‹. After the film, each newcomer is asked to a personal interview with a collaborator of the OMI. In about 30 minutes, the OMI official evaluates the capacities of the newcomer and the difficulties s/he encounters in order to give advice on the most important (administrative) steps to be taken, e.g. with regard to employment, housing, schools for children, healthcare. The OMI official can advise the migrant to see a specialised social worker and/or do a quick language evaluation. The language evaluation shall direct the newcomer towards a language course close to his/her living area. Better co-operation between the platform and the language course provider made the number of migrants rise who

15 At the moment, the *Zuwanderungsgesetz* is negotiated in the reconciliation committee. For further facts and information on the history of the draft proposal see www.integrationsbeauftragte.de

16 The platforms could assure a high participation (over 80 per cent, depending on the region) because of this linking to the obligatory medical exam and the overall organisation through the state Office for International Migrations.

participate in a language course after having passed on the platform. Nevertheless, final participation in language courses is still low and differs throughout the *départments* (regions). This has been explained by the lack of language courses and services such as childcare facilities but also through the non-obligatory character of the French programme. The centre-right government that came to power in June 2002 has proposed in October 2002 the creation of integration contracts for every newcomer comprising a right and an obligation to participate in a language courses. The participation in the language course will then be taken into consideration for the attribution of a permanent residence permit.[17]

This short overview illustrates that the programmes in the three countries are at very different periods of implementation and planning. While debates in France and Germany deal with the obligatory character of the programme, the Netherlands discuss whether a migrant has fulfilled his/her obligation to integrate by ›merely participating in the programme‹ and whether the participation in the programme should be a precondition to obtain citizenship. This shows that the administration of integration through programmes requires a close definition of the position the programme takes in the integration process. This will be discussed in the following paragraph.

Making Integration *Administrable*: the Complex Implementation of Integration Programmes

Dutch policy makers have chosen the term *inburgering* (meaning familiarisation or settlement but vaguely translated as *introduction*[18]) to mark a distinction with the notion of *integration* that relates to the broader societal process.[19] The distinction shall express that an *inburgeringsprogramma* is a first step towards integration but that it cannot assure the entire societal process. This idea that integration programmes have a limited scope is popular also in

17 The proposed legislative basis for the integration contract consists of only one sentence while the concrete form of the programme will be regulated – as often the case in France – through circulars.

18 The English denomination *introduction programme* that is used in translated Dutch, Danish and European documents is not always suitable because in several countries the integration programmes are also addressed to migrants who have immigrated several years before. The reason why these former newcomers *(oudkomers)* fall under the target group of the programmes is not related to their ›first introduction to the host society‹ but rather to a (re-)integration into the labour market. This means that, in line with the target group, the very general translation as ›integration programme‹ is more appropriate.

19 Measures to promote integration on the societal level are e.g. the promotion of ethnic minorities in relevant sectors of the host society or the intercultural opening of administrations.

other countries, even if it is not laid down in clear terms. Indeed, integration programmes concentrate on a first phase of adaptation and usually aim at providing first keys towards further integration into society. There is no claim whatsoever that a newcomer who has participated in a programme is in fact integrated.[20] This is beneficial to the conception and implementation of the programmes because the objectives can be defined in a flexible manner, e.g. declaring participation in a programme successful if the newcomer reaches a certain (even low) level of language skills. On the other hand, this implies that one of the biggest differences between integration programmes in EU Member States is to be found in relation with the requirements for newcomers: in Austria, newcomers receive 100 hours of language tuition and shall reach a level A1 on the European Reference Framework as defined by the Council of Europe.[21] In the Netherlands, newcomers shall reach, with a little less than 600 hours of language tuition, a B1/B2 while in Germany the *Zuwanderungsgesetz* proposes B1 as a goal (with 600 hours of language tuition). The German Christian Democrat opposition envisages A1/A2 as a realistic goal. Even if such differences between EU Member States bring up serious questions about the qualitative standards of language courses, it has to be noticed that the definition of learning targets is an important step to making integration ›administrable‹.

Integration programmes have a very pragmatic bias and barely refer to a national ›philosophy of integration‹.[22] On the contrary, it is often underlined that national ideology of integration has been responsible for the vague, i.e. unpragmatic approach of integration issues in the 1970s and 1980s. Today's integration programmes have been conceived as a pragmatic, *post-assimilationist* and *post-multiculturalist* response to earlier integration policies. However, despite the rejection of ideological questions to whether or not, when and how complete integration can be achieved, integration pro-

20 Even if this probably is a realistic statement, it brings up the question how much more a foreigner who has completed an integration programme of one to three years must do in order to be considered ›integrated‹.

21 The European Reference Framework distinguishes three main levels (from A to C) twice subdivided (A1, A2) so that a person with low language skills would be classified A1 while a C2 can be reached by native speakers. For more information on the linguistic elements at stake in relation with integration programmes see the detailed study undertaken by Utz Maas/Ulrich Mehlem, Qualitätsanforderungen für die Sprachförderung im Rahmen der Integration von Zuwanderern (IMIS Beiträge, no. 21), Osnabrück 2003.

22 Adrian Favell, Multicultural Nation-building: ›Integration‹ as Public Philosophy and Research Paradigm in Western Europe, in: Swiss Political Science Review, 7. 2001, no. 2, pp. 116–124.

grammes need to define e.g. learning targets for orientation courses about Dutch society that deal with ›Dutch norms and values‹.[23]

In addition to the control and management of learning targets, integration programmes need a solid organisational structure that is deep-seated at different administrative levels in order to succeed. The implantation of the non-obligatory French integration programme in the different regional districts showed that the spatially decentralised but centrally administrated reception platforms were of limited success as long as they did not manage to transform the system of actors in place. In fact, in order to function properly, the platforms depend on a (sometimes non-existing) network of language course providers and on the support of institutions of common law, e.g. concerning labour market information. This means that the platforms should collaborate with and transform the local system of actors who are (potentially) in touch with migrant populations. In the districts where the platforms were successful, the competencies and ›importance‹ of actors shifted, new collaborations were enhanced and the integration and reception of newcomers appeared on the agenda of (local political) key actors. The Dutch experience of the liberalised ›integration market for *oudkomers*‹ suggests that management skills are also required when the programmes' scope is extended. For such an extension, efficient measures of control and monitoring are needed, especially when it comes to decentralisation and outsourcing. Different control mechanisms assure the implementation of the Dutch programme for *oudkomers*: parliament controls the integration trajectories proposed for *oudkomers* on the local level through the *oudkomers*, a compilation of very detailed statistics that municipalities are asked to fill in twice a year. In fact, the production of statistics is a task that costs administrations a lot of time and energy and is considered to be a heavy burden. In a big French municipality, the members of a network for the legal counselling of newcomers and other migrants were supposed to produce statistics on the migrants they had received. At the end of the first year the statistics were declared invalid because the ways in which the different organisations had counted their clients varied widely. A similar problem has been revealed in the Netherlands, where the municipalities needed an adaptation period in order to produce statistics that are comparable. However, the mere ›collection‹ of statistics does not assure their usage. In this regard, the collection of statistical information can be described as a tool of latent control. From 2004 on, three criteria for the allotment of municipalities' financing (based on results, *outputfinanciering*) will be the registration of language skills, the number of

23 The *eindtermen*, thus qualification goals defined by the consultant office CINOP on the request of the ministry of education, culture and science (OC&W) had to be revised on the request of Dutch parliament.

signed integration contracts and the number of finished integration programmes. In order to increase the scores in (language)[24] test results, the Ministry of Justice asks the communities to make clear and strict contracts with (language) course providers.

These contracts between municipalities and language course providers are also based on result-oriented financing, e.g. 80 per cent of the participants of an integration trajectory for *oudkomers* shall improve at least one level of language skills in at least two of the four capacities.[25] As of now, the language tests for *oudkomers* are not standardised, which means that there is still some doubt about the reliability of the test procedure. Among the private enterprises that have submitted an offer for ›*oudkomer trajectories*‹, some subcontract language tutors. Thus, if an intermediary test shows that too many participants will not reach the aspired level, the tutor (threatened with suspension) may either demonstrate that the number of hours of language tuition foreseen is not sufficient or focus his/her training on the concrete questions that will be asked in the final test. Another way in which language course providers can try to influence the final outcome of the language test is to select[26] migrants who have a chance to progress. Such pitfalls, created by a combination of factors (e.g. absence of reliable test methods, results-based financing, privatisation and absence of quality norms) obviously do not always curtail the quality of the programme (they can be controlled), but they raise the awareness of counter-productivities: in the above instances, the interests of the different organisations concerned could carry more weight than the linguistic progress of the individual newcomer.

Integration Programmes for Newcomers Caught in Political Games

The political use different governments make of integration programmes has to be assessed critically. In France, the introduction of the reception platforms in 1998 has not gained a lot of public attention and the implementation has been – after the announcement in the council of ministers – completely taken over by the Directorate Population and Migration (DPM, ministry of social affairs) and the OMI (Office for International Migration), subordinate to the

24 The participants of an integration programme are also asked to pass a test in the ›social orientation‹ courses.

25 The four capacities are: reading, speaking, writing and listening. The Council of Europe adds conversational skills as a fifth capacity.

26 It should be noted that *oudkomer* is a category of migrants that public administrations cannot identify unless these migrants decide to participate in an integration programme. This means that language course providers that conclude a contract with the municipality must attract their own ›clients‹.

DPM. Still, the development of an integration programme was not an apolitical act since it sent out a message about (integration) policy: the specific measures shall make the newcomer self-supportive and autonomous as quickly as possible. Putting the stress on the efforts the migrant has to make is a way of pointing at the ›unwillingness of migrants‹ to integrate. This is an important political message in the debate about the question ›why has integration failed?‹. By obliging migrants to integrate, the programmes touch the sensitive question of a pluralistic versus an assimilationist society. However, this did not always provoke the conflicts and discussions that could be expected, partly because integration programmes, as many other policy measures, can be interpreted and presented in very different ways. One of these ways to announce the creation of an (obligatory) integration programme is to refer to the ›Dutch model‹. It can be observed that such references are frequent, but that the actual *knowledge* about the Dutch programme remains very limited.[27] On less than one page, the report of the French HCI (High Council on Integration[28]) presents the Dutch integration programme as a positive »global approach to problems caused by the reception of newcomers« and quickly enumerates its main organisational elements. In spite of the briefness of this presentation, government representatives and newspapers have quoted the Dutch programme as a model for the future French integration contracts. Astonishingly, the announcement of these integration contracts through the new centre-right government provoked very little criticism, and instead large approval among socialists and human rights activists. One reason for the overall approval is that the programme was strategically presented as a generous right accorded to every newcomer and not as an obligation linked to the acquisition of a permanent residence status, as finally suggested by the proposal for a law on immigration.[29] A second reason for

27 Rudolf Feik, Verpflichtende Integrationskurse in der EU, in: Migralex, 2. 2003, pp. 53–58.

28 Haut Conseil à l'Intégration, Les parcours d'intégration. Rapport au Premier Ministre, Paris 2002.

29 The proposition of integration contracts was seen as a strategic move of the Interior Minister Sarkozy in order to moderate the restrictive image he had obtained through the announcement of reforms on asylum and internal security. This shows that, at least until the linking between integration requirements and the acquisition of a permanent residency status became very clear, integration contracts were perceived as an ›innocent‹ and positive action. This changed with the publication of the proposal for a law on the mastery of immigration and the residence of foreigners, that in its Article 8 stipulates that »the delivery of a first permanent residence permit is subordinate to the republican integration of the foreigner into French society, appreciated in particular with regard to his/her sufficient knowledge of the French language and of the principles that rule the French Republic«. See law no. 2003-1119 from 26.11.2003 on the mastery of the immigration and the residence of aliens in France and on nationality (passage translated by the author).

the general approval is that the Netherlands' liberal image has contributed to making integration programmes a more consensual issue and legitimising governmental ambitions in the field.

However, Dutch policy of integration has strongly changed over the last months and years. While Germany, Austria and France turn towards the Netherlands, many Dutch officials in national consultation bodies, ministries and town councils have engaged in a vivid exchange with Denmark about *Danish* integration and immigration policy. Hence, it can be expected that these two countries will be the precursors of a ›harmonised‹ integration policy on the European level, which gives rise to some concern about the ongoing linking of integration and immigration policies. In this regard, two important legal steps have already been taken on the European level: the adopted Council Directive (2003/86/EC) of 22 September 2003 on the right to family reunification and the proposal for a Council Directive[30] on the status of third-country nationals who are long-term residents both give Member States the possibility to ask third-country nationals (refugees are treated separately) to comply with integration requirements in order to obtain a (permanent) residence permit.[31] In relation with the linking of integration requirements and residence status, the Commission writes in the recent Communication on immigration, integration and employment[32] that »The current discussions at EU-level concerning integration requirements reflect the political importance which Member States assign to the successful integration of third-country nationals. A major area of debate concerns the nature of integration programmes and the kind of integration measures which should be provided. Another key issue is whether they should be obligatory or not, and the effect which non-compliance might have in terms of legal and financial consequences. Whether or not non-compliance with obligatory measures should lead ultimately to the revocation of a residence permit, is an issue which is playing an increasing role in the negotiation of the different legislative proposals currently before the Council. These discussions show that there are many similarities in the problems Member States are facing and

30 Directive on the Status of Third-Country Nationals who are Long-Term Residents (2003/109/EC), Article 5(2).

31 Indirectly, even the granting of a first residence permit can be made dependent on the fulfilment of integration requirements, because in Article 7(2) of the Council Directive it is said »With regard to the refugees/family members of refugees referred to in Article 12 the integration measures referred to in the first sub-paragraph [Member States may require third-country nationals to comply with integration measures, in accordance with national law.] may only be applied once the persons concerned have been granted family reunification.«

32 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on Immigration, Integration and Employment. COM (2003) 336 final. Brussels, 3.6.2003.

in the way they seek to tackle them. This has led to a growing recognition of the need to act collectively at EU level by developing additional common instruments and adapting existing ones to the new challenges.« This long extract shows that the development of a harmonised integration policy – an issue that seemed completely unrealistic a couple of years ago – is making headway. In addition to the legal steps already described, the Danish Presidency and the European Commission have initiated the creation of a network of National Contact Points on Integration (one or two contact points per Member State). These contact points on integration shall exchange best practices of integration and come up with a ›Handbook on Integration‹ towards the end of 2004, during the Dutch presidency.

The integration programmes conceived at the end of the 1990s are not the same as today's ones since the ambitions, objectives and debates about integration policy have changed. The recent Dutch policy developments towards the slashing of the programmes and the maintenance and extension of integration requirements as a tool for immigration control raise questions about the future developments of such programmes within the EU. However, even if Member States decide to slash the programmes, the issue of integration requirements has been placed successfully on the European political agenda.[33] Whether the Netherlands, once again, will be a trend-setter in privatising the integration market and using integration requirements as an instrument of immigration control is still an open question, at least until the forthcoming Dutch Presidency of the European Union. If this happens and the European ›harmonisation of integration programmes‹ takes place along these lines, the meaning of the term ›integration‹ in the sense of a ›manageable learning process‹ will have to be re-defined as a skill the migrant should possess in order to immigrate.

33 The Dutch government, which will take over the presidency of the European Union in the second semester of 2004 already announced that the ›harmonisation‹ *(afstemming)* of European integration policies will be on its working programme, cf. Rapportage Integratiebeleid Etnische Minderheden 2003, Kamerstukken II, 2003/04, 29 203, no. 1.

