

Amnesty for illegal migrants?

The situation of illegal migrants: living and working conditions and social policies¹

The expression "amnesty" provokes conflicts in Germany, because it has a very polarizing role in the socio-political debate: It is mostly used to signify that which has been done at large scale in southern European countries, where hundreds of thousands irregular migrants could apply for documentation, sometimes with little more to fulfil than proving that they have been in the country for so and so long and held a job at a given time. Referring to that, my central argument in this presentation will be: *I am against general amnesties for illegal migrants, but at the same time very much in favour of more differentiated regularisation options.* This position is due to two sets of arguments:

First, as already indicated, because of the divisive character the question of amnesty ("Legalisierung") has in the German political debate: Left groups demand: "Legalize all" ("Papiere für alle"), conservatives are opposed because they are afraid of 'Pull-Effects'. In Germany it is more advisable if you start with issues which are less contested and open for broad democratic consensus, which is most of all the question of human and/or social rights which can be granted pragmatically, without even touching the question of regularisation.

But – second – I am also opposed to general amnesties at a large scale because of findings within my own research, namely because of the following reasons:

- Experience of all countries with 'amnesty-experience' shows, that for those regularized new illegal migrants enter the country an fill in the gaps. After all, they are wanted because they are illegal, i.e. without rights, and this means they are cheap and exploitable labour.
- Correspondingly, a lot of working-migrants (which are by far the largest group among the undocumented migrants in Germany) tell me that work is more important for them than status and that they rather prefer to be attractive on the labour market than to be too expensive to be employed. This position has been proven right by developments in many countries once migrants got their papers: They lost their job.
- Amnesties do not solve the big problems for the national economies in those states applying that mechanism: Many migrants happily accept the offered papers, which gives more security in case of police controls in the street, but then they continue with black labour, thus still strengthening the shadow economy which avoids paying taxes and insurances. And so on.

I agree totally with what a high-level conference, organized by the Dutch EU presidency in September 2004 rightly pointed out: Both expulsion and regularisation "of unauthorised immigrants are clearly only remedial measures that do not alter the fundamental dynamics - or realities - that drive unauthorized migration" [presidency 2004b, p. 3]. The more realistic and pragmatic way is to live with these dynamics and realities. And in doing that,

"(m)anaging unauthorised migration well is not only a project of controlling the *numbers* of unauthorised immigrants, but also of controlling irregular migration's *consequences* for societies, their institutions and migrants themselves. This aspect of managing unauthorised migration often receives too little attention at the national and EU levels. *Two necessary first*

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steps toward controlling better the consequences of unauthorized migration are (1) guaranteeing basic rights for all residents of EU territory regardless of legal status, and (2) involving cities and localities—the levels of government that most directly deal with unauthorised immigrants and their effects—in planning immigration (and integration) management efforts". [presidency: 2004a: 15]

This approach reflects also the priorities in the German political debate. Most efforts of most agents in politics and civil society are spent on securing the effective enjoyment of human rights for undocumented migrants such as medical treatment, school-education for children and protection against exploitation. These rights can be granted independently of a legal status if – and that's the crucial point – you make sure that, hospitals, schools or courts do not have to investigate into the residence-status of clients or claimants and to report them to the Alien Authorities, who then would start the proceeding of expulsion and/or detention. That hospitals or schools do have the duty to report is *one* possible interpretation of § 87 Aufenthaltsgesetz, but legal experts, politicians, judges, church agencies and so on are quarrelling for years over the question whether this is the *only* possible interpretation. Opponents to 'denunciation' argue, that the professional duty of doctors, teachers and judges is healing, educating and investigating into the justification of wage-claims, not the investigation into the residence status. If a non-denunciation-practice can be guaranteed, you can secure medical treatment just in time, prevent infections and higher costs due to delay in approaching doctors, you can offer children a future, you can prevent Mafia-Units from taking on tasks normally reserved to governmental institutions in the 'Milieu', who are so far for many migrants the most effective alternative if access to courts is barred. In the latter context another step forward would be a similar regulation as the US seems to have, where combating of crime is separated from combating irregular residence and no data exchange exists between the police and the immigration service. In Germany, no 'Illegal' would contact the police if s/he is threatened by the Mafia, because the most certain result would be his arrest and deportation².

For Germany all that indicated would be already huge improvements in the present situation both for migrants and supporters. Furthermore, and this is important, the state would NOT be deprived of the right to control immigration and residence, because he can safeguard this right independently of all that with border guards, police and officials from customs and labour authorities. For all the reasons given, this seems to be a very promising line of compromise to initiate the first steps in changing the present policy approach to undocumented migration in Germany. Not surprising, that in these areas (namely health-care, schooling and labour courts) and on the political level of municipalities, the political body most immediately confronted with undocumented migrants, we witness the most promising initiatives, discussions and developments in Germany, namely in the towns of Munich, Freiburg and Berlin³.

Beyond that and additionally, however, I am in favour of regularisation-options, both temporary and permanent:

First of all in the case of refugees who do not have a realistic return-option. Here you find a lot of people who are living in Germany for a long, long time, who have children, a job, know the language and the 'habits of the country'. Nevertheless they have, for the sake of principle, to leave the country after, e.g., their claim of asylum, after years of proceedings, has turned down. I know a lot of people going underground for fear of deportation or returning illegally

² In Germany this is due to the "Legalitätsprinzip", which is enshrined for the police in § 163 Abs. 1 StPO. According to that paragraph, the authorities and the police are obliged to examine *all* punishable deeds ("Straftaten"). However, if undocumented residence would be 'downgraded' from a "Straftat" to a mere "Ordnungswidrigkeit" this problem would also be solved for Germany (vgl. Cyrus 6+70).

