

IRREGULAR VS. ILLEGAL IMMIGRATION: SETTING THE DEFINITIONS. AN OVERVIEW OF EUROPEAN PRACTICE

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For the European Union (E.U.) and its Member States, migration is not a new phenomenon. Administratively abnormal immigration is mainly at the heart of all humanitarian efforts and political debates on the harmonization of the Union's common immigration policy. However, even today, the notion of irregular immigration and the exact wording of the terminology associated with the specific dimension of the phenomenon has not found a general and acceptable version. Interpretations on the categorization of immigrants and their movements depends every time on political discussions, public documents issued and academic studies. The essay demonstrates the variety of use of the relevant terms focusing on the inseparable dependency on the performance of interpretation of the two terms "irregular immigration" and "illegal immigrant".

Keywords: irregular, illegal, immigration, immigrant

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INTRODUCTION

Migration is seen today as a mass phenomenon in the context of European Union (E.U.) and its Member States, but at the same time in the international level as well, however, the irregular immigration is still the major point of contention, in particular among the politicians. Irregular immigration is approached as a core work subject both at a legislative level and in the decision making policy, considering the necessary measures which have to be implemented, in order to deal with the mass flows of immigrants without a proper documentation. However, policy documents, academic studies, books and public documents of any type each time use a different interpretive approach to describe irregular migration. Different terms are used such as "illegal", "clandestine", "undocumented" or "unauthorized" immigration. This diverse

interpretation of irregular immigration also results in different interpretations of the term “irregular immigrant” which is finally attached to any other characteristic definition by which the immigrant is formulated according to the interpretation of the concept of irregular immigration. Essentially there is an inseparable dependency on the performance of interpretation of the two terms “irregular immigration” and “irregular immigrant”.

FALSE IMPRESSIONS

According to the International Organization for Migration (IOM), “**irregular migration**” is the term which is able to describe the movement that takes place outside the regulatory norms of the sending, transit and receiving countries (IOM, 2011). The explanation is more given by the two aspects of the destination and the sending countries. Thus from the point of view of the destination countries it is the entry, stay or work consequences in a country without the necessary authorization or documents required under that country’s immigration regulations. On the other side from the point of view of the sending country, the irregularity of the movement is seen in actions in which a person is led to an international border – crossing without a valid passport or travel document or does not meet the administrative criteria for leaving the country.

However, there is no precise definition of the term “irregular migration” that could be clearly described or universally accepted (IOM, 2011). This is, more, a socio-political problem and one that brings with it a language and terminological issue (Perkowska, 2016). This is further complicated by the fact that current academic knowledge based on critical scholarly literature in regards to the E.U. legislation related to irregular migration is lacking in comparison to the regular one. The development of academic study which addresses migration has resulted in a general awareness that the old models and conceptual tools are no longer sufficient to enable rigorous analysis of new and emerging patterns of human mobility (European Commission, 2009). Since the E.U. legislation approximates migration from the point of view of managing the regular immigration, by avoiding in many cases the adoption of the non-regular immigration as an equally or/and secondary nature of the migration phenomenon, it creates a shortfall in the study and the results it generates have no impact on the real expressions of migration mobility as it is operating in an irregular dimension. This is particularly problematic when it comes to analyses of the rights granted to migrants, which – in accordance with policy agendas – are regarded as assets to be distributed for the purpose of enhancing a state’s attractiveness, rather than being made subject to a critical evaluation on the basis of human rights considerations (De Somer, 2012).

Moreover irregular immigration is getting a more problematic dimension as it occupies a large section of public opinion through the public policy making, thereby creating false impressions of the different conceptual correlations of irregular immigration with other terms relating to and describing different situations. Saying that, the most glaring example of the failure of research to inform policy and public debate, and in which reliable information is sorely needed, is -what is called- illegal migration (European Commission, 2009). However, it is important to notice that, the worlds of academic research and public policy work on different assumptions, which in turn provide for different endogenous dynamics concerning views on instrumental usage

of knowledge vs. its potential function as ways of understanding and as criticism (Faist, 2010).