Jan-Coen de Heer

The Concept of Integration in Converging Dutch Minority and Migration Policies

On entering the Netherlands, most immigrants are confronted with the Dutch government's policies on migration and minorities. The Aliens Act of 1965 marks the beginning of a ›restrictive migration‹ policy in the Netherlands. In this context restrictive does not only refer to legal terms of admission (admission policy), but also to the right of residence granted only temporarily and conditionally.

Dutch minority policy was introduced in the 1970s with the Memorandum on Foreign Workers (*Nota Buitenlandse Werknemers*).[1] This is the first official statement of the government's attitudes towards migrants. Since then, four major developments have occurred.

Firstly, there has been a fundamental change in the rationale and goals of minority policy now being characterised as (civic) integration policy. The concept of multiculturalism has recently been jettisoned in favour of the more assimilationist, but vague notion of civic integration *(inburgering)*.[2] In addition, views of how integration is achieved have changed. Integration is no longer seen to be a process located only in the host country, but as starting prior to immigration, preferably in the country of origin. Secondly, the altered premises of minority policy have led to the government taking a stricter stance on integration. This is exemplified in the emphasis on immigrants being themselves responsible for their integration, an attitude used as an argument for more restrictive measures regarding integration. Thirdly, the role of law as an instrument in policies on migration and minorities has increased, displacing other instruments. Finally, the underlying notions of the policy of admission and that of integration have been converging. They have been influencing each other over the last few years and are now closely connected.

1 Kamerstukken II, 1969/70, 10 504, no. 2.

2 Han Entzinger, The Rise and Fall of Multiculturalism. The Case of the Netherlands, in: Christian Joppke/Eva Morawska (eds.), Toward Assimilation and Citizenship. Immigrants and Liberal Nation-States, Houndmills 2003, pp. 59–86; Christian Joppke/Eva Morawska, Integrating Immigrants in Liberal Nation-States. Policies and Practices, in: ibid., pp. 1–36.

These four developments can be analytically separated, but are linked in practice. This article focuses on two of the developments described above: the change in the rationale of minority policy, and the convergence of the policies of admission and minorities. It is common in the political and social sciences as well as in law to separately deal with the fields of admission and minorities. As will be shown, the convergence of these two fields is pertinent not only to questions of scientific demarcation, but also to the explanation of changes in one of these fields of government policy.

The central questions addressed in this paper are: Which were the initial views on minority policy, and how have they changed? Which changes have occurred in the relation between the policies of minorities and admission over the past thirty years? And finally, how can this relation be characterised?

Labour Migration and the Fiction of Temporary Stay (1970–1978)

In 1970 the government's Memorandum on Foreign Workers introduced a ›thin‹ minority policy. It was published in reaction to the increase in ›spontaneous labour migration‹ from the Mediterranean countries. The Dutch government firmly declared that the Netherlands were not an immigration country. This attitude constituted the basic ideology of minority policy. Since migrants were supposed to return to their home countries after only a short stay, the government opted for a policy of preserving the immigrants' identities. The identities of cultural groups were supported, for example by means of community work. Regarding admission policy, the memorandum stated the government's intention to stop ›spontaneous labour migration‹ and rejected a liberal policy of family reunification. In the parliamentary discussion, most parties supported the government's line. They had reservations concerning the migrants' ability to adjust. Other reasons mentioned were a shortage in housing and the view that the Netherlands were not an immigration country.

In 1973 the government qualified its attitude towards temporary stay and family reunification.[3] The latter was seen as a ›positive choice‹ for settling in the Netherlands. The change in the perception of family reunification was, among other things, motivated by cultural arguments. Given the immigrants' cultural background, usually implying close ties and strong feelings of responsibility within families, it was no longer considered appropriate to refuse family reunification. However, in some cases, the problem of settling was still deemed problematic. »Family reunification accentuates the

3 Kamerstukken II, 1973/74, 10 504, no. 9.

problems in connection with the adjustment of the spouse to Western life and with the education of the children«, the government declared.

To recapitulate, it can be stated that until the late 1970s, minority policy and admission policy were thought of as separate fields of government intervention. Although in some respect these fields were loosely linked, changes in migration policy were not directly attributable to minority policy.

Restrictive Admission Policy and the Concept of Integration (1979–1993)

The publication of the report on ›Ethnic Minorities‹ by the Dutch Scientific Council for Public Policy (*Wetenschappelijke Raad voor het Regeringsbeleid*, WRR) in 1979 marked the beginning of a new era in migration policies.[4] The main issue of the report was the fear of minority groups becoming socially deprived and culturally isolated. The WRR acknowledged that the residence of labour migrants was not, as initially supposed, temporary, but permanent. The approach of integrating migrants while preserving their identities, however, had been based on the assumption of temporary residence and led to a multicultural society. To prevent minorities from becoming a sub-proletariat, it was now considered necessary to improve their legal position. The WRR pleaded for a solution that accorded to migrants a legal position as similar as possible to that of Dutch citizens, thereby referring to the position of migrants from the Moluccas, who had been treated as Dutch citizens since 1976.[5] The WRR further recommended that after a maximum of five years, migrants were to be given certainty as to whether they were allowed to take up permanent residence. Generally, after this period expulsion was not to be allowed.

In response to the WRR report, the government published a memorandum on minorities in 1983 *(Minderhedennota)*.[6] According to the memorandum, the primary goals of minority policy were to combat deprivation and neglect and to help the minorities to emancipate. The government wanted to improve the legal situation of the migrants who were admitted for reasons of family reunification. The same applied to migrants who intended a long-term stay. The restrictive admission policy was upheld. The government argued that because of the economic situation, a restrictive admission policy was indispensable for minority policy. However, the restrictive admission policy was to be combined with a liberal practice of naturalisation. Here the concept

4 Wetenschappelijke Raad voor het Regeringsbeleid, Etnische minderheden, The Hague 1979.

5 Faciliteitenwet Molukkers Stb. 1976, 468.

6 Kamerstukken II, 1982/83, 16 102, no. 20–21.

of civic integration was introduced. Before naturalisation was allowed, the migrant had to acquaint himself with Dutch society. »This is a matter of actual participation in society – a society one has accepted and where one feels quite at home«. Civic integration was defined as actual participation in Dutch multicultural society.

The memorandum marks the point where minority policy turned into integration policy. The policy of preserving the immigrants' identities was replaced by an ideology of actual social and economic participation. Integration policy, however, was still considered to be mainly of the government's responsibility. The terms ›integration‹ and ›civic integration‹ were used synonymously. Only in 1994 a distinction was introduced between these two concepts.

In 1989, the WRR published the report ›Allochtonenbeleid‹ (Foreigners Policy).[7] The WRR observed that the government had too much perceived foreigners as troublesome. The report regarded integration policy as the core of minority policy. Integration policy was to focus on the three sectors of labour, education, and adult education. The Council suggested a ›right to learn‹, i.e. every migrant should be allowed to attend a basic Dutch language course and a course in ›orientation on Dutch society‹. The WRR thought a separate integration policy no longer adequate, and instead emphasised a change in and intensification of elements pertaining to integration within the existing policy sectors. Apart from integration policy, the Council stressed the importance of migration policy. It opposed large-scale labour immigration. With view to the integration of those migrants already resident in the Netherlands, family reunification was not to be restricted.

From 1979 onwards, minority policy was no longer considered the government's responsibility alone, but was also seen as the immigrant's duty. ›Integration‹ became the buzz-word in politics. A restrictive admission policy came to be seen as facilitating integration. Restricting the possibility of expulsion, for example, was held to improve the legal position of long-term migrants.[8] The WRR's advocacy of family reunification also testifies to this change in attitudes.

7 Wetenschappelijke Raad voor het Regeringsbeleid, Allochtonenbeleid, The Hague 1989.

8 Cf. Kees Groenendijk/Robin Barzilay, Verzwakking van de rechtspositie van toegelaten vreemdelingen, Utrecht 2001, p. 6.

The Convergence of Integration and Minority Policies (since 1993)

The years from 1993 onwards are of special importance to the topic, since integration has been a crucial issue in public and political debate, and new initiatives have been launched in politics and law.

In 1994 the Dutch government published a memorandum called the ›Contourennota integratiebeleid etnische minderheden‹ (Memorandum on the integration policy for ethnic minorities) and gave its view on the issues addressed in the 1989 WRR report.[9] By way of an introduction, the government stated that since the 1983 Memorandum on Minorities, its minority policy had always been aimed at the social integration of immigrants. Social integration, the government argued, is »a process of mutual acceptance, in which both newcomers and the receiving society have to make efforts«. The government supported a view of integration as a process leading to the full participation of all groups in society, in which respect for the other's distinctiveness was a necessary condition. The term ›minority policy‹ was replaced by that of ›integration policy‹ in order to stress its procedural character and reciprocity. The policy of ›civic integration‹ approached the idea of citizenship, which has become a central part of the Dutch integration policy. This is due to the government limiting its own role in the matter and emphasising the importance of individual responsibility.

As to migration policy, the government reiterated its opinion that a restrictive admission policy was a precondition for a successful integration policy. The government even planned to reduce the number of migrants admitted to the country. The relation between migration and integration policy was seen in the fact that the former constituted the condition on which migrants became subject to the latter.

In 1998 the Newcomer Integration Act (*Wet Inburgering Nieuwkomers*, WIN) came into force.[10] The Act puts migrants under the obligation to attend an integration course. This also applies to Dutch citizens, born outside the Netherlands, who are more than 18 years old and have never settled in the country before.[11] However, it does not pertain to migrants with a right to temporary residence. In case the migrant does not comply or does not complete the course successfully, an administrative fine can be imposed. Although the Newcomer Integration Act is not part of the Aliens Act, it does occasionally refer to definitions laid down in the Aliens Act.

9 Kamerstukken II, 1993/94, 23 684, no. 2.

10 Stb. 1997, 604.

11 This measure is aimed at Antilleans, i.e. Dutch citizens not from Holland but from other parts of the Kingdom.

In November 1998 the Minister of Large Cities and Integration Policy (Minister van Grote-Steden en Integratiebeleid) published a memorandum named ›Getting the Opportunity, Taking the Opportunity‹ *(Kansen krijgen, kansen pakken)*.[12] It was characterized by a somewhat different tone in comparison to other government memoranda. Addressing the situation of the native Dutch in relation to the newcomers, the Minister (Van Boxtel, D'66) felt that the government had not adequately recognised the Dutch people's efforts to come to terms with the consequences of migration.

The Minister advanced the opinion that »members of ethnic minorities can be expected to do their utmost in order to acquire an independent position in our country as soon as possible. This requires them to choose for this society and to take responsibility for making use of the many facilities that our country offers to its new compatriots«. Adequate command of the Dutch language was now perceived as a crucial element of integration.

According to the memorandum, integration policy acknowledged the fact that the Netherlands had become multicultural. This was seen as having consequences down to the level of the democratic constitutional state itself. The primary aim of integration policy was »to bring about active citizenship for members of ethnic groups«. To achieve this goal, migrants with a residence permit were to be accorded the same official status as Dutch citizens.

The memorandum identified the concept of citizenship as central for integration policy. Citizenship was considered not so much as a legal status (nationality), but as a desirable activity expressed in everyday life as a city dweller and neighbour, as a scholar, an employee, a customer etc.[13] In compliance with the democratic character of citizenship, social interaction should be marked by respect for the other's contribution. The individual was considered free to choose the values connected to citizenship and the mode of realising them within the limits set by constitutional democracy and its most fundamental rights. The memorandum stated this without drawing any conclusion for migration or nationality law.

Preparations for a new Aliens Act began in 1999. While the issue was deliberated in parliament, the Democrats (D'66), the Liberals (VVD) and the Social-Democrats (PvdA) introduced a motion in order to set up new requirements for a permanent residence permit. In addition, the government was urged to consider possibilities for introducing the notion of obligatory integration courses to the new Aliens Act. This is important for this essay's topic for several reasons: firstly, because integration courses were made mandatory within the framework of migration law; secondly, because the

12 Kamerstukken II, 1998/99, 26 333, no. 1–2.

13 Cf. Will Kymlicka/Wayne Norman, Return of the Citizen. A Survey of Recent Work on Citizenship Theory, in: Ethics, 104. 1994, no. 2, pp. 352–381.

obligation to attend an integration course was extended to a group which had not been subject to it before, namely those who had already had a temporary residence permit when the WIN came into force. The only result of the motion so far has been a request by the government to the (non-governmental) Aliens' Affairs Advisory Committee to advise on the issue.

In 2001 the WRR published its third report on migration issues, ›The Netherlands as an Immigration Society‹ *(Nederland als immigratiesamenleving)*.[14] According to the WRR, the government had only a limited responsibility for integration. Self-realisation, cultural development and identity were now seen as of each migrant's responsibility. The WRR favoured a more sober integration policy in which a more formal and procedural approach to integration took precedence over its values and contents. A multicultural society, for the WRR, was not a normative concept but a fact. Assimilation in the sense of complete adaptation to Dutch culture was considered neither recommendable nor necessary. According to the WRR, multiculturalism was limited naturally by the fundamental values of western liberal democracy, because migrants were obliged to accept the dominant democratic and constitutional institutions.

The WRR report contained several recommendations on migration law. The Council drew attention to the fact that family formation was not a priority issue in migration law, especially when second-generation migrants with partners from their countries of origin were concerned. The council thought more attention to the subject necessary because family formation was likely to carry educational and language disadvantages from one generation to the next. Nevertheless, the WRR did not recommend a more restrictive admission policy for family formation and reunification.

The Dutch government responded in 2002 with the memorandum on ›Integration in the Perspective of Immigration‹ *(Integratie in het perspectief van immigratie)*.[15] The government argued that integration was a complex process that defied definition. Integration, it claimed, had numerous dimensions and its course depended on the individual. The memorandum named three related dimensions:

The social dimension implies that integration is a matter of personal participation. Equipment *(toerusting)* is the key notion. The cultural dimension entails that an individual should be able to realise his or her identity while at the same time culturally associating with the host society. The institutional dimension stresses the importance of acquiring a certain position in society and the need of becoming part of the social structure. »Integration is

14 Wetenschappelijke Raad voor het Regeringsbeleid, Nederland als immigratiesamenleving, The Hague 2001.

15 Kamerstukken II, 2001/02, 28 198, no. 1.

never finished«, Minister Van Boxtel claimed. Even though the government considered full absorption of ethnic groups by the Dutch multicultural society a fiction, it expected from the migrants loyalty to the fundamental values and to the ›common basis‹ of society.

The memorandum once again emphasised the importance of a more restrictive migration policy. Labour migration was to be limited to an absolute minimum. The migrants who filed a request for family formation (family reunification was exempt) were supposed to take an active role in their partner's integration. This was understood by the government as a financial obligation for the migrant who should carry a substantial part of the costs of the integration course.

Immigration and integration were important issues in the chaotic general elections of July 2002. The first cabinet Balkenende (CDA, VVD, LPF – Pim Fortuyn party) adopted many suggestions of the aforementioned memorandum.[16] Furthermore, while integration policy had been part of the Ministry of the Interior and Kingdom Relations (of which the special Minister for Urban Policy and Integration of Ethnic Minorities had been part between 1998 and 2002), it was now transferred to the newly created Minister of Alien Affairs and Integration within the Ministry of Justice.

