



Legal Analysis of EU Policies: Understanding the Binary Status of Labour Migration

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Abstract

In the context of the post-COVID-19 pandemic, Europe faces two significant challenges regarding migrant workers: a shortage of agricultural production workers in certain countries and the "coercive acceptance" of undocumented migrant workers. As most EU countries experience economic recovery following the pandemic, there is an urgent need to restore production activities at a reasonable cost. However, the aging population in some European nations compels governments to recruit foreign workers at elevated costs, leading to irregular migrant workers being viewed as a viable temporary solution. Reopening diplomatic programs with strategic partner countries is also a pressing priority, creating a challenge in reducing illegal migration without erecting insurmountable barriers in diplomatic relations. This analysis examines EU policies regarding migrant workers, with a particular focus on Spain, utilizing qualitative comparative research methodology to explore the distinction between illegal and irregular migration from the perspectives of human rights law and humanitarian considerations, while highlighting various aspects of EU legal documents aimed at protecting the rights of migrant workers and their families.

A. Introduction

In many developing nations, infrastructure and resource shortages often make it difficult to meet the basic needs of their citizens, increasing the likelihood that migrant populations will be overlooked. The European Union (EU) has initiated a reform process to address these challenges by securing its external borders and enhancing the link between border control and international cooperation on migration. Several factors contribute to Europe being a prominent destination for migrants, including environmental, social,

political, economic, and demographic considerations, as well as the introduction of the new EU migration accord.¹ Migrants tend to be concentrated in metropolitan areas, where they are more likely to find employment. However, this concentration places significant pressure on the "receiving" regions, exacerbating challenges such as rising housing costs and other socioeconomic strains, thus complicating efforts toward inclusivity. These migration patterns lead to complex interactions between urban centers and their surrounding regions.

Existing research on irregular migrant workers in the EU includes works such as "Irregular Migrant Domestic Workers in Europe" by Maykel Verkuyten and "Illegal, Legal, Irregular or Regular: Who is the Incoming Foreigner?" by Magdalena Perkowska. However, these studies often lack a clear definition of "illegal" or "irregular" migrants. In this context, my research aims to examine the distinction between illegal, unauthorized, or irregular migrant workers within the framework of EU policies, with a specific focus on the case of seasonal migrant workers in Spain. This analysis seeks to explain why it is important for nations to maintain a binary classification of migrant labor status.

The research employs a normative juridical approach by analyzing the relevant legal principles, regulations, and doctrines applicable to the issues at hand. Normative legal research involves identifying and interpreting legal norms and rules as established in laws, regulations, and societal concepts of justice. Additionally, a literature review is conducted to gather data from relevant legal sources, including laws, legal textbooks, articles, journals, case law, and other legal materials.²

The novelty of this research lies in its analysis of EU policies regarding migrant workers, using the case of Spain as a reference. The methodology applied is comparative qualitative research, focusing on the distinction between illegal and irregular migration from a human rights and humanitarian perspective. This analysis is grounded in EU laws and regulations that shape policies treating immigrant status in binary terms.

B. Discussion

1. Legal Studies on Migrant Workers

a. Legal Basis

Article 3(2) of the Treaty on European Union (TEU), which outlines the EU's principal objectives, emphasizes the establishment of an Area of Freedom, Security, and Justice (AFSJ). This objective is further developed in Articles 67 to 89 of Title V of the Treaty on the Functioning of the European

¹ Adrian Favell and Randall Hansen, "Markets Against Politics: Migration, EU Enlargement and the Idea of Europe," *Journal of Ethnic and Migration Studies* 28, no. 4 (2002): 581–601.

² Depri Liber Sonata, "Metode Penelitian Hukum Normatif Dan Empiris: Karakteristik Khas Dari Metode Meneliti Hukum," *Fiat Justitia: Jurnal Ilmu Hukum* 8, no. 1 (2015).

Union (TFEU), which detail the framework for AFSJ creation. The AFSJ's goals, as outlined in Article 67 of the TFEU, include the promotion of freedom, security measures to prevent and combat crime, and access to justice in civil matters. However, one of the primary challenges facing these objectives is the ambiguity surrounding their implementation.

The treaties mandate the development of a comprehensive immigration policy to effectively manage migration flows, ensuring equal treatment for all legally residing third-country nationals (TNCs) within the member states. This policy also addresses the prevention of human trafficking and illegal immigration, with measures that range from preventive strategies to more stringent enforcement actions. However, the distinction between legal and illegal immigration remains unclear, and EU policy requires more explicit goals to navigate these complexities.³

The AFSJ guarantees that foreign nationals will be treated fairly under the TFEU. However, to ensure this promise is upheld, it is essential to evaluate how immigration status and related controls impact migrants and refugees. The equitable treatment of migrants, particularly those "lawfully residing in the Member States," must be ensured, while simultaneously implementing measures to combat illegal immigration. Yet, migrants, due to their limited political power and social protection, often face challenges in accessing human rights and engaging with the nation-state.⁴

Irregular migration has become a pressing global issue, particularly within the EU, where it occupies a central position on the policy agenda. Migration patterns, such as South-North migration and the increased flows following the Russia-Ukraine conflict, have prompted the publication of the Global Compact for Migration (GCM). The issue of migrant workers has thus become a global concern, affecting not only the EU but many other regions as well. The concept of illegal migration encompasses several distinct issues⁵, including the unauthorized entry of foreigners, overstaying visas or residence permits, and non-citizens working in violation of their immigration status.⁶

b. Migrant Workers Illegal, Unauthorized, or Irregular?