That, in turn, if it is accepted in practice and not merely as an assumption, might lead to a better criticism and understanding of the different treatment of the issues arising during and between the conceptualized situations of the irregular and the regular migration, respectively, but also could provide an opportunity of explaining the misunderstandings on the use of terms describing particular actions and / or omissions, related to the above mentioned migratory movements. Notwithstanding, this process of understanding concepts and accepting determinations relevant to migratory mobility might be, potentially, difficult to be achieved objectively since, the media and political figures, then, as powerful actors who influence public opinion, create prejudices, and shape uninformed opinions (especially in the case of socially sensitive issues), are most likely to use the most negatively charged terms when referring to undocumented migrants or issues related to irregular migration (Paspalanova, 2008).

This difficulty and complexity in defining and obtaining the correct interpretation on terms which are relevant to human beings' socio-legal behaviour, makes more sense since the adjective "irregular" appears to be adopted as synonymous to "illegal", which is however defining further the concept of non-legal or/and non-lawful acts. Thus, finally, the role of immigrants and asylum seekers who find themselves in an illegal movement is poorly understood, as are the variety of ways in which immigrants and the individuals and the institutions that assist them, seek to circumvent the law (Black, 2003).

THE CRIMINALIZATION ASPECTS

The term "illegal migration" describes an immigration act of movement that is "not legal" or is carried out in opposition to national or international lawful standards. It is worth mentioning that migrants can never be illegal themselves, only their activities can be regarded as such (Perkowska, 2016). Therefore the relationship between immigration and the criminalization of acts is evident and creates a series of misunderstandings. In a narrow sense, the term "illegal migration" designates the act of entering a country in contravention to the law and is confined to illegal border crossing (but not overstaying the terms of visas or residence), referring only to a flow and not to a stock of persons (Jandl, Vogel and Igllicka, 2008).

However, at the E.U. level the term "illegal" which has been used in many basic policy documents related to irregular immigration, such as the European Pact on Immigration and Asylum in 2008¹ and the Stockholm Programme in 2009², referring not only to the illegal cross border crossing but to the illegal stay as well. The article 3.2 of the E.U. Return Directive (2008/115/EC)³ exactly defines "illegal stay" as "the pres-

1 The European Pact on Immigration and Asylum was adopted by the European Council on 15-16 October 2008, following the Commission's Communication of June 2008 "A Common Immigration Policy for Europe: Principles, actions and tools". Building on the progress already achieved over 10 years, the Pact is a further stepping-stone towards a comprehensive E.U. migration policy. (see <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52009DC0266>)

2 The Stockholm Programme, adopted by the European Council in December 2009, provides a framework for EU action on the issues of citizenship, justice, security, asylum, immigration and visa policy for the period 2010-2014. It calls for a coherent policy response which goes beyond the area of free-

ence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code⁴ or other conditions for entry, stay or residence in that Member State”.

Although the use of “illegal” was gradually associated with the entire procedure of an unlawful entry, stay and residence, and in addition to all those actions and / or omissions associated with relevant separately followed procedures during the migratory movement, the further criminalization of the particular immigration mobility, typically understood in contrary to the national laws and the State’s sovereignty, brought in addition other features into the concept of “illegal” immigration creating a much more delicate conceptualization due to specific delinquent activities. Paspalanova (2008), in an attempt to describe this wide criminalization, notes that there is one trend, which has attracted attention: migrants are always categorized as “illegal” in contexts relating migration to criminality, irregular working practices, and drug dealing (e.g. Friman, 2001) or in contexts relating to migration control and providing assistance to undocumented migrants (e.g. Pantoja, 2006).

REASONING THE DEFINITIONS

Undoubtedly, the term “illegal” describing both the movement of immigration and the immigrants as its actors, became the main term in use avoiding or overlapping other similar terms. However, the closer to the concept of “criminal” activities were getting, the more widely activists, academics, public opinion and finally many politicians and political institutions started being criticized. Human rights advocates have long argued that the derived noun “illegal migrant” is discriminatory, since “No human being is illegal”, as the slogan of a campaign would put it (Jandl, Vogel and Iglicka, 2008). These criticisms have resulted in a wide debate about the use of the term “illegal” related to immigration and especially among academics. Indeed, some authors have argued strongly against the designation “illegal” migration, on two main grounds; first it is argued that migration is only made “illegal” by the action of the states, rather than through any intrinsic quality; second, there is concern that “illegality” in migration could arise from breaking laws other than immigration laws, leading to confusion and a lack of focus on the core element of the “problem” (Collyer, 2001 in Black, 2003).