The government felt that there should be as little influx as possible of migrants who were liable to reach but a disadvantaged position. Hence the limitation of family formation was considered of the utmost importance. Family formation with partners from countries of origin was regarded as problematic, even if the migrant in case belonged to the second generation. The cabinet proposed several measures to restrict family formation, including the introduction of an age limit, a stricter requirement concerning income, and the introduction of an obligation on part of the migrant to carry the costs of an integration course. Furthermore, completion of an integration course was made a prerequisite for acquiring a permanent residence permit.

The issue was continued during the parliamentary debates on the budget of the Ministry of Justice in November 2002. The second chamber submitted a motion in which it asked the government to draw up proposals bringing essential Dutch values, standards and fundamental rights to the migrant's attention while he or she was still in his home country awaiting the outcome of admission procedures to the Netherlands.[17]

In a letter to parliament, Hilbrand Nawijn (LPF), the former Minister of Alien Affairs and Integration (Minister van Vreemdelingenbeleid en Integratie) presented the basis of integration policy.[18] The Minister stated that

16 Kamerstukken II, 2001/02, 28 375, no. 5, pp. 14–17.

17 Kamerstukken II, 2002/03, 28 600 VI, no. 60.

18 Kamerstukken II, 2002/03, 27 083 and 28 612, no. 29.

admission policy was the centrepiece of integration policy. According to the Minister, integration was much simpler a concept than the sophisticated debates suggested. Integration, in his view, was about speaking and understanding the Dutch language, behaving and acting according to Dutch values and norms, participating in social activities, earning a living or being employed, and raising children by Dutch standards, including school attendance. Integration included civic integration *(inburgering)*. The ›integrated citizen‹ was declared the goal of this kind of integration policy. It remained unclear, however, what was meant by the civic aspect of integration. The Minister drew no consequences for migration policy which is not surprising as in the Minister's opinion the integration process completely takes place within Dutch society.

After the fall of the first cabinet Balkenende in October 2002, the second cabinet Balkenende (VVD, CDA, D'66) presented its coalition agreement.[19] It provided that those migrants who fell under the WIN should be obliged to learn the Dutch language before leaving their home country. They were to be granted access to the Netherlands only after having acquired basic command of the Dutch language.[20] Upon immigration they were to acquaint themselves with Dutch society by taking an integration course. The costs of both measures were to be borne by the migrant. The successful attendance of an integration course was also to be made mandatory for asylum seekers applying for a permanent residence permit.

During the parliamentary debates in November and December 2002, it became clear once more that family reunification and formation were regarded as important issues for integration.[21] A broad political majority voted for a motion asking the government to explore the possibility of beginning civic integration in the migrants' countries of origin. It was generally believed that due to a lack of knowledge and skills, those newcomers who immigrated because of family formation or reunification failed to integrate with view to Dutch culture and language. In June 2003, the preliminary results of a feasibility study on the topic were presented.[22] The authors concluded that it was hardly feasible to require civic integration to begin in the countries of origin, because learning Dutch without being able to practice it was considered as difficult. The study also pointed to potential conflicts with international human rights.

19 Kamerstukken II, 2002/03, 28 637, no. 19.

20 A yet unpublished bill was put forward in October 2003 called the ›Civic Integration Abroad Act‹ (Inburgering in het Buitenland). This act contains, however, not only language conditions but also requirements concerning basic knowledge of Dutch society.

21 Handelingen II, 2002/03, 28-2011-2014.

22 Kamerstukken II, 2002/03, 27 083, no. 36.

In September 2003 Rita Verdonk (CDA), the current Minister of Aliens' Affairs and Integration, presented to parliament the policy she intended to pursue. She saw integration as a matter of ›equipping‹ *(toerusten)* people.[23] This entailed adequate command of the Dutch language, Dutch values and standards and knowledge of the basic social institutions in the Netherlands.

The Minister presented a number of plans concerning integration. Those migrants immigrating voluntarily, for example for the purpose of family formation or reunification, were to prove that they had adequate command of the Dutch language and elementary knowledge of Dutch society while still being in their country of origin. After settling in the Netherlands all newcomers were supposed to improve their language skills as well as their knowledge of Dutch society and their social skills in order to take part in Dutch society as citizens. Acquiring such skills was declared a condition for being granted a permanent residence permit. The proposals did not distinguish between asylum seekers and other migrants. Each migrant should be responsible for his or her integration process and should bear the costs of the integration course. Only upon successful completion of the course a (partial) refund should be possible.

It becomes clear that in the present period, the basic concepts of citizenship have transformed ›integration policy‹ *(integratiebeleid)* into ›civic integration policy‹ *(inburgeringsbeleid)*. Thereby it has been possible to literally move integration policy to the borders of the Netherlands or beyond. Integration policy and migration policy, or, to be more specific, admission policy, have become complementary mechanisms of control. Another important development lies in the increasing emphasis of integration policy on family formation and reunification with reference to partners from the countries of origin.

Towards Unfolding Internal Control

This article has described the growing convergence of minority policy and immigration policy. In the first period (1970–1978), the state wanted immigrants to preserve their identities, and integration was not considered desirable. The government assumed only limited responsibility for integration. This changed in the second period (1979–1993), when the law was altered to facilitate the migrants' emancipation and cultural development. A set of anti-discrimination and equal opportunities laws was adopted. Government agencies and institutions were alerted to this group's special needs. Integration was viewed as a social process based on participation and interaction. In short, social integration became the responsibility of the state. Immigration policy was thought of no direct importance to minority policy.

23 Kamerstukken II, 2003/04, 29 203, no. 1.

At the end of the second period, in 1994, ›minority policy‹ turned into ›integration policy‹. More and more responsibilities have come to lie with the individual migrant. Migrants have a duty to do their utmost for integrating. Command of the Dutch language and familiarity with Dutch society are preconditions for social participation. Since the 1990s migration policy has been part of integration policy. Integration is now seen as requiring more than the migrant's functional capability in social contexts. The ultimate goal of integration is seen to be citizenship and ultimately Dutch citizenship.[24] All migrants have to meet the demands set by the government. If they fail to do so, the present government intends to refuse admission or permanent residence. This entails deterioration in the migrants' overall legal position.[25]

Initially integration and civic integration were terms used synonymously. Later on, they acquired different meanings. ›Integration‹ is now to be understood in terms of ›social integration‹, meaning that migrants and their organisations have social contacts with society in a broad sense. ›Civic integration‹, however, is not about becoming ›part of society‹ or ›part of a group‹, but about acquiring a citizen's qualities.

Immigration policy once referred to an implicit and narrow notion of citizenship, including for example economic independence and abiding by the law. This ›thin‹ conception has been replaced by a more substantial or ›thick‹ notion of citizenship. It was initially presented as more or less neutral, but has meanwhile been filled with specifically Dutch elements. When ›citizenship‹ is used as an instrument of restrictive admission policy, this raises new questions for normative political theory like the question how theories of citizenship can contribute to this discussion on the changing concept of integration.

One might argue that part of the idiom of ›citizenship‹ is mere rhetoric and only used as an argument for a more restrictive admission policy. After all, since the idea of integration has been introduced, it is claimed that integration can only be successful if the number of migrants entering the Netherlands is limited. In terms of external and internal migration control[26], the present developments in migration policy can be described as a process of expansion or extension of internal control starting with the integration requirements for citizenship as nationality.[27] A crucial point is reached at

24 ›Dutch‹ because besides language more cultural conditions, e.g. knowledge of Dutch history may be incorporated in the future.

25 Groenendijk/Barzilay, Verzwakking van de rechtspositie.

26 Grete Brochmann, The Mechanisms of Control, in: idem/Tomas Hammar (eds.), Mechanisms of Immigration Control. A Comparative Analysis of European Regulation Policies, Oxford 1999, pp. 1–29, here p. 12.

27 Eric Heijs, Van vreemdeling tot Nederlander. De verlening van het nederlanderschap aan vreemdelingen 1813–1992, Amsterdam 1995, p. 31.

which a – theoretical – distinction between external and internal migration control no longer reflects reality. The process of convergence has been initiated or accompanied by a change in the basis of integration policy. Minority or integration policy and immigration policy are incompatible, the former aiming at inclusion, the latter at exclusion. By introducing the concept of civic integration, the Dutch government has opted for exclusion. There will soon be sanctions for those migrants who are unwilling or unable to integrate. They will probably be refused admission or permanent resident status. This, however, is not yet the end of the story. In a recent debate between parliament and the Minister of Education, Culture and Science on the future of the WIN the Minister agreed with the chamber that integration programmes should also include education in Dutch history and Dutch.[28] Thus, the government, instigated by developments in society, demands even more skills and efforts from the newcomers.

28 Kamerstukken II, 2002/03, 28 600 VIII, no. 126.

Transnational Ties and the Role of Sending States

Pascal Goeke

Transnational Migratory Identities between Nuremberg, Serbia, Croatia and Bosnia-Herzegovina

The article reflects briefly on the wide variety of transnational approaches in migration research. The deficits in these approaches necessitate the introduction of clearer concepts. One of these concepts is the notion of hybridity. As an analytical tool, the notion of hybridity helps to analyse processes of transnational identity formation. Three interview passages will be interpreted using the notion of hybridity. Based on this interpretation, the interview passages will then be linked to general discourses on the relations between Europe and the Balkans.[1]

Transnationality and Beyond

The ›cultural turn‹ caused discussions of ›identity‹ and ›culture‹ to infiltrate a wider scope of geographers than formerly thought possible. If ›globalisation‹ is the 1990s buzz word in the field of economic geography, its counterpart in migration studies is ›transnationalisation‹. Although there is a wide range of differences among transnational approaches, these concepts all claim that nation-states are losing the power to determine the biographies of migrants; that nationally defined social and spatial fields are successively becoming disrupted; and that new transnational social spaces are emerging in which migrants locate themselves. Because of these new social spaces migrants no longer have to decide in favour of or against one national identity, but instead can (re-)locate their identities within continuously changing temporal and spatial points of reference. Although proponents of these approaches do not argue in terms of deterministic causality, they nevertheless claim that the global extension of transportation and communication infrastructures facilitates the continuation of intensive social relations across the nation-states' borders, enabling migrants to get entwined in multisited networks. Narrow definitions of transnationality that deal with transmigrants include only those migrants »…whose *daily* lives depend on multiple and constant inter-

1 I am indebted to Itta Bauer and Noelle Noyes who made valuable and thought-provoking remarks.

connections across *international* borders and whose public identities are configured in relationship to more than one nation-state.«[2] In this respect, transnationality can be understood as the attempt of migrants to align their biographies with the horizons of at least two nation-states. Other approaches used transnationality as both a radical and playful perspective, trying to overcome the reproach of methodological nationalism and to uncover the hidden normative agenda of the nation-state, which is inherent in traditional concepts.[3] In-between positions focus on the liberating potential of hybridity and transgression.[4]

Regardless of the approach, the notion of transnational spaces provided the opportunity to decouple society and space epistemologically – especially for geographers.[5] Therefore, this perspective fits well into the recent seachange within the field of geography of conceptualising the relation between space and society. Even more importantly transnational approaches produce inestimable sources of irritation for methodological nationalism. They demonstrate that the congruence of social spaces with administratively fixed territories, the ideal nation-state, is merely a possible but not a necessary result.[6] Yet transnational approaches also attract harsh and partly justified criticism. This criticism is mainly directed at the poorly elaborated links with social theory in general and specifically with other approaches in migration research.[7]

2 Nina Glick Schiller/Linda Basch/Cristina Szanton Blanc, From Immigrant to Transmigrant. Theorizing Transnational Migration, in: Ludger Pries (ed.), Transnationale Migration, Baden-Baden 1997, pp. 121–140, here p. 121 (emphasis added).

3 E.g. Brenda S.A. Yeoh/Shirlena Huang/Katie Willis, Global Cities, Transnational Flows and Gender Dimensions, the View from Singapore, in: Tijdschrift voor Economische en Sociale Geografie, 91. 2000, no. 2, pp. 147–158.

4 Cf. Homi K. Bhabha, Die Verortung der Kultur, Tübingen 2000; Armin Nassehi/Markus Schroer, Staatsbürgerschaft. Über das Dilemma eines nationalen Konzepts unter postnationalen Bedingungen, in: Klaus Holz (ed.), Staatsbürgerschaft. Soziale Differenzierung und politische Inklusion, Wiesbaden 2000, pp. 31–52.

5 Hans-Joachim Bürkner, Transnationalisierung von Migrationsprozessen – eine konzeptionelle Herausforderung für die geographische Migrationsforschung?, in: Hans H. Blotevogel/Jürgen Oßenbrügge/Gerald Wood (eds.), Lokal verankert – Weltweit vernetzt. Tagungsbericht und wissenschaftliche Abhandlungen vom 52. Deutschen Geographentag in Hamburg, Stuttgart 2000, pp. 301–304.

6 Cf. Marc Boeckler, Entterritorialisierung, ›orientalische‹ Unternehmer und die diakritische Praxis der Kultur, in: Geographische Zeitschrift, 87. 1999, no. 3/4, pp. 178–193.

7 E.g. Michael Bommes, Migration, Raum und Netzwerke. Über den Bedarf einer gesellschaftstheoretischen Einbettung der transnationalen Migrationsforschung, in: Jochen Oltmer (ed.), Migrationsforschung und Interkulturelle Studien. Zehn Jahre IMIS (IMIS-Schriften, vol. 11), Osnabrück 2002, pp. 91–105.

Research Focus

This paper focuses mainly upon transnational identity formation of migrants who are in some way related to the city of Nuremberg and to the countries Bosnia-Herzegovina, Croatia and Serbia.[8] Recalling the claim made by transnational approaches that migrants locate themselves – or are located – in at least two national contexts over a considerable length of time, the question then would be how they identify themselves with both contexts and how they produce their own geographies while linking distant localities to a social space which they perceive and present as their personal social space. The process of linking distant localities in itself would probably not be very interesting if there were not dividing borders between these localities – borders which separate different nation-states as well as different lifeworlds.

Looking at processes of identification in relation to the Balkans requires several opening remarks, since they enable a better understanding of these processes. The break-up of the federal state of Yugoslavia – which definitively ceased to exist in the spring of 2003 – was both caused by and led to processes of nation building. Due to the wars in the 1990s, the Balkans once again became synonymous with a bloody history, and their relations with Europe – particularly with the European Union – were deeply disrupted. Unfortunately, these changes are reflected in the academic literature: there is a predominance of topics such as ›war‹ and ›refugees‹. Thus, scholarly literature neglects the large number of Balkan labour migrants living in Germany. Migratory experiences between Germany and the Balkans, however, are apparently better described in fiction than in scientific literature.[9] At the same time, questions of integration in Germany are often narrowly focused on Turkish migrants. Additionally, scholarly literature itself is often directly involved in the process of nation building. This process of creating a nation involves a narrative of homogeneity which – upon closer inspection – reveals paradoxical features. Although it is never really explained what this kind of homogeneity is made of or based upon, it is nevertheless presented as something very desirable. The following quote may illustrate this point: »The republic of Croatia belongs to the national homogeneous countries in Europe.

8 This paper is based on the author's doctoral dissertation, which also investigates both, transnational identity formation as well as transnational human agency and structures. In addition, the focus allows to avoid tackling the difficult question: what, precisely, is meant by ›newly emerging spaces‹ and what is the ontological status of these spaces in comparison to other spaces. Answers to these questions are generally very unclear, hence the advantage in focusing on the epistemological dimension, as already indicated.