³ Detailed information on <www.joerg-alt.de/politisches/kommunen/kommunen.html>

back to Germany after having left the country first, but being unable to start anew in their country of origin.

Second for those, whose relatives live in Germany. Family is on the one hand a very important migration-directing factor for legal and illegal migration, but on the other hand there are not enough legal options for these people to join their family. The concept of parents and minor children beneath 16 years does not fit the concept of the larger family ("Großfamilie") and the attached bonds of solidarity, which is common in non-European countries. For example: Families, who want to children older than the law permits or parents in need of care to join them in Germany have to resort to illegal options.

Right now, solutions for these two groups can only be aimed for by calling upon the so called 'Hardship-Regulation' in the new immigration law. But: In the recently established 'Hardship Commissions' each case has to be dealt with individually I am rather sure that this is not sufficient for the numbers at hand.

Third we need better regularization-options for those prepared to cooperate with authorities responsible for combating exploitation and crime, if these goals are given more weight than it is right now when it pops up at best every now and again in political declarations, but no sufficient resources in terms of finance and personnel are contributed. In this context, the European Social and Economical Council commented in view of protecting witnesses against criminal organisations:

"Gradually legalising the situation of illegal immigrants must be an element in a process including opening up legal immigration channels and intensifying measures against the criminal organisations involved in trafficking human beings. It should be made clear to public opinion that if approached in this way, legalisation will not boost illegal immigration, but rather will reduce it significantly" [ESC: § 3.5.3.].

Present options on offer are not attractive enough for potential witnesses because – e.g. – they are only short-term, provide no incentives or do not include relatives in countries of origin (which would be important in the case of transnational organized crime).

Similarly, the Council recommends for combating exploitation in the shadow economy:

"Legislative and fiscal measures, and contractual agreements, are needed to bring companies operating in the black economy gradually into the legal sphere.... These measures must, however, be supplemented by sympathetic treatment of migrants who are being exploited, with the aim of legalising their position. This could encourage the workers themselves to report the exploitation they are subjected to" [ESC: § 4.3.6.].

Apart from these mentioned there is final area where I would propose to think in a longer perspective for more legal options or regularisation. But I want to emphasize that I do not want to put it, as far as importance is concerned, on the same level as the three before. Nevertheless: Sooner or later, especially given the demographic development, we have also to deal with the question of workforce, especially in the area of such jobs for which Germans do not queue up for, e.g. in agriculture, construction, domestic caring and nursing. Here we may consider temporary and permanent options:

Temporary options could mean for example that people, who want to come to Germany only to earn money for – e.g. – building a house, opening a business, paying for hospital treatment may apply from abroad to enter the country for a specific period of time and be given the

opportunity to do that. However, to secure their returning home, maybe the following might be considered: A part of their wage would only be given to them after they returned back in their home country, perhaps with interests on the deposited amount of money [cf. Martin: 149ff.].

But there are also arguments regarding a more permanent perspective of people already living in Germany illegally, because: Why asking people from abroad to come to Germany filling in the jobs in the first place, when you have hundreds of thousands already inside the country, capable, integrated, assimilated, but illegal? It would make more sense to regularize them, and a specifically promising group from which those regularized should come are those mentioned already at the beginning: Refugees and family members already present in Germany for a longer period of time in an irregular status. Here you could combine humanitarian and economical criteria in backing up the argument for regularisation. In this context, the concept (and arguments in favour) of "earned regularisation", as developed at the *EU- Presidency Conference on Future European Union Co-operation in the Field of Asylum, Migration and Frontiers* (Sept. 2004) seems to be very useful to consider.

"The emerging concept of 'earned regularisation' is one example of how regularisation programmes might be more strategically designed in the future. Earned regularisation would allow all unauthorized immigrants to apply for temporary work and residence permission, after registering with authorities and passing through security-conscious background checks. During the period of their temporary stay, regularized migrants would be able to 'earn' permanent settlement rights by holding a job, showing signs of language proficiency and social integration, obeying the law and demonstrating other valued behaviours. Points would be accrued for various criteria and only migrants achieving a certain score during the allotted time would be permitted to stay.

Earned regularisation proved to be a concept that generated both great interest and some controversy. Starting with controversy, sceptics felt that applying concepts of immigrant selection and granting settlement rights to some members of a population that has broken the law comes to close to 'normalizing' unauthorized migration and making it an explicit part of one's national immigration posture. Countering this concern was the view of many other participants who argued that unauthorized immigration is large and productive enough in many Member States to have reached the point of being a *de facto* labour immigration policy. Establishing rules for extended temporary and more permanent stays, while conceding that unauthorized immigration has not been stopped, may at least regulate the phenomenon and shift policy toward meeting many other national priorities." [presidency 2004a: 14]

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⁴ Unterlagen zu dieser Konferenz sind zum Herunterladen eingestellt unter <http://www.migrationpolicy.org/events/2004-08-31.euroconf_publications.php>