However, there is still today an emphasis on the determination of immigration as “illegal” even if the immigrant who is following this type of movement should not be

dom, security and justice. It includes external relations, development cooperation, social affairs and employment, education and health, gender equality and non-discrimination. Section 4.4.2 particularly highlights trafficking in human beings and the necessity to strengthen and enhance the prevention and combating of trafficking in human beings and smuggling of migrants. It also calls for the establishment of an Anti-trafficking Co-ordinator. (see https://ec.europa.eu/anti-trafficking/eu-policy/stockholm-programme-open-and-secure-europe-serving-and-protecting-citizens-0_en)

3 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (see <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32008L0115>)

4 This regulation is intended to improve the legislative part of the integrated border management European Union policy by setting out the rules on the border control of persons crossing EU external borders and on the temporary reintroduction of border control at internal borders. (see <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A114514>)

considered as an “illegal” one. As to the explanation of that interpretation there are various justifications. Black argues that it could intend to maintain a focus on immigration that is considered as “illegal” for several reasons (Black, 2003). First as a response to the increased interest both from the public and state opinions in Europe in human trafficking and smuggling which are both considered as “illegal” activities and thereby are characterizing the immigration movement as “illegal” as well.

Second because the fact that immigrants and asylum seekers are usually breaking legal standards adds a greater range of importance for justification in specific methodological and practical research issues, rather than the fact that their same practical action could be considered that they are not following the conventional, formal and / or documented sectors. Third because it should be under consideration that there are elements of “illegality” that are rooted of course directly in the immigration and asylum procedures but elsewhere as well, increased the sectors of illegality, like in the immigrants’ experience even as “undocumented” or “hidden” who is trying to get access in the labour market but is following anyway an “illegal” process.

NEW PERSPECTIVES

Ultimately in recent years the use of the term “irregular immigration”, especially at the E.U. level has gradually gained important momentum in comparison to the use of term “illegal immigration”. The new Post-Stockholm Programme⁵ which was adopted in 2014 by the European Council providing a roadmap in terms of Justice, Freedom and Security for the five years period 2015-2020 and many other official documents and statements of the E.U. are increasingly using the term “irregular immigration”, while however the term “illegal” is still in use. “Irregular migration” in this context denotes a form of migration that is “not regular”, “unlawful” or not according to the rules (without necessarily being “illegal”, “illicit” or “criminal” in the legal sense) and “irregular migrant” is therefore a migrant who, at some point in his migration, has contravened the rules of entry or residence (Jandl, Vogel and Iglicka, 2008). This is also in accordance with the Resolution 1509/2006 of the Council of Europe Parliamentary Assembly on human rights of irregular migrants. The Recital 7 of the Resolution states that “The Assembly prefers to use the term «irregular migrant» to other terms such as «illegal migrant» or «migrant without papers»; this term is more neutral and does not carry, for example, the stigmatization of the term «illegal»; it is also the term increasingly favoured by international organizations working on migration issues” (Parliamentary Assembly, 2006).

In fact there is still some confusion over the definition between “irregular” and “illegal” immigration considering the problems which arise in separating the “legal” from the “illegal” forms of immigration in general. However, there is an ongoing practice to describe migrants as “irregular” / “undocumented” rather than “illegal” because at various stages they may drift in and out of a legal status (Salt and Stein, 1997). The IOM adopts the use of term “irregular immigrant” as the person who,

5 In June 2014, the European Council defined the strategic guidelines in the area of freedom, security and justice over the coming years. These guidelines are in line with the priorities set in the strategic agenda for the EU, which was also adopted in June. They build on the progress achieved by the Stockholm programme, the multiannual programme for justice and home affairs for 2010-2014. (see <http://www.consilium.europa.eu/en/policies/strategic-guidelines-jha/>)

owing to unauthorized entry, breach of a condition of entry, or the expiry of his or her visa, lacks legal status in a transit or host country (IOM, 2011). Thereby the definition covers, apart from the immigrants who use irregular border crossing practices, those persons who as immigrants or under another status like for example tourists have entered a transit or host country following the legal requirements and standards but however, have overstayed for a longer period than the one that is authorized or even start working in both situations with no related legal documents.

The latest leads to the term of “undocumented immigrant” which is used as equal to the “irregular immigrant” as was already defined. The European Parliament, following an evaluation on the situation of fundamental rights in the E.U. and having regard to the need of harmonizing the way of implementation of its resolutions on fundamental rights and human rights among the Member States, started calling on the E.U. institutions and Member States to stop using the term “illegal immigrants”, which has very negative connotations, and instead to refer to “irregular/undocumented workers/migrants” (European Parliament, 2009).