9 E.g. Marica Bodrožić, Tito ist tot, Frankfurt a.M. 2002; Jagoda Marinić, Eigentlich ein Heiratsantrag, Frankfurt a.M. 2001; Mile Stojić, FensterWorte. Ein bosnisches Alphabet, Klagenfurt/Celovec 2000.

Nonetheless there is a multitude of other national communities and minorities. According to the last national census of 1991 Croats form 78,1 per cent of the population.«[10] On the one hand, the author's nationalistic bias is easily detectable in the quotation, on the other hand it is almost impossible to fully reject national categories or even to refrain from basing research upon them. That is because the research is focused on migrants who are ›in some way *related* to the countries Bosnia-Herzegovina, Croatia and Serbia‹ instead, for example, ›migrants from Ex-Yugoslavia‹ or even more reductionist ›Yugoslavians‹.

The Notion of Hybridity

As mentioned above, the links of transnational concepts to other developments in social theory are poorly elaborated. The notion of hybridity, however, provides a sharp analytical tool to grasp the ongoing processes of identity work in which migrants are involved. Identities are permanently constructed, yet never finished; their points of reference are always different, yet never without meaning. Nationality as a socio-cultural concept of identity and the assumption that »in the modern world everyone can, should, will ›have‹ a nationality, as he or she ›has‹ a gender«[11] refers to the formal universality of the concept which makes national identities a tantalising object of investigation. To understand the whole extent of national identities it is worth considering the process of nation building. The process of nation building was and still is linked with everlasting processes of territorial and social closure[12] accompanied by a quest for national purity and homogeneity, which result – from a national perspective at best – in isomorphic structures of the social and the territory. The following figure illustrates both mechanisms and the effects of these processes, and thus helps to achieve a better understanding of transnational identity formation.

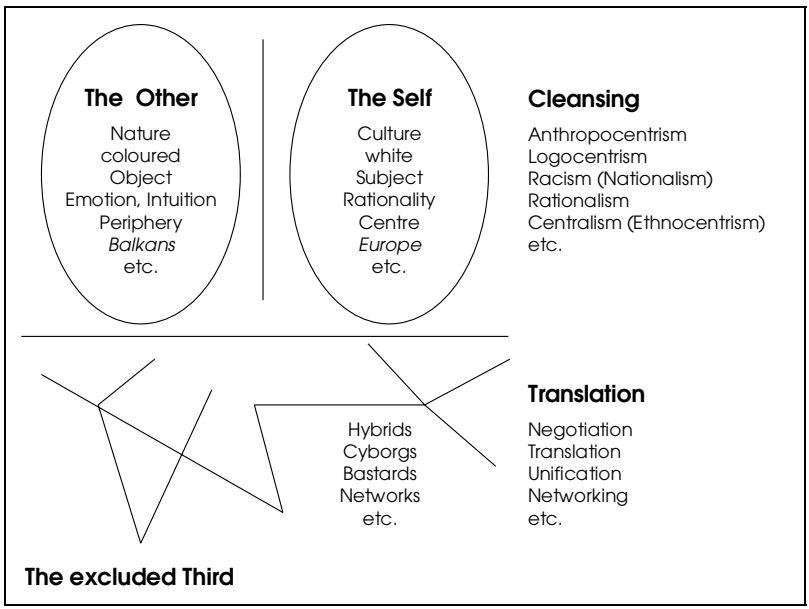
When applying the implications of the diagram to questions of identification, it is crucial to recognise that the construction of a ›self‹ requires a dichotomous separation from the ›other‹. Both entities are then conceptualised as essential identities. Employing this scheme to the particular field of research on the Balkans, it is possible to specify the antagonists as Europe vs.

10 Ivan Crkvencic, Auswanderungen und demographische Prozesse in Kroatien, in: Wilfried Heller (ed.), Migration und sozioökonomische Transformation in Südosteuropa, Munich 1997, pp. 267–281, here p. 267.

11 Benedict Anderson, Imagined Communities. Reflections on the Origin and Spread of Nationalism, rev. ed. London/New York 2003, p. 5.

12 Cf. Andreas Wimmer, Territoriale Schließung und die Politisierung des Ethnischen, in: Claudia Honegger/Stefan Hradil/Franz Traxler (eds.), Grenzenlose Gesellschaft?, Opladen 1999, pp. 510–518.

Figure: Phallogocentrism – Modernity's Form of Dominion



Source: Wolfgang Zierhofer, Geographie der Hybriden, in: Erdkunde, 53. 1999, no. 1, pp. 1–13, here p. 11. The diagram is a slightly changed version: ›Europe‹ and ›Balkans‹ are added for example, other terms were left out.

the Balkans: Europe then represents the ›self‹ and the Balkans the ›other‹. Again, these distinctions are a matter of principally contingent processes of othering in a principally relational world. To fulfil the fictional demands of purity, processes of purging or cleansing are necessary. The separation of the ›self‹ from the ›other‹ leads automatically to a second division, illustrated in the diagram by the horizontal line. This second separation – or more precisely the fade-out – excludes all of the third possibilities. The excluded third comprises of all those who do not fit easily in either of the first two categories, since the relations upon which they build their identities involve different contexts. From an outside perspective, they might be labelled as ›hybrids‹.[13] They are continuously involved in processes of translation between the supposedly ›pure‹ elements. In contrast to biographies within the borders

13 This argument leads directly to questions of positionality and reflexivity, which can not be elaborated in this context. Cf. Gilian Rose, Situating Knowledges. Positionality, Reflexivities and other Tactics, in: Progress in Human Geography, 21. 1997, no. 3, pp. 305–320.

of a nation state, migratory identities are by (national) definition linked with transgressions of nation-states' borders, transgressions from one ›imagined community‹ to another. Transnationality involves a continuous transgression.

The notion of hybridity as introduced here should not be read as a process of mixture, since this would once again assume the existence of essential entities and hence contradict the notion that everything is and has to be regarded as relational. Cultural hybridity moves the axis of differentiation from an external division between self and other to an internal plurality of differences.[14] This is why hybridity should be understood as an analytical tool but not as a mode of self-description, especially since it is often a nameless and hidden category. Moreover the notion of hybridity is somewhat of a polluted notion. To put it bluntly in other words: »The globe consists so to speak only of global networks. The question then goes: Who makes which relations subject of discussion for what reasons?«[15]

Empirical Findings

The findings presented below give only a glimpse of the empirical work undertaken for this research and will be mainly restricted to the meaning migrants attach to different places, regions or nations in relation to their biography. The prerequisite for the chosen examples is that they all maintain intensive relations in both national contexts. The first quote is from a spontaneous situation with youth from different countries. The official nationality of the speaker is indicated in brackets behind his/her name.

Semra (Turkish): Albania would be fine…

Ilaz (then-Yugoslavian): What did she [Semra] say?

Belmin (Bosnian): Albania is not Europe! [she said]

Ilaz: The next German says: ›Asia!‹ [to Albania]

Belmin: Asia! [with a giggle]

Ilaz: Oh, I'd kill him immediately! We are Serbian Kosovo-Albanians!

Belmin: Actually he is nothing!

Ilaz: I'm a Kosovo-Albanian, I live in Serbia!

Uta (German): A Kosovo-Albanian, a Serbian-Kosovo-Albanian-Franconian![16]

14 The argument was brought forward and further elaborated by Boeckler, Entterritorialisierung, p. 182.

15 Wolfgang Zierhofer, Geographie der Hybriden, in: Erdkunde, 53. 1999, no. 1, pp. 1–13, here p. 12.

16 The local background in Germany is set by the city of Nuremberg which is located in the region Franconia.

Ilaz' identity formation shall be the focus of the following analysis. Ilaz, who is 17 years old, was born in Nuremberg and spent most of his life in the city. Twice a year he goes to Preševo (Serbia) where he meets up with relatives from all over Europe. During the remaining holidays he often visits relatives in the cities to which they migrated, mainly Basel, Switzerland.[17] It should be evident that Ilaz' biographical stations – in this case the places and spaces with which he puts himself in relation – do not fit into a single national narration, especially since almost incommensurable identities are linked within the above-mentioned spaces. Ilaz' identity has to be regarded in relation to other identity matrices. First it should be mentioned that it is not by coincidence that Belmin, who links himself with Bosnia-Herzegovina and a Muslim identity, tries to exclude Albania (and therefore Ilaz) from Europe. Here he is participating in the endless ›othering-game‹ played in the Balkans, by which almost everyone tries to exclude the nearest ›other‹ from Europe, thereby presenting oneself as an integral part of Europe. Ilaz, well aware of this exclusionary process, exaggerates the unspoken exclusion and links Albania with Asia, a notion which is pejorative both for him and Belmin. The identity ›Serbian Kosovo-Albanian‹ then suggested by Ilaz is hardly comprehensible, taking the recent military conflicts into account. Belmin, likewise well aware of that incompatibility, excludes Ilaz from any of these possible modes of identification. Ilaz becomes temporarily the excluded third, and is forced to state his situation more precisely: he purges his identity of the Serbian impurity and uses ›Serbia‹ only as a marker of locality, since ›his city‹ (Preševo) has never been located in the once autonomous province of Kosovo.[18] The next impurity, however, is already lurking and is promptly introduced by a German, who offers Ilaz not the German identity but the regional identity of Franconia, mixing it ignorantly with almost all of the aforementioned possibilities. Spaces and places, often useful, successful and unambiguous markers, are now turned into precarious and difficult notions. When asked later in an extended interview, Ilaz denies all notions of hybridity and utters little understanding for the much more celebrated hybrid Turkish-German youth culture with well-known authors like Feridun

17 For a good account of ›Albanian‹ migrants in general see Denis Torche, Structuration d'un espace migratoire. Le cas des émigrés albanais des Yougoslavie vers la Suisse, in: Geographica Helvetica, 48. 1993, no. 4, pp. 159–164.

18 Apart from the city of Preševo, the cities of Bujanovać and Medvedja are located outside the once autonomous province of Kosovo – Kosovo-Albanians, however, build the majority of the population (circa 100,000). For a detailed account see also Michel Roux, La Population de la Yougoslavie en 1991. Inventaire avant le chaos, in: Méditerranée, 81. 1995, pp. 35–46, here p. 44.

Zaimoğlu.[19] Picking up the question of the sense of belonging to Europe the passage quoted above fits into the omnipresent discourses which try to establish the ›own nation‹ as a constitutional part of Europe, thereby excluding the other ›Yugoslavian‹ nations: While Slovenians have little problem with this sort of (b)ordering and will soon become EU citizens, Croatia struggles to present itself in the »cultural and geographical heart of Europe«[20] and opposes the diction in Brussels which regards Croatia as part of the western Balkans. Serbia, which is predominantly Serbian-orthodox (not Catholic like Croatia), perceives itself as the last defender of Christianity. Therefore it is not surprising that at the preliminary end of the ›othering-game‹ that Ilaz plays, he argues that if all of the Kosovo-Albanian-Muslims were to pull off their skins, they would find a Christian core even inside of the Kosovo-Albanian. On the other hand, Muslims from Turkey or Arabic countries are Muslim to the core.

Another exemplary biography: Petar, a 37-year-old academic, son of a German teacher and a Croatian ›guest worker‹, who grew up in Dalmatia but was born in Gelsenkirchen, reflects briefly upon some of his biographical stations.

P.G.: You've said you were born in Gelsenkirchen…

Petar: Yes, that's were I was born, but that was by accident…

P.G.: By accident…

Petar: Yes, maybe a good coincidence, because in the Ruhr area it was one of the typical cities with guest workers. So the cruel fate of the guest workers is represented in this place in which I have never been since [my birth]. It doesn't play a big role. […] Dalmatia, one of the first sayings which I knew as a child, was: ›Stick your finger into the sea and you are linked with the whole world!‹ Well, that is a saying, but its meaning was absolutely clear: living on the coast means constant exchange.

Here, Petar manages quite smoothly to integrate the image of Gelsenkirchen in his biography; or more precisely in the labour history of his father. Petar, who experienced an occupational advancement in comparison to his father, uses the labour ›identity‹ to present himself as a successful social climber, without looking arrogantly back upon his father's modest career. More important is the meaning of Dalmatia, the Croatian coastal region which he dis-

19 For a good account on (Turkish-German) transcultural identity negotiations see Itta Bauer, Deutsche Türkinnen, türkische Deutsche? Transkulturelle Identitäten junger Nürnbergerinnen, in: Geographische Rundschau, 55. 2003, no. 4, pp. 36–40.

20 Racan (prime minister of Croatia), cited in: Bernhard Küppers, Kroatien stellt Beitrittsgesuch. EU-Ratspräsidentschaft begrüßt Entscheidung Zagrebs, in: Süddeutsche Zeitung, 22/23 February 2003, p. 7.

cusses soon after mentioning Gelsenkirchen. Although he claims a sense of belonging to both Germany and Croatia, he uses the particular meaning of Dalmatia expressed in the above-mentioned saying to present himself as a complete subject and to maintain the belief in the modern meta-narration of the subject. Apart from that it is no coincidence that he uses Dalmatia as an important identity matrix, since regional identities in Yugoslavia were fostered in order to try to neutralise national identities.[21] The saying allows him to withdraw from the national identities German and Croatian, especially since both the feeling of global interconnectedness and a favourable identity of a Dalmatian are embedded in the saying.

Whereas Petar presented potential dividing lines in a personally well-arranged mode, another interviewee oscillated between different modes of self-description. Vesna, a 31-year-old woman, has studied the last four years in Zagreb and recently moved back to Nuremberg, where she was born. Politically active – she was even invited to a reception given by Franjo Tuđman – she reflects at length about identity. The starting point of this particular interview passage is a conversation regarding actual and prospective modes of education:

Vesna: …but there is for example a certain author, and I want my son to know her very well and to know: that's Croatian. And that even such a small group of people has such stories… because they are as nice as the Brothers Grimm's stories, to put it that way.

P.G.: You've just said that your son should know exactly what Croatian is, and a moment ago you said: ›I'm mixed!‹?

Vesna: Yes, that doesn't work, you can't mix it! In my life it was separated: School – after the whole thing with the [Yugoslavian] Hauptschule – school was German; leisure, friends, for the most part Croatian I would say… In any case I know just one person, she said from the beginning: we will stay in Germany, my son should grow up as a German. There is nothing about which she would say: ›that's Croatian!‹ Nothing! … She said right from the beginning: ›the mother tongue is German!‹ And they go to the German mass and so on. That is something different, if you decide to go that way. If you try somehow to link these two worlds, or cultures or whatever they might be, then you separate, then you separate and say, no, that is Croatian and that is German!

21 Cf. Elisabeth von Erdmann-Pandžić, Kleine und große Regionen. Globalisierungsansätze in Kroatien und Bosnien-Herzegowina und ihre Vereinbarkeit mit der Existenz kleiner Kulturen und regionaler Identitäten, in: Sefik Alp Bahadir (ed.), Kultur und Region im Zeichen der Globalisierung. Wohin treiben die Regionalkulturen?, Neustadt an der Aisch 2000, pp. 479–494.

The notion of hybridity as introduced in this text helps to read and analyse these last sentences especially well. Since a mixture of these different contexts appears to be impossible, the only remaining solution is for Vesna to insert a strict separation between them; thus, she lives them as internal, occasionally overlapping differences.

Another striking point in the biographies of Petar and Vesna is that they both managed – partly with the aid or guidance of their parents – to withdraw from cramping demands from both contexts. These demands comprise both normative national discourses and moral-financial demands made by relatives. Because both Petar and Vesna are very much involved in a process of individualisation, they do not feel obliged or responsible for the welfare of remote relatives. This enables them to move freely between the different contexts. Whereas other interviewees depicted their or their parent's region of origin as a poor place with pitiable prospects, Petar and Vesna appropriated the positive aspects of Croatia and Germany equally. Not only are they theoretically able to earn a living in both countries, but they use this opportunity and have worked both in Croatia and Germany. They both present themselves as being able to integrate – or as being integrated – in both nations. Through their profound experiences in both countries they are able to regard both nations from an in-between position and thereby confirm the statement, that nothing is as reliable as the double perspective of the migrant.[22] When coming from the perspective of assimilation theories, it might be possible to describe these separate processes as assimilation. Yet the pivotal problem remains that such theories tend to conceptualise assimilation as a universal, unidirectional and irrevocable process. Thus, they fail to take into account the complex processes of interaction and feedback which occur in cultural evolution. Instead, these theories reduce these processes to an asymmetric, teleological process between two eternal entities.[23] This understanding of assimilation becomes extremely difficult to maintain under transnational conditions.

Having mentioned the normative national demands from which Petar and Vesna have freed themselves, the focus will now shift to the example of the Croatian Mission in Germany and western Europe. The Mission pursues identity politics which can be partly and roughly described as a quest for purity. At the annual meetings of the Western European Mission, the migrant situation plays a crucial role and the meeting itself serves as an important point of reference for the everyday work in the parishes. Interesting is the

22 Bhabha, Die Verortung der Kultur, p. 7.

23 Elisabeth Bronfen/Benjamin Marius, Hybride Kulturen. Einleitung zur anglo-amerikanischen Multikulturalismusdebatte, in: Elisabeth Bronfen (ed.), Hybride Kulturen. Beiträge zur anglo-amerikanischen Multikulturalismusdebatte, Tüingen 1997, pp. 1–29, here p. 19.

image of migration within the Croatian Mission, described as follows: »[t]he Croatian people (families) have left the home of their great grandfathers. […] Not for a single moment has the majority of these people forgotten its identity, its catholic belief, its culture and its language.«[24] Church officials do not hesitate to indirectly blame migrants for the misery in Croatia and Bosnia-Herzegovina, arguing that migrants have left their homes at an age when fertility levels reach their peak. They even use a divine and at the same time not fully comprehensible argumentation when they postulate that »the country in which you [members of the diaspora] were born, is your land as a basic human right and as a specific godly category«.[25] Church officials, however, rarely mention the second generation and hardly a word is spoken concerning intermarriage – and when this does happen, such marriages are pejoratively described as ›sambo-marriages‹.[26] The quest for purity is detectable in the local Croatian Mission as well. When the author Mile Stojić from Sarajevo (Bosnia-Herzegovina) was invited to a reading in Nuremberg it caused severe upset. Even though in the programme the author was described as coming from ›a Croatian family in Sarajevo‹, some parishioners accused him of ›selling his mother‹ and boycotted the reading, since this formulation was not accepted as a clear commitment to the Croatian nation.

In the preliminary and selective passages shown so far the attempt was made to demonstrate how migrants who do not fit easily into single national categories try to construct their own identities in accordance with their biographies. Though in principle these processes do not differ from the processes other people go through, they are more difficult for migrants due to the ongoing border-transgressions. And they are especially difficult for migrants from the Balkans since this region has acquired a more or less pejorative reputation.[27] Although the stress was laid upon the migrants' own identity work and the strategies they use in constructing their identities, their personal constructions were linked to the general discourses on the relations between the Balkans and Europe. Even from a constructivist perspective, identities are not free-floating and, as this article has shown, migrants – like everybody else – are trying to find stable identity matrices.

24 Stipo Šošić, Die Familie in meiner Pastoralarbeit und die Möglichkeiten der Familienpastoral in Schweden, in: Josip P. Klarić (ed.), Die kroatische Migrantenfamilie – Hrvatska Obitelj u Pokretu, Frankfurt a.M. 2001, pp. 283–287, here p. 283.

25 Tomislav Jozić, Ehe und Familie in Kroatien und Bosnien-Herzegowina, in: ibid., pp. 199–224, here p. 207.

26 Šošić, Die Familie in meiner Pastoralarbeit, p. 286.

27 Vesna and Petar for example know about that reputation very well, yet they are keen on establishing a more positive discourse on the Balkans.

Cathelijne Pool

Open Borders: Unrestricted Migration?

The Situation of the Poles with a German Passport in the Netherlands as an Example for Migration after Accession to the European Union

In May 2004, ten central and eastern European countries will join the European Union.[1] This enlargement of the EU is unprecedented in terms of the number of countries that will join, in terms of the number of inhabitants, and in economic differences. Although the enlargement will bring about changes in many respects, the free movement of workers has been a subject of particular speculation. Especially Germany and Austria fear that opening their borders will result in mass migration from Poland, the candidate Member State with the largest number of citizens. Because of this fear, transitional measures on the free movement of workers were agreed upon. This article presents the range of transitional measures Member States can apply in order to control immigration from future central and eastern European Member States. Furthermore, it discusses the question of whether other, already existing migration flows justify the fear of mass migration particularly from Poland to the current EU Member States. For this purpose, the migration of people from Poland who possess a German passport to the Netherlands is studied in more detail. Since these people, because of their German descent, already enjoy the right of free movement of workers laid down in Community Law, the analysis of their current migration from Poland to the Netherlands could contribute to a more rational discussion on the size and types of migration flows to be expected from Poland.

As already mentioned, the current Member States of the European Union agreed upon a number of transitional measures on the free movement of workers with eight of the new Member States.[2] These transitional measures can be applied up to a maximum of seven years after these countries have joined the EU. This creates three different options.

1 This article is dated January 2004.

2 Cyprus and Malta are excluded. Central and eastern European citizens working in the EU with a working permit valid for at least 12 months will also have free access to the labour market of that country (as well as their families) as of May 2004.

The first option allows the Member States to maintain their national immigration policy on the movement of labour for two years after accession, which may then be prolonged for another three years. After these five years, it is only possible to apply any transitional measures for another two years if the EU Member State can prove that the influx of migrants from the new Member States poses a serious threat. After a maximum of seven years, the citizens of the central and eastern European countries must be treated according to Community Law and will have free access to the labour market in the EU.

The second option is that a Member State grants citizens from the new Member States access to its labour market immediately but still requires work permits, which will be issued without a labour market priority check. This enables Member States to keep a finger on the pulse and react immediately in the case of any disturbance on the labour market.

In the third option Member States can decide not to apply any transitional measures, and to open the borders for all EU citizens immediately after accession. In case of any serious disturbances in a specific sector or region, the borders may then be closed. If a state chooses to impose a transitional measure, it may decide to re-open the borders afterwards at any time after the third year following the expansion of the EU. The measures are reciprocal, so that a new Member State can also maintain restrictions vis-à-vis the citizens from the state which imposes transitional measures.[3]

Until the end of April, 2004, Member States may decide to impose any transitional measures. Ireland, Denmark, Sweden and the Netherlands quickly stated that they would not impose any transitional measures. As far as the Netherlands is concerned, the government took this position in June 2001 in reaction to the advice of the Social and Economic Council on labour mobility in the EU.[4] But although the Netherlands have taken this position, and although various people and sectors in the Netherlands assume that as of May, 2004 Polish citizens will have free access to the Dutch labour market, the Dutch position is again uncertain. In the last few years, the situation on the labour market in the Netherlands has changed considerably and unemployment rates have gone up. In a debate in the Second Chamber, some Members of Parliament doubted whether it is the right decision to open the borders immediately, and asked the government to reconsider its position.[5]

3 The Treaty of Accession 2003 of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia. Signed in Athens on 16 April 2003. http://europa.eu.int/comm/enlargement/negotiations/treaty_of_accession_2003/table_of_content_en.htm

4 Kamerstukken II, 2000–2001, 27 400 VX, no. 59.

5 Kamerstukken II, 2003–2004, 28 442, 24 September, 2003.

But do we have to prepare ourselves for a huge influx of migrants as of May 2004? Will opening the borders after the enlargement of the EU result in an exodus from the central and eastern countries to western Europe? Most of the reports dealing with this question conclude that free movement of persons will not result in mass migration.[6] In the Netherlands, the Bureau for Economic Policy Analysis assumes that only 10,000 migrants a year will migrate from the candidate states to the Netherlands if the borders are opened.[7] Other reports even state that there will be less immigration from eastern Europe than western Europe actually needs.[8]

The fear of huge numbers of migrants is not new. Earlier enlargements of the EU by southern European countries, like Greece in 1981 and Spain and Portugal in 1986, caused the same fear of mass migration, which did not occur.[9] Will this also be the case with the enlargement to the east? In some respects the upcoming enlargement is not comparable to former ones. This time, ten countries are to join, in which the economic situation differs substantially from the current average standard of living in the EU. And also the fact that migration is very common nowadays and that existing migration networks may facilitate migration[10], may influence migration after the eastward enlargement of the EU.

The Case of the *Aussiedler*

It is difficult to predict the effect of the free movement of workers on migration from the new Member States to the west. Estimates are often based on analyses of the economic situation and migration patterns in eastern and western European countries. In addition, however, the situation after accession can be assessed by looking at the current situation of a specific group: people from Poland with a German passport. Because of their German nationality these people do not face any barrier to live and work in the other countries of the European Union.

6 E.g. Tito Boeri/Herbert Brücker et al., The Impact of Eastern Enlargement on Employment and Labour Markets in the EU Member States, Research on Behalf of the Employment and Social Affairs Directorate General of the European Commission, 2000.

7 Arbeidsmigratie uit de Midden- en Oost-Europese toetredingslanden, CPB Notitie, 14 January 2004.

8 E.g. Thomas Straubhaar, East-West Migration. Will it be a Problem?, in: Intereconomics, January-February 2001, pp. 1f.

9 European Commission, The Free Movement of Workers in the Context of Enlargement, 6 March 2001, p. 16.

10 Ibid., p. 15.

Many of them live in former German areas of Poland. After World War II, the borders of Poland were moved to the west. Not all Germans migrated to Germany from this western part of Poland. Many ›ethnic‹ Germans remained in Poland. Those who could prove their German descent could be recognised as *Aussiedler* and/or obtain German nationality. Especially in the 1980s, many ethnic Germans applied for the *Aussiedler* status and migrated to Germany. Since their number was approximately three times higher than the estimated number of ethnic Germans living in Poland, it may be assumed that there were some who detained German nationality who were not of German descent.[11] As of 1989, Germany gradually reduced the special facilities for *Aussiedler*, and in 1993 the rules for the recognition of *Aussiedler* became much more restrictive. However, in Poland, there still live a large number of persons who possess both, the Polish and German nationality, and thus, like all EU citizens, are free to enter and to live and work in any EU Member State. The exact number of persons with dual nationality in Poland is not known, estimates range from 100,000 up to 300–700,000.[12] Regionally the number varies, with a concentration in the former German areas as Silesia, with 10 to 15 per cent[13] of the total population or perhaps even more.

Although many Poles who also possess a German passport moved to Germany while others remained in Poland or moved to different countries, this article concentrates on the situation of Poles with a German passport in the Netherlands. This analysis is based on a small-scale, qualitative research among Polish persons with a German passport and employment agencies. A closer look at this group may shed light on what will happen when new EU citizens obtain free access to the European labour market, which will be the case as of 1 May 2004, or some years later if transitional measures are imposed.

Polish Persons with a German Passport in the Netherlands

The exact number of Polish people who also possess a German passport and who work and live in the Netherlands is very difficult to obtain.[14] Estimates

11 Marek Okólski, Migraties vanuit Oost Europa naar de Europese Unie met speciale aandacht voor België. Paper voor colloquium Centrum voor Gelijkheid van Kansen en voor Racismebestrijding, Brussels, 23 March 2001, p. 52.

12 Kees Groenendijk, Regulating Ethnic Immigration. The Case of the *Aussiedler*, in: New Community, 23 October 1997, no. 4, pp. 461–482.

13 Bart Dirks, Wij leveren in één uur honderd Polen, in: De Volkskrant, 29 October 2002.

14 See for instance Frauke Miera, Zuwanderer und Zuwanderinnen aus Polen in Berlin in den 90er Jahren. Thesen über Auswirkungen der Migrationspolitiken auf ihre Arbeitsmarktsituation und Netzwerk (Discussion paper Wissenschaftszentrum Berlin für Sozialforschung), Berlin 1996, p. 17.

fluctuate from 6,000 to 20,000.[15] These numbers must be interpreted with caution. Since most of the Poles who possess a German passport move back and forth between the two countries instead of settling permanently in the Netherlands, some may be counted twicewhile others probably will not be registered at. And in case they are registered as migrants in the Netherlands, they will be registered as Germans.

Estimates of the number of the employment agencies which specialise in this group vary from one hundred to one thousand. The latter number probably also includes many informal intermediaries.[16] The employment agencies vary in size, employing one hundred to some thousands of persons each year. They began employing Poles with a German passport about five years ago. By then, Poles came to work in the Netherlands on their own, generally doing harvesting work in agriculture. Some Dutch then discovered that these Poles with German nationality could work legally without a working permit in the Netherlands and set up specific employment agencies providing employment on the Dutch labour market only for Polish persons with a German passport.[17]

The employment agencies actively recruit Poles with a German passport in Poland to employ them in the Netherlands. It takes only a few days to get a person employed in the Netherlands. The employment agency organises everything: transportation to the Netherlands, housing, transportation to the working place, social insurance number, insurance, and a bank account. The first day the new employee is taken to different organisations to take care of these administrative requirements, and as of the following day he or she can start working. The Polish persons are often young, both male and female, with a minimum age of 18 years. Some have previously worked abroad, often in Germany, but most are inexperienced. Most of them also do not have a high education, as many of them leave for work in the west just after finishing secondary school.

After working six to ten weeks in the Netherlands, these people then return home for a few days. The work and working conditions differ from one employment agency to another. Some of the agencies send the Poles to one specific company for a long time, while in other labour agencies the work and location may differ daily. Some use short-term contracts, while others give their employees contracts for a year or more.

15 Chris van Alem, Handjes uit Polen, in: De Gelderlander, 9 February 2002.

16 Stella Braam, ›Duitse‹ Polen. Gouden Handel, Stichting Onderzoeksjournalistiek Nederland, 2003.

17 It is easier to set up employment agencies in the Netherlands than in other EU countries. Some of the agencies have also tried to employ Poles in Belgium, which was not successful due to rules on salaries and taxes.

Over time there has been a gradual shift away from temporary seasonal work in agriculture to different types of work which can be done all year. Nowadays Poles with a German passport are employed in different branches, such as floriculture, recycling, production and hotel cleaning. They do unskilled, unattractive jobs that Dutch persons are often not willing to do, at least not under the same conditions.[18] Some of the employment agencies have tried to employ highly educated Poles too, but this has proven to be very difficult or impossible, due to problems with the recognition of qualifications. Language, too, is a barrier for getting other types of work. Many Polish workers do not speak any language other than Polish, which makes communication difficult. If possible, they work in small groups in which one person is able to speak some English or German, who then explains what has to be done to the others. The employment agencies do have interpreters to explain to the employees what they should know. Nevertheless, the lack of knowledge of the Dutch language makes Polish employees dependent on the labour agencies and vulnerable, given that contracts are often drawn up in Dutch.