However, “undocumented migrant” is also used as a synonym for “unrecorded migrant”, which excludes persons who are documented but nevertheless unlawfully residing in a country, such as rejected asylum applicants pending deportation, persons with a toleration status, and others (Jandl, Vogel and Iglicka, 2008). For this category of persons is more in use the term “unauthorized migrant” which exactly refers to who is entering or staying in a transit or host country without holding the domestic national legal authorization. Of course, not everyone residing in a foreign country needs explicit authorization to do so (e.g. if there are free movement rights like within the E.U.) and we need to interpret “unauthorized” as “not authorized according to the law” (Jandl, Vogel and Iglicka, 2008).

CONCLUSION

It is thereby, due to not merely ethical reasons, a much more appropriate approach to deal with immigration as a phenomenon in its irregular dimension and the relevant interpretations following that, without stigmatizing it in a generally negative perspective basically based on political and social arguments, even though essentially it is considered as a problematic area with unsolved issues. However, even if today more academic papers and political reports seem to prefer the use of terms “irregular immigrant” and “undocumented immigrant” the similar expression terms of “illegal” and “unauthorized” are still in use as well as synonyms with no differentiation importance.

Rather, importance has been given more to the interpretation and explanation of the reasons that cause the phenomenon and the necessary measures to tackle it as well as for measurement purposes due to the statistics and the estimates. However, it should be understood that migration is a phenomenon of human beings’ mobility and therefore any circumstances describing it and the resulting consequences have a direct impact on its main actors, who as immigrants are always in a vulnerable position. This brings to light the need for a monitoring of the way irregular immigrants are treated since misunderstandings and different interpretations to their status are associated with concepts and meanings other than the protection and promotion of their fundamental rights.

REFERENCES

- Black, R. (2003). Breaking the Convention: Researching the “Illegal” Migration of Refugees to Europe. *Antipode*, 35(1), 34–54.
- De Somer, M. (2012). *Trends and Gaps in the Academic Literature on EU Labour Migration Policies*. Centre for European Policy Studies, No. 50, December 2012, 1–20. Retrieved from <https://www.ceps.eu/publications/trends-and-gaps-academic-literature-eu-labour-migration-policies>
- European Commission (2009). *Moving Europe: EU research on migration and policy needs*. Directorate-General for Research Socio-economic Sciences and Humanities, EUR 23859 EN : 1 – 48. Retrieved from https://cordis.europa.eu/citizens/docs/sh_research_migration_20090403_en.pdf
- European Parliament (2009). *Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008 (2007/2145(INI))*. Retrieved from <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0019+0+DOC+XML+V0//EN>
- Faist, T. (2010). Academic knowledge, policy and public role of social scientists. The case of migration and development. Centre on Migration, Citizenship and Development. *COMCAD Arbeitspapiere – working papers*, 71, 1–22.
- IOM – International Organization for Migration (2011). *Glossary on Migration*. *International Migration Law Series, No. 25*. Retrieved from <http://www.iom.int/cms/en/sites/iom/home/about-migration/key-migration-terms-1.html>
- Jandl, M., Vogel, D, Igllicka, K. (2008). *Report on methodological issues. Prepared for Work Package 2 of the research project CLANDESTINO “Undocumented Migration: Counting the Uncountable. Data and Trends Across Europe”*, 01-79. Retrieved from http://irregular-migration.net/typo3_upload/groups/31/4.Background_Information/4.1.Methodology/Methodological_Issues_Clandestino_Report__Nov09_2.pdf
- Parliamentary Assembly (2006). *Resolution 1509(2006) on Human Rights of irregular migrants*. Retrieved from <http://assembly.coe.int/nw/xml/XRef/Xref-XML-2HTML-en.asp?fileid=17456&lang=en>
- Paspalanova, M. (2008). Undocumented vs. Illegal Migrant: Towards Terminological Coherence. *Migraciones Internacionales*, 4(3), 79–90.
- Perkowska, M. (2016). Illegal, legal, irregular or regular – Who is the incoming foreigner? *Studies in Logic, Grammar and Rhetoric*, 45(58), 187–197.
- Salt, J., Stein, J. (1997). Migration as a Business: The case of Trafficking. *International Migration*, 35(4), 467–494.

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