The employment agencies also have to organise housing for their employees. Due to problems in finding decent housing, this essentially limits the number of Poles the agencies can employ in the Netherlands. Often they arrange a house or an apartment where a number of Polish employees can live together. Bungalow parks and camp sites are also used as housing, or large accommodations are rented, some of them giving room to around one hundred persons. It is especially convenient for the companies that boast of being able to supply employees within only a few hours when the Poles live closely together, so they can be picked up in groups.

As they are legal workers, the Polish employees have to be treated and paid according to Dutch rules. When Poles come to the Netherlands to work, they generally want to work as many hours as possible. This may cause some friction, because of Dutch rules on the maximum number of working hours. The employment agencies often have to explain that the workers must follow the rules to avoid problems when the government checks their files. The agencies try to expel the idea that they are conducting illegal activities, which Poles are often associated with in Dutch society.

The most important motivation for the Poles to work in the Netherlands is to receive better salaries than they could earn in Poland. Although they previously used to signed almost any kind of contract the Polish employees have gradually become more critical and no longer accept all working and living conditions. This is the result of bad experiences in the past.

18 This is not specific for the Dutch case. Miera describes a similar situation in Germany. Miera, Zuwanderer und Zuwanderinnen aus Polen, p. 23.

Nowadays, people inform each other in advance about the reputation of the employment agency before signing a contract. Various employment agencies are aware of this shift, and try to organise everything well to keep their employees satisfied and to preserve a good reputation. Nevertheless excesses still exist such as: employees who are underpaid, who do not get paid all their earnings, or who do not get paid for their last week of the contract if they do not sign for a new period.

Many Polish employees are ill informed about their rights. This can be illustrated by the example of illness. Poles often do not know that according to Dutch law they have to get paid at least 70 per cent of their salary as of the third day of illness. Instead of staying at home if they are ill, they keep on working or return to Poland. To understand this reaction, it should be kept in mind that their entire sojourn is organised by their boss, so they also rely on the employment agency in case they need medical care. Bad language skills in Dutch or even English or German make it almost impossible for them to solve problems themselves. Against this background it is somewhat striking that the employment agencies boast of their Polish employees as being hardworking persons, who do not complain and are never ill. Another reason why many Poles with a German passport do not complain or do not dare to take a day off because of illness is that they are afraid they will lose their job.

Poland still has a high unemployment rate, and the salary and working conditions in the Netherlands are better than in Poland. Some of the workers support their families, others save money for the future. Only a few say they work to spend the money at home and live a luxurious life during the few weeks they are in Poland. Whatever the aim, the Polish workers make optimal use of the differences in economic situations, e.g. by bringing almost all the food they need for their stay, so they do not have to spend money in the Netherlands.

Polish persons with a German passport work in the Netherlands but live in Poland. They refer to their residence in Poland as ›home‹ although they stay in the Netherlands most of the time. Since they mainly come to the Netherlands to make money they do not make an attempt to come into contact with Dutch society or to learn the Dutch language. Sometimes they are not even aware of the existence of a Polish settled community in the Netherlands, with its own church and other organisations, nor do they know of anyone who could help them if they have problems, such as illness or a conflict with the labour agency. For the case of the workers in Germany, Miera gives another explanation for the isolated position of Poles with a German passport. She states that they distance themselves from the settled Polish community because Poles with a German passport are viewed more posi-

tively in Germany than Poles who do not possess German citizenship.[19] Some of the Poles with a German passport in the Netherlands who have previously worked in Germany, however, stress that they felt more discriminated in Germany than in the Netherlands. Their explanation is that Poles in the Netherlands do not form a large group of migrants.

Some Poles have been working in the Netherlands for a number of years now, travelling back and forth to Poland every few weeks. They keep on wandering in order to be able to stay at home. They have no intention of settling in the Netherlands, and if they could find work in Poland, they would return there. This, too, is not specific for Poles in the Netherlands. For Poles with a German passport in Belgium it has been shown that German nationality is seen as a trump in an uncertain future, but given the choice, they would stay in Poland.[20] Like the contemporary migration of the Polish in general, Poles with a German passport are generally young and mobile people who migrate temporarily.[21]

A Brief Look Ahead

How will the situation of this group change after Poland's entry to the EU and especially when the borders are open to all citizens from the new Member States? And what can the situation of the Poles with a German passport tell us about the future migration of Poles to the Netherlands and other EU Member States? On the one hand, it can be presumed that many Poles will try to find a job in the EU Member States because of the relatively short distance which enables them to commute every few weeks, and the high unemployment rates and low salaries in Poland.

Polish persons with a German passport themselves fear the situation of open borders after the accession to the EU. This is not surprising: they will lose the privileged position of being a relatively small minority of the Polish population who can work legally in the Netherlands. If all Poles are allowed to work in the Netherlands and other EU countries, they can no longer be selective and will probably have to accept working conditions which they can refuse at present. The employment agencies mainly expect advantages from the situation after accession, in which the number of possible employees will increase. However, they do not expect that open borders will generate mass migration to the west. From their point of view, this is simply impossible: housing already limits the number of people who can be employed in the

19 Ibid.

20 Okólski, Migraties vanuit Oost Europa naar de Europese Unie, p. 52.

21 See for instance Miera, Zuwanderer und Zuwanderinnen aus Polen, or Krystyna Iglícka, Mechanisms of Migration from Poland Before and During the Transition Period, in: Journal of Ethnic and Migration Studies, 26. 2000, no. 1, pp. 61–73.

Netherlands. Furthermore, the number of unskilled jobs that can be done by people who do not speak Dutch is limited. Already now, Poles with a German passport stay at home in periods when the labour agencies do not have work for them.

The fear of a possible huge influx of migrants from the eastern European countries after the enlargement of the EU is still alive. But one must keep in mind that free movement of workers does not mean that persons from all EU countries can rely on social welfare in all other countries without having worked in that country for some time. It is only possible for a citizen of the European Union to settle and work in another Member State if he or she has a job in that country. In addition, free movement of workers does not remove all obstacles to working in other EU countries: it will not solve language barriers and problems with the recognition of qualifications. Hence, free movement of workers does not mean that the possibilities for migration are unrestricted. The economic situation on the labour market will still affect the influx of migrants, as comments by employment agencies also indicate.

The case of the Poles with a German passport can be seen as an example of the free movement of workers from Poland to the west with the right to work and live in the EU Member States. It shows that Poles come to the Netherlands only to raise their living standard in Poland, and lack the intention of settling down in the Netherlands permanently. If the economic situation in Poland improves, they prefer to return home. Thus, if open borders result in a migration wave to western European countries, it will probably only be a temporary wave. If the economic situation in the home countries improves and the relative differences between countries diminish, people will return home. They will be inclined to do so even more if they are allowed to export their claims to social welfare to their home countries, as is already the case within the EU. Generally speaking, people prefer to stay in their familiar but somewhat less favourable situation at home, instead of engaging in an uncertain future abroad.[22]

The debate is still going on whether the Netherlands will decide to open the borders directly after accession or apply transitional measures. While some want to open the borders directly after accession, others want to apply transitional measures, based on the fear of an exodus of Polish migrants, flooding the EU labour market. Although it is difficult to predict what will happen the moment the borders are opened, several arguments can help put this fear into perspective. Previous enlargements of the EU have resulted in economic improvement in the new Member States so that it is likely that the same will occur in the central and eastern European countries. Furthermore, it can be observed that despite the open borders, no more than 2 per

22 Straubhaar, East-West Migration.

cent of the EU citizens are living in other EU countries. Even differences in salaries and unemployment rates have not resulted in increased migration movements.[23] In a way, the current discussion is somewhat peculiar and contradictory: on the one hand, transitional measures are imposed to avoid a potential migration wave from the Central and Eastern European countries, while on the other hand the EU pursues a specific policy of promoting migration within the European Union.

23 Sociaal Economische Raad, Arbeidsmobiliteit in de EU, The Hague 2001.

Uwe Hunger

›Brain Gain‹

Theoretical Considerations and Empirical Data on a New Research Perspective in Development and Migration Theory

The New Perspective

For decades the migration of elites from developing countries to industrialised countries was interpreted as a one-way migration which intensified the economic and social demise of developing countries (›brain drain‹). Recent studies have shown that the loss of elites does not necessarily have to be irreversible but might instead be a temporary stage within a long-term process. For the developing countries there might be the possibility of a positive outcome in the long run given reports of a re-immigration of their elites – quasi the reversal of ›brain drain‹. Furthermore, empirical research has shown evidence suggesting a positive relationship between economic development and the return migration of Third World elites (›brain gain‹) including the establishment of social networks built up by migrant diasporas.[1] A first group of research studies deals with scientific networks built up by emigrated scientists to foster the scientific exchange between developing and industrial countries and to accelerate the transfer of knowledge and technology.[2] These networks may either work on a virtual level (via internet) or in actuality in

1 E.g. Jean-Baptiste Meyer, Network Approach versus Brain Drain. Lessons from the Diaspora, in: International Migration, 39. 2001, no. 5 (Special Issue: International Migration of the Highly Skilled), pp. 91–110; Jacques Gaillard/Anne Marie Gaillard, The International Mobility of Brains: Exodus or Circulation?, in: Science, Technology and Society, 2. 1997, no. 2, pp. 195–228; Robyn Iredale/Fei Guo, Return Skilled and Business Migration and Social Transformation: the View from Australia. Paper prepared for the Return Migration Workshop, University of Wollongong, 2000.

2 Mercy Brown, Using Intellectual Diaspora to Reverse the Brain Drain: Some Useful Examples, in: Brain Drain and Capacity Building in Africa, ed. by the United Nations Economic Commission for Africa/International Development Research Centre/International Organization for Migration, 2000, pp. 90–106; Devesh Kapur, Diasporas and Technology Transfer, in: Journal of Human Development, 2. 2001, pp. 265–286.

terms of bilateral conferences, exchange programmes etc. A second group of studies deals with transnational entrepreneur networks which try to foster investments and the return migration of emigrated entrepreneurs. Many of these networks were founded abroad and then expanded to the country of origin. The most important studies on these networks are about developing countries such as India[3], China/Taiwan[4], and also for developed countries such as Ireland[5] and Sweden.[6] All these studies intend to evaluate the specific impact of return migrants who are in most cases entrepreneurs in the field of the new technologies. They also intend to identify general factors which support the return migration and the successful integration of migrants into the developing process of their country of origin. Most important factors in this context seem to be: (1) in the country of origin: (financial or legal) incentives for the return migration; (2) in the receiving country: the socio-economic position of the migrant; and (3) the quality of existing networks between both countries. In the following, the most important aspects of this research will be presented with respect to the developing countries China/ Taiwan, India and Mexico.

3 Martina Fromhold-Eisebith, Internationale Migration Hochqualifizierter und technologieorientierte Regionalentwicklung. Fördereffekte interregionaler Migrationssysteme auf Industrie- und Entwicklungsländer aus wirtschaftsgeographischer Perspektive, in: IMIS-Beiträge, 2002, no. 19, pp. 21–41; Uwe Hunger, Vom Brain Drain zum Brain Gain. Die Auswirkungen der Migration von Hochqualifizierten auf Abgabe- und Entsendeländer (Forschungsinstitut der Friedrich-Ebert-Stiftung, Gesprächskreis Migration und Integration), Bonn 2003; Binod Khadria, Second-Generation Effects of India's Brain Drain, New Delhi 1999; idem., Skilled Labor Migration from Developing Countries. Study on India (International Migration Papers 49), ILO, Geneva 2002.

4 Shirley L. Chang, Causes of Brain Drain and Solutions. The Taiwan Experience, in: Studies in Comparative International Development, 237. 1992, no. 1, pp. 27–43; AnnaLee Saxenian, Local and Global Networks of Immigrant Professionals in Silicon Valley, Public Policy Institute of California 2002; Bob Gill/Ho Wai Yeng/Loh Hsiao Yng Seow/Chow Chin et al., Talent Migration in Taiwan. MBA Dissertation, Nanyang Technological University 2002.

5 Alan M. Barrett, Return Migration of Highly Skilled Irish into Ireland and their Impact on GNP and Earnings Inequality, in: International Mobility of the Highly Skilled, Paris (OECD) 2002, pp. 151–157; Alan M. Barrett/Fergal Trace, Who is Coming Back? The Educational Profile of Returning Migrants in the 1990s, in: Irish Banking Review, Summer Issue, 1998, pp. 38–51.

6 Per-Olof Grönberg, Internationale Migration und die Remigration schwedischer Ingenieure in den 1990er Jahren. Paper presented at the Conference on ›Migration and Development‹, 5/6 June 2003, Münster; see also idem, Learning and Returning. Return Migration of Swedish Engineers from the United States, 1880–1940, Umeå 2003.

Empirical Evidence

Chinese and Taiwanese Return Migrants in the 1980s and 1990s

China and Taiwan have been intensively investigated with respect to a possible development from ›brain drain‹ to ›brain gain‹. China, in particular, is considered a developing country which has largely profited from its circa 60 million citizens living abroad (the so-called overseas Chinese). It has been estimated that 60–65 per cent of foreign investment in China can be attributed to former emigrants. Overseas Chinese thus play an important role in the market capitalisation in China.[7] This process started already in the 1970s and was strongly intensified by politics of liberalisation during the 1990s. Special programmes, such as the facilitation of trade and buying of land, were specifically introduced to attract overseas Chinese to invest their money back in China. Also special technology parks were installed for overseas Chinese entrepreneurs to give an incentive to do business in China.

The role model for this process was the development in Taiwan which as early as in the 1980s introduced a policy to attract emigrated elites. Thousands of scientists, students and other highly skilled Taiwanese returned to their country of origin. Although development research mainly focused on the role of the state in fostering technology, science and education in the Taiwanese development process[8], transnational networks and return migration (mainly from the US) also played an important role in the upswing process of Taiwan.[9] As early as in the 1970s and 1980s, Taiwanese elites returned to their country of origin bringing with them their knowledge and capital. Even some of the leading politicians have been return migrants from the US. In the 1980s the Taiwanese government installed the National Youth Commission, a new agency to facilitate the return migration of Taiwanese students and other highly qualified persons (the so-called ›reverse brain drain‹-programme).[10] Since then the number of return migrants has increased substantially.[11] Besides the returnees, many Taiwanese living in the US started to commute between Taiwan and the US creating transna-

7 For the importance of the market capitalisation of overseas Chinese in other southeast Asian countries see Annabelle R. Gambe, Overseas Chinese. Entrepreneurship and Capitalist Development in Southeast Asia, Münster 1999.

8 Graham Field, Economic Growth and Political Change in Asia, Houndsmills 1995.

9 AnnaLee Saxenian, Brain Drain or Brain Circulation? The Silicon Valley-Asia Connection. Paper presented at the South Asia Seminar, Weatherhead Center for International Affairs, 29 September 2000.

10 Chang, Causes of Brain Drain.

11 Jean M. Johnson/Mark C. Regets, International Mobility of Scientists and Engineers to the United States – Brain Drain or Brain Circulation?, in: National Science Foundation Issue Brief: www.nsf.gov/sbe/srs/issuebrf/sib98316.htm

tional enterprises fostering the development process of Taiwan. With the help of these people Taiwan has become one of the world market leaders in technologies.[12] The importance of the overseas Taiwanese can be demonstrated by the fact that more than 50 per cent of the enterprises within the Hsinchu Science-Based Industrial Park, one of the biggest technology parks in Taiwan, were founded by return migrants from the USA.[13]

The Success of Indian IT Entrepreneurs in India and the US since the 1990s

Another prominent example is India, which is one of the biggest recipients of international development aid and has been regarded as a country suffering the most from ›brain drain‹. Today this country is beginning to profit from the re-migration of its experts previously ›lost‹ to the USA. In the past few years a remarkable economic upswing has taken place in the Information Technology (IT) sector providing new jobs in India with potential positive spill-over effects for its overall economy. This development coincides with the return of elites who had previously emigrated to the US. Until today, the IT sector is the only economic sector of international competitiveness.[14] The software industry is the motor driving the upswing in the Indian technology sector. In the fiscal year 1999/2000, total revenues within this industry were 5.7 billion US-$. This represents 65 per cent of the total revenues within the IT sector in India. In the past fifteen years the software industry has accounted for 400,000 new jobs. By 2008, it is estimated that an additional two million jobs will have been created within this sector. Information technology is also being used to modernise the economy and administrative capacities of the government.[15]

Besides economic and political factors[16], migration plays a role in the success story of the information technology in India. A large portion of top-

12 See Otto C.C. Lin, Science and Technology Policy and its Influence on Economic Development in Taiwan, in: Henry S. Rowen (ed.), Behind East Asian Growth. The Political and Social Foundations of Prosperity, London 1998, pp. 185–206; Field, Economic Growth.

13 AnnaLee Saxenian, Silicon Valley's New Immigrant Entrepreneurs, in: Wayne A. Cornelius/Thomas J. Espenshade/Idean Salehyan (eds.), The International Migration of the Highly Skilled. Demand, Supply, and Development Consequences in Sending and Receiving Countries (CCIS Anthologies, no. 1), San Diego 2001, pp. 197–234.

14 Beate Kruse, Zur Globalisierung in Indien, in: Werner Draguhn (ed.), Indien 2001. Politik, Wirtschaft, Gesellschaft, Hamburg 2001, pp. 263–278.

15 See NASSCOM, The IT Software and Services Industry in India, Strategic Review 2001, New Delhi.

16 See Richard Heeks, India's Software Industry. State Policy, Liberalisation and Industrial Development, Neu Delhi 1996.

level management positions in the Indian software sector is filled by non-resident Indians who left the country and emigrated (mainly to the USA) in the 1960s, 1970s and 1980s (former ›brain drain‹ Indians). At the beginning of the 1990s, after the introduction of the Indian economic liberalisation policy, many of these elites built up networks or enterprises in India either by re-migrating to their home country or – when staying in the US – through branches of their US companies. In India, these elites were able to utilise government subsidisation policies within the IT sector to their advantage in the software industry and thus revitalising the economy of India. In 2000, ten out of the 20 most successful software enterprises in India (representing more than 40 per cent of the total revenues within the industry) were set up and/or are managed by former non-resident Indians returning from the USA. Four additional enterprises (Mahindra-British Telecom, IBM, i-flex, Cognizant Technology Solutions) are joint ventures between Indian and foreign companies. All of them have former non-resident Indians in their top management. The remaining six companies are old-established Indian companies (Tata, Wipro, HCL, and their respective sister companies) which have diversified into IT. Five of these six companies also have non-resident Indians in their top management. Today, 19 of the 20 top software companies in India have non-resident Indians in top level management positions, and on the whole (at least) 28 per cent of all Indian enterprises within the entire software industry were founded and/or managed by them.[17] In addition, various organisations contributing considerably to the upswing of the Indian software sector were founded by non-resident Indians returning from the USA. The fact that the upswing of the Indian software industry is considerably linked to export opportunities towards the USA is further evidence stressing the importance of non-resident Indians in the USA. In the year 2000, 70 per cent of the total revenues of the Indian software economy were due to export revenues. 62 per cent of these export revenues came from North America. It can be hypothesised that a majority of the export deals are based on marketing contacts made by Indians in the USA, who were able to convince US customers of the quality and profitability of Indian software products. Today (at least) more than half of all Indian software enterprises (56 per cent) have subsidiaries in the USA (front office) that market Indian products in the US which are carried out in the development centres back home in India (back office).[18]

17 Based on a random sample of n=88 enterprises of a population of n=896 software enterprises in India that are members in the central employer association NASSCOM and represent 96 per cent of the total turnover of the sector. The range of the 95 per cent-confidence interval is in each case ±10 of the determined value in the random sample.

18 Based on the results of the random sample described in the preceding footnote.

Whether the potential ›brain gain‹ is able to offset the negative effects of ›brain drain‹ in India remains questionable. India, on the one hand, still suffers from an estimated loss of 2 billion US-$ per year due to the ›brain drain‹ of IT specialists migrating to the US.[19] On the other hand, this amount was clearly exceeded by the amount of software export to the US. It may, thus, be concluded that in the case of India the ›brain drain‹ may (at least) be mitigated by remigration of Indian elites and/or the establishment of networks with the elites abroad. Without the help of non-resident Indians, this success of the Indian IT industry would not have been as impressive as it appears today.

Mexico's Efforts to Use the Mexican Diaspora in the USA

In contrast to India and China/Taiwan, Mexico does not belong to the category of classic ›brain drain‹ countries. This is striking because several hundred thousands of highly qualified Mexicans live abroad (in 1990 about 340,000 in the USA alone) and are, thus, unavailable to push the country's development. In relation to the huge total number of Mexicans living in the US, the elites account only for a small percentage. In relation to the total number of highly qualified people with Mexican nationality, however, this group accounts for more than 10 per cent. This means that the ›brain drain‹ in Mexico is indeed more intense than in India (about 3 per cent), China (about 3 per cent) or Taiwan (about 9 per cent in 1990).[20] Given that more than 20 per cent of all Mexican citizens live in the US, the question how this group might contribute to the development process in Mexico becomes quite relevant. In the 1990s several initiatives were started to re-attract Mexicans living abroad. Among other initiatives, the ›Instituto de los Mexicanos en el Exterior‹ (IME) was founded to use the Mexican diaspora as a resource for the development of the country.[21]

One of the key aims of IME is to foster the remittances from the US to Mexico which already counts for the third-biggest source of foreign income in the developing country following oil and tourism.[22] In 2002 all remittances added up to more than 9 billion US-$. To support this trend, the Mexican government introduced a programme which triples every single US dollar

19 UNDP, Human Development Report 2001. Making New Technologies Work for Human Development, New York/Oxford 2001.

20 See William J. Carrington/Enrica Detragiache, How Big is the Brain Drain? (IMF Research Department, Working Paper WP/98/102), Washington, DC 1998.

21 See Jutta Groß-Bölting, Die Bedeutung der Migration in die USA für die Entwicklung Mexikos, Master Thesis, Münster 2003.

22 Federico Torres, Las remesas y el desarrollo rural en las zonas de alta intensidad migratoria de México (CEPAL Working Paper 200), Mexico-City 2001, p. 27.

that is sent home by Mexicans living in the US. One of the biggest obstacles in this context is the extraordinarily high bank fee which is due when ordering a foreign bank transfer in the US. It is one of the efforts of the IME to get this fee reduced.

Another aim of the IME is to promote the return migration of Mexicans living abroad. In 1991, the Mexican government started a specific initiative for Mexicans doing their doctorate in the US to subsequently return to Mexico. During their stay in the US, the Mexican government reserves a work place for these candidates and covers the expenses for salaries in the first year after their return. The success of this programme, however, has been questioned. While government officials report a return rate of 95 per cent, an independent University study registered a return rate of only 25 per cent of candidates.[23] There are other studies that also stress the importance of Mexican return migrants from the US. The International Organisation for Migration for example reports that Mexico benefits from returned migrants (who worked in the US for at least one year) by a productivity which is »eight times higher« than that of Mexicans who never emigrated.[24] The potential Mexican ›brain gain‹ is not as well explored as it has been for China/Taiwan and India. The Mexican government made more efforts to advance the situation of Mexicans in the US than to foster their return migration. The IME also acts as a lobby-organisation for Mexicans in the US improving the education opportunities for Mexicans by fostering bilingual classes and University admission for illegal migrants.[25]

Perspectives

The examples of a (possible) development from ›brain drain‹ to ›brain gain‹ lead to a change in scientific evaluation of the international migration of Third World elites. For decades, migration of highly skilled workers from developing counties was exclusively seen as a one-way street resulting in a tremendous loss for the country of origin.[26] Within the past several years, this interpretation has been extended by the possibility that developing countries may also benefit from the emigration of their elites. This seems to be particularly true for developing countries such as India, China/Taiwan, and

23 Heriberta Castaños-Lomnitz, Emigration of Mexican Talent. What Price Development?, Institute of Economics, National University of Mexico, Mexico-City 2000.

24 IOM, World Migration Report 2000, New York 2001, p. 33.

25 Groß-Bölting, Die Bedeutung der Migration; Consejo Consultivo del Instituto de los Mexicanos en el Exterior, Asociación Nacional para la Educación Bilingue (Working Paper), Mexico-City 2000.

26 For an overview see Heiko Körner, ›Brain Drain‹ aus Entwicklungsländern, in: IMIS-Beiträge, 1999, no. 11, pp. 55–64.

possibly Mexico. Migration and development research has just begun to analyse and evaluate this new phenomena. The investigation of this development seems very important given the great increase in mobility of the highly skilled world-wide.[27] In the second half of the twentieth century, mobility of capital has been the most important factor of economic development. In the new century, mobility of labour will be even more important. An increasing number of industrial countries use immigration policy as a tool for economic development. Highly skilled labour from all over the world is recruited to meet labour market shortages in specific sectors and to foster technological and economic innovations through immigration. In the past decades developing countries were used as ›extended workbenches‹. Today they are more and more used as ›extended training banks‹. Due to the demographic decline in most European countries it is foreseeable that this trend will intensify in the future.[28] The extraordinary success of the US-economy (especially in technology) at the end of the 1990s which was to a big extent due to the immigration of millions of foreign experts[29] has promoted this development.

The increase in the mobility of elites could have negative impacts on developing countries, if a reversal of the ›brain drain‹ is not possible. The deplorable living conditions in most developing countries are still strong push factors for many of their experts. At the same time there are strong pull factors in industrialised countries in the form of liberalised immigration policies. The examples of China/Taiwan and India, however, show that emigrated elites can be re-attracted by their home country on condition that substantial market reforms and special incentives for return migration are introduced. The existing studies suggest that strategies to foster foreign investment and transnational entrepreneurship are very effective.[30] To re-attract emigrated elites without an entrepreneurial background (e.g. scientists), other return incentives are necessary such as general reforms in the education system and

27 International Mobility of the Highly Skilled, Paris (OECD) 2002.

28 Almost all OECD countries provide special immigration schemes for highly skilled migrants. In some countries these instruments are very sophisticated (Australia, Canada): immigration incentives are not only given to highly skilled workers but also to their family members (which is also the case in the Netherlands). The emerging global competition for highly skilled workers has led to a considerable liberalisation of immigration policies in almost all countries. This is also true for Germany. For an overview see Gail McLaughlin/John Salt, Migration Policies Towards Highly Skilled Foreign Workers. Report to the Home Office, London 2002.

29 Saxenian, Local and Global Networks; idem, Silicon Valley's New Immigrant Entrepreneurs.

30 For Tunisia see Jean-Pierre Cassarino, Tunisian New Entrepreneurs and their Past Experiences of Migration in Europe: Resource Mobilization, Networks, and Hidden Disaffection, Aldershot 2000.

the increase of salaries. Incentives like these have been quite successful in some countries such as Taiwan and South Korea. However, as long as the preconditions in the developing country do not improve, the likelihood of success of a return programme are small – as the example of Mexico suggests. In this case building transnational (scientific) networks which do not require the physical return migration of scientists seem to be the better strategy.[31] However, from a realistic point of view it seems to be more appropriate to support brain circulation and ›brain gain‹ strategies offensively than to stick to the old defence strategy trying to avoid ›brain drain‹ which has been unsuccessful for decades.

31 See for example Hyaeweol Choi, An International Scientific Community. Asian Scholars in the United States, London 1995.

Appendix

Axel Kreienbrink

Bericht zum IMIS-Workshop ›Bedrohung und Abwehr. Die Weimarer Republik und ihre osteuropäischen Zuwanderer‹

Osnabrück, 6./7. Mai 2004

Organisation: Apl. Prof. Dr. Jochen Oltmer, Institut für Migrationsforschung und Interkulturelle Studien (IMIS) der Universität Osnabrück; Dr. Tobias Brinkmann, Simon-Dubnow-Institut für jüdische Geschichte und Kultur, Leipzig.

Ziel des international besetzten Workshops war es, wesentliche Elemente und Entwicklungen der Migrations- und Integrationsgeschichte der Weimarer Republik unter besonderer Berücksichtigung der jüdischen Migration herauszuarbeiten. Der Ausgangsthese zufolge wurde Zuwanderung in der Weimarer Republik als Bedrohung und Belastung wahrgenommen und dementsprechend zunehmend kontrolliert und restringiert.

Nach der Begrüßung durch den Direktor des IMIS, Klaus J. Bade, der in einem knappen Abriß auf migrationspolitische Kontinuitäten von der Weimarer Republik bis in die Gegenwart hinwies, hob Jochen Oltmer (Osnabrück) in seinem Einführungsreferat die ausgesprochene Vielfalt des Migrationsgeschehens in der Weimarer Zeit hervor. Die Erforschung dieses Themenbereichs stelle jedoch innerhalb der sehr ausdifferenzierten Weimarforschung weiterhin ein Desiderat dar.

Übergreifende Strukturen und Systemfragen

Das war der Titel der ersten Sektion, die sich einleitend einem zwischenstaatlichen Vergleich des politischen Umgangs mit Zuwanderung aus Osteuropa nach 1918 widmete. Andreas Fahrmeir (Frankfurt a.M.) verwies darauf, daß die Unterschiede zwischen dem Vereinigten Königreich und Frankreich aus jeweils unterschiedlichen bevölkerungspolitischen (und eugenischen) Überlegungen resultierten. Das Vereinigte Königreich besaß kein klares Einwanderungskonzept, sondern beließ es bei Einzelfallentscheidungen, die vor allem dem Innenministerium oblagen. Grundsätzlich spielte osteuropäische Einwanderung dort anders als irische und koloniale Zuwanderung keine besondere Rolle. Im Gegensatz zum britischen Desinteresse bemühte sich

Frankreich vor dem Hintergrund seiner Obsession eines demographischen Niedergangs durchaus um vor allem polnische Zuwanderung. Allerdings wählte es bei der Anwerbung ausländischer Arbeitskräfte den Weg der Privatisierung, was einen staatlichen Kontrollverlust mit sich brachte, der sich in Zeiten wirtschaftlicher Krise seit Ende der 1920er Jahre bemerkbar machte. Solche Unterschiede riefen die Frage nach wechselseitigen Beeinflussungen in der Politikgestaltung hervor. Dabei wurde deutlich, daß sich Frankreich vor dem Ersten Weltkrieg eher an Deutschland orientiert hatte, während nach dem Krieg dann eher Deutschland über den Rhein blickte und Frankreich sowohl als Vorbild wie als Konkurrent betrachtete.

Jochen Oltmer zeichnete das Bild protektionistisch motivierter Restriktionen in der Migrationspolitik der Weimarer Republik. Osteuropäische Einwanderung wurde grundsätzlich als unerwünscht betrachtet, da sie den Verantwortlichen sowohl als Belastung für Wirtschaft und Arbeitsmarkt wie auch als Bedrohung der inneren Sicherheit galten. Die Migrationspolitik begegnete den Migranten mit Hilflosigkeit und Desinteresse, versuchte aber dennoch, sie teilweise als außenpolitische Manövriermasse zu nutzen. Oltmer unterschied zwischen je drei Gruppen von Migranten und Reaktionsmustern der Verwaltung: zum einen reichsdeutsche Zuwanderer aus den abgetretenen Gebieten, die aufgenommen werden mußten, obwohl ihr Verbleib in den abgetretenen Gebieten als eine zentrale Bedingung für die Revision des Versailler Vertrages angesehen wurde. Zu dieser Gruppe wären auch Auslanddeutsche zu zählen, deren dauerhafte Einwanderung in das Reich ebenfalls nicht erwünscht war, um eine Schwächung des ›Deutschtums‹ in den osteuropäischen Siedlungsgebieten zu verhindern. Zum zweiten nannte Oltmer osteuropäische Flüchtlinge (Russen, Juden), für die aus Desinteresse an ihrem Verbleib keine Integrationsangebote gemacht wurden und für die die Fürsorgemaßnahmen privatisiert wurden. Die dritte Gruppe bildeten osteuropäische Arbeitskräfte (Polen), deren wirtschaftliche Notwendigkeit zwar anerkannt wurde, deren Zahl aber einerseits durch Kontingentierungen und andererseits durch stärkere Rückkehr zu saisonaler Anwerbung nach dem Vorbild der Regelungen im kaiserlichen Deutschland verringert werden sollte. Die Diskussion offenbarte die große Kontinuität der ideologischen Leitkonzepte gegenüber den drei Einwanderergruppen seit dem Kaiserreich, auch wenn Deutsche als Zuwandererkategorie erst spät entdeckt wurden. Wichtig war der in der Diskussion geäußerte Hinweis auf die Verbindungen zur Auswanderung in der Weimarer Republik, die wahrscheinlich in erheblichem Umfang gerade ›unerwünschte‹ Auslanddeutsche umfaßte. In diesem Zusammenhang wurde aber auch deutlich, wie unsicher das vorhandene Zahlenmaterial zu den Migrationsbewegungen ist.

Michael Schubert (Osnabrück) beschäftigte sich mit den Folgen der Unerwünschtheit von Migranten und ging der Frage nach der diskursiven und

rechtlichen Konstruktion von Illegalität durch staatliche Intervention nach. Auch wenn der Begriff ›Illegalität‹ als solcher nicht die Konjunktur erlebte wie heute, konnte Schubert auf eine Reihe von Kontinuitäten verweisen. So wurde bereits in der Weimarer Republik der ›lästige Ausländer‹ als ein Problem des Not leidenden Sozialstaats aufgefaßt. Auf der faktischen Ebene wurde die Illegalisierung von Migranten durch ein intransparentes Ausweisungs- und Paßrecht befördert, das die Entscheidung auf administrativ niedriger Ebene bei den örtlichen Polizei- und Grenzbehörden beließ. Illegale Arbeitsverhältnisse osteuropäischer Arbeitnehmer beruhten zu einem erheblichen Teil auf der Pflicht zur Beschäftigungsgenehmigung für die Arbeitgeber. Und schließlich fielen besonders bei der Thematisierung von illegalem Grenzübertritt und Menschenschmuggel die sehr aktuell klingenden Zuschreibungen im Gefährdungsszenario auf. Inwiefern die Entwicklung der staatlichen Kontrolle, z.B. die Vielzahl von Ausweisungserlassen, eine Folge von steigendem Regelungsbedarf, außenpolitischen Konjunkturen oder der Rückwirkung innenpolitischer Entwicklungen gewesen ist, mußte vorläufig offen bleiben.

Jenseits der staatlichen Ebene fragte Simone Herzig (Osnabrück) nach der Wahrnehmung von Migration in deutschen Tageszeitungen als einem Element der Krisenperzeption in den Jahren 1918 bis 1925. Ihre Ergebnisse schienen in gewissem Widerspruch zu den vorherigen Referaten zu stehen, da in der Zeitungsberichterstattung Migration lediglich ein randständiges Thema darstellte. Migration erschien nicht als Ursache, sondern lediglich als Folge krisenhafter Erscheinungen. Gleichwohl gab es die Instrumentalisierung von Migranten- und Fremdengruppen im Kampf um die Revision des Versailler Vertrages. Herzig erwähnte hier die rassistische Berichterstattung über französische Besatzungstruppen afrikanischer Herkunft. Daneben verwies sie auf die wiederholt vorgebrachte Forderung, daß Deutsche aus den abgetretenen Gebieten dort verharren sollten, worin ein stark antipolnisches Element mitschwang. In der lebhaften Diskussion zu diesen Ergebnissen standen drei Aspekte im Vordergrund. So wurde die Aggregierung der Ergebnisse problematisiert, da die politisch-ideologische Ausrichtung der betrachteten Zeitungen zu wenig berücksichtigt würde. Zudem seien die verwendeten Bilder im jeweiligen Zeitungskontext anders konnotiert. Ein Einwand richtete sich gegen die ausschließliche Verwendung von eher berichtenden Tageszeitungen, da auf diese Weise die ›Metaebene‹ der sehr viel stärker kommentierenden Wochenzeitungen fehle. Schließlich erhob sich angesichts der Ergebnisse die Frage nach der grundsätzlichen Relevanz des Themas Migration für die Weimarer Republik. Sie konnte dahingehend geklärt werden, daß Regierung und Verwaltung diesem Bereich eine solche Wichtigkeit zumaßen, daß sie hier bewußt eine Abschottung gegenüber der Presse vornahmen.

Politisch bedingte / politisch gesteuerte Migrationen: Fallstudien

Der Schwerpunkt in dieser zweiten Sektion der Tagung lag bei der jüdischen Zuwanderung. Die Untersuchung politischer Äußerungen war die Basis, von der aus Ari Sammartino (Oberlin, Ohio) den Begründungen für die anfängliche Aufnahme der an sich unerwünschten jüdischen und russischen Flüchtlinge in Preußen nachspürte. Dabei wurden unterschiedliche Muster deutlich. Im Fall der jüdischen Flüchtlinge spielten die Berücksichtigung humanitärer Gründe sowie der Blick auf die internationale Reputation eine wesentliche Rolle – bei Sozialdemokraten zudem eine Art moralischer Verpflichtung aufgrund selbst erlittener Verfolgungserfahrungen. Mit Blick auf russische Flüchtlinge, denen grundsätzlich weniger Ablehnung entgegenschlug, war dagegen sowohl bei Sozialdemokraten als auch bei Konservativen von einer Art antibolschewistischer ›Schicksalsgemeinschaft‹ die Rede. Während bei diesem Vortrag die Diskrepanz zwischen der Tolerierung der jüdischen Flüchtlinge und hinlänglich bekannten negativen Judenbildern offenkundig war, blieb das entsprechende Verhältnis bei den russischen Flüchtlingen offen. Das lag zum einen daran, daß sich die Entwicklung deutscher Russenbilder vor und während des Krieges in diesem Kontext nur schwer herausarbeiten ließ, zum anderen aber auch, weil sich der Begriff ›Russe‹ als unscharfer ›umbrella term‹ herausstellte. Zeigte sich in der Aufnahme jüdischer Flüchtlinge in Preußen zunächst ein gewisses Maß an Toleranz, so beinhaltete diese jedoch keine Überlegungen zu einer erleichterten Einbürgerung.

Dieter Gosewinkel (Berlin) machte aber deutlich, daß eine einfache Gleichsetzung von ›Ostjude‹ gleich ›unerwünschter Bevölkerungszuwachs‹ mit der Folge einer grundsätzlichen Ablehnung der Einbürgerung nicht gegeben war. Vielmehr sei die staatliche Haltung in diesem Punkt nicht einheitlich gewesen. Nach einem Rückblick auf die restriktive Einbürgerungspolitik im Kaiserreich konnte er anhand des Vergleichs der Positionen Preußens und Bayerns zeigen, daß das sozialdemokratische Preußen zweimal Versuche unternahm, die Einbürgerung osteuropäischer Juden zu erleichtern. In einem ersten Anlauf sollte eine rein wirtschaftliche Bewertung ohne Rücksicht auf Religion und ethnische Zugehörigkeit vorgenommen werden. Später ging ein Vorstoß dahin, den Nachweis der Zugehörigkeit zur deutschen Kultur in den Vordergrund zu rücken. Gegen den starken Widerstand der bayerischen Regierung, die Sprache als Integrationskriterium ausdrücklich ablehnte und keine jüdische Akkulturation wünschte, konnten solche Positionen im Reich aber nicht durchgesetzt werden.

Daß der Erwerb der Staatsbürgerschaft für einen Großteil der jüdischen Zuwanderer aus Osteuropa möglicherweise gar kein relevantes Thema ge-

wesen ist, folgte aus dem Beitrag von Tobias Brinkmann (Leipzig) zu jüdischen Migranten in der Metropole Berlin vor und nach dem Weltkrieg. Er bezeichnete diese Gruppe als eine ›community in transit‹, für die Berlin in erster Linie ein Ort des Durchgangs gewesen sei. Berlin ermöglichte durch die Nähe zum Osten noch die Aufrechterhaltung von Verbindungen, war aber gleichzeitig eine Art Wartesaal auf dem Weg weiter nach Westen. Mit dieser These vertrat Brinkmann eine Gegenposition zum Narrativ der deutsch-jüdischen Historiographie, in dem Berlin vor allem für Stetigkeit jüdischen Lebens steht. Kennzeichen dieser ›community in transit‹ waren entsprechend hohe Mobilität und Fluktuation, die zum Beispiel im kulturellen und publizistischen Bereich gut zu beobachten seien. Brinkmann betonte hierbei die hohe Relevanz des Migrationsthemas in der jiddischsprachigen Presse. Die Diskussionsbeiträge thematisierten das grundsätzliche Verhältnis dieser neuen Zuwanderer zur etablierten deutsch-jüdischen Gemeinde in Berlin, aber auch das Migrationsverhalten beider Gruppen im Vergleich. Auch wenn hier weiterer Forschungsbedarf konstatiert wurde, scheinen die Kontakte auf den ersten Blick gering und wechselseitig vorurteilsbeladen gewesen zu sein.

Während Brinkmann ausdrücklich nicht die kulturelle Elite der jüdischen Zuwanderer in den Blick nahm, stand diese bei Brigitta Gantner (Budapest) im Mittelpunkt, konkret die linksgerichteten ungarisch-jüdischen Intellektuellen, die nach dem Ende der Räterepublik (August 1919) vor dem Horthy-Regime geflohen waren. Die sehr detailreichen Ausführungen zu den Großen der ungarischen Moderne thematisierten die besonderen Integrationsmöglichkeiten in Berlin. Die Möglichkeiten zur Weiterentwicklung der intellektuellen Betätigung im Exil lagen in der Vorbildrolle begründet, die die deutsche Kultur in den Jahrzehnten vor dem Krieg besonders im ungarisch-jüdischen Milieu gespielt hatte. Daraus folgten eine verbreitete Mehrsprachigkeit und bereits vor dem Krieg eine Vielzahl von Verbindungen, an die angeknüpft werden konnte. Das galt für den künstlerischen Bereich ebenso wie für den politischen (Kommunisten).

Alexandra Behr (Paris) widmete sich der russischen Zuwanderung anhand der ›Russenlager‹ bis 1925. Diese Lager dienten teilweise der Unterbringung von Kriegsgefangenen, dann aber vor allem in Form offener Lager derjenigen von (weiß-)russischen Flüchtlingen. Es wurde eine Ambivalenz der Behörden im Umgang mit dieser Zuwanderung deutlich, die sich einerseits in der Privatisierung der Lagerverwaltungen zeigte, während es andererseits Bemühungen gab, die Insassen in den Arbeitsmarkt einzugliedern. Hervorgehoben wurde außerdem die gleichsam beiderseitige Unwilligkeit zur Integration, da sowohl die Administration als auch die Lagerinsassen lange von der Rückkehrmöglichkeit ausgingen. Folge davon war die Ausbildung von russischen ›Mikrogesellschaften‹ in den Lagern. In der Diskussion, die den Topos Lager thematisierte und auf die langen Kontinuitätslinien von

1870/71 bis in die Gegenwart hinwies, wurde angeregt, den Begriff des Ghettos in die Analyse dieser offenen Lager einzuführen. Die Frage nach den Reaktionen der einheimischen Bevölkerung auf Lager in ihrer Umgebung konnte zusammen mit der erneut auftretenden Frage nach ›Russenbildern‹ nicht befriedigend geklärt werden.

Brian McCook (Berkeley/Mainz) wechselte die Perspektive vom Osten in den Westen des Reichs und behandelte die Gruppe der ›Ruhrpolen‹, die (zusammen mit den Masuren) mit annähernd einer halben Million Personen die größte Minderheit vor dem Ersten Weltkrieg bildeten. Der begonnene Integrationsprozeß über ›social citizenship‹, den McCook im Gegensatz zur älteren Historiographie positiv bewertete, wurde durch den Krieg unterbrochen, die Polen dann zunehmend als feindliche ›Fremdkörper‹ wahrgenommen. Dazu kam der organisatorische Zusammenbruch des polnischen Milieus, da jeweils etwa ein Drittel der ruhrpolnischen Bevölkerung nach Polen zurück- bzw. nach Frankreich weiterwanderte. Die Bemühungen, im Zuge der Integration die ethische Identität weitgehend zu erhalten, scheiterte aus mehreren Gründen: Sie lagen im geringen Stellenwert von Minderheitenrechten in der Weimarer Republik, dem durch Assimilationsdruck der Umgebung nur geringen Interesse der zweiten bzw. dritten Generation am Erhalt von polnischer Sprache und Kultur sowie nicht zuletzt in der verstärkten Ausgrenzung des polnischen Elements unter den Nationalsozialisten.

Im Ergebnis machte die Tagung drei Betrachtungsweisen des Themas deutlich, wenngleich die Bezeichnungen von Brinkmann in seinem Resümee (top-down approach, bottom-up approach, ›Seitenperspektive‹) nicht ganz passend erscheinen: 1) Der Umgang des Staates mit Migration als perzipiertes Problem, bei dem Kontinuitäten und Brüche zum kaiserlichen Deutschland, aber auch zur Zeit nach dem Zweiten Weltkrieg deutlich wurden. Restriktion und Exklusion gingen dabei durchaus mit Ansätzen von Toleranz und Inklusion einher. 2) Die Analyse von Zuwanderung, Aufenthalt, Weiterwanderung und Integration einzelner Migrantengruppen, die sich auf Binnenstrukturierung und Vernetzung konzentriert. Hier stach der spannende Ansatz der ›community in transit‹ hervor. 3) Die Beschäftigung mit übergreifenden Strukturen, die in die anderen beiden Herangehensweisen hineinspielen. Sie offenbarten zum einen die Notwendigkeit zur Differenzierung, wie am Beispiel der Wahrnehmungen in bezug auf Zeitumstände und einzelne Gruppen deutlich geworden war. Zum anderen eröffneten sie spannende Vergleichsmöglichkeiten zur Gegenwart wie im Fall der Konstruktion von Illegalität.

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SHM 12

Alexander Freund

Aufbrüche nach dem Zusammenbruch

Die deutsche Nordamerika-Auswanderung nach dem Zweiten Weltkrieg

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SHM 13

Klaus J. Bade

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Michael Bommes und Jochen Oltmer

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