There is considerable debate within the scientific community regarding the definitions and implications of border crossing in the context of illegal migration. Human rights advocates argue that no individual should be labeled a criminal based solely on their migration status. Terms such as

³ Christina Boswell, "Migration in Europe," in *The Politics of Migration* (Routledge, 2018), 91–110.

⁴ Franck Düvell, "Clandestine Migration in Europe," *Social Science Information* 47, no. 4 (2008): 479–97.

⁵ Martina Tazzioli and William Walters, "Migration, Solidarity and the Limits of Europe," *Global Discourse: An Interdisciplinary Journal of Current Affairs* 9, no. 1 (2019): 175–90.

⁶ Elspeth Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International B.V., 2004).

"undocumented migrant" and "irregular migrant" are often used interchangeably. Legal classifications of immigration as either legal or illegal are primarily determined by national laws, which can vary significantly across different jurisdictions. Additionally, individuals may be deemed illegal immigrants if they have violated the laws or rights of the country from which they fled, whether that be their country of origin or a transit nation.

The International Convention for the Protection of the Rights of All Migrant Workers and Their Family Members (ICRMW) serves as a crucial treaty ratified by numerous countries, particularly in the Global South, indicating a broader commitment to addressing migration, including aspects related to undocumented labor. In discussions surrounding migration, various terms are utilized, including "illegal immigrant," "irregular immigrant," "undocumented immigrant," "undocumented person," and "secret immigrants" (as referenced in Spanish).⁷

However, the use of the term "illegal" is often regarded as problematic due to its criminal connotations and negative implications. In its 2006 "Special Communication on Policy Priorities in the Battle Against Illegal Migration of Third-Country Nationals" (COM (2006)), the European Commission attempted to clarify the definition of "illegal migration" to mitigate these issues. According to this document, illegal immigrants from third countries are defined as those who enter a Member State's territory through land, water, or air, often employing fictitious or counterfeit documents and facilitated by organized criminal networks engaged in trafficking and smuggling.

The term "covert migrants" (also referred to as "undocumented" or "migrants in unusual situations") encompasses individuals who have legally entered a transit or host country but subsequently overstay their visas or engage in unauthorized work. Many scholars argue that the term "irregular" is more appropriate than "illegal" since it avoids the negative implications associated with criminality and emphasizes the humanity of migrants.⁸

In my view, terms such as "illegal migration" or "undocumented migration" may still be suitable for describing the phenomenon of migration that contravenes legal regulations. The researcher proposes that "irregular migration" more accurately captures the temporary movements often occurring in border regions. Despite numerous efforts to standardize terminology for individuals who enter or remain in countries unlawfully, no single term has achieved widespread acceptance. Consequently, migrants

⁷ Perkowska, "Illegal, Legal, Irregular or Regular – Who Is the Incoming Foreigner?" 9.

⁸ Floya Anthias and Gabriella Lazaridis, *Gender and Migration in Southern Europe: Women on the Move* (Routledge, 2020). 23.

often experience limited access to labor markets with few restrictions, complicating their legal and social standing within host countries.⁹

Although the role of EU law is clearly articulated, the binary distinction between legal and illegal migration remains contentious within various conceptual frameworks. Different legal authorities whether legislative, executive, or judicial—can influence the classification and status of migrants based on domestic, EU, or human rights law (such as the European Convention on Human Rights, ECHR). This legal overlap complicates the delineation between legal and illegal migration, creating a contested space regarding its definition. Even the terminology associated with "illegal migration" carries significant implications and complexities.

Researchers often use terms like "unusual" and "undocumented" to mitigate the negative connotations associated with illegality. Alternatives such as "covert" or "irregular" immigration are preferred to describe diverse migration patterns. For example, within the EU, emigration and the residence of EU citizens in other EU member states are permitted, contingent upon domestic regulations that, while indicative, do not confer absolute rights. Movement within the EU is recognized as a right for all EU citizens, allowing them to live and work freely. Therefore, the term "illegal" encompasses far more than the status of EU citizens alone.

In its broadest interpretation, irregularity encompasses various liminal statuses. According to the European Commission's communications, both overstayers and illegal immigrants reside within the EU. Many migrants find themselves in a state of partial compliance with immigration laws, often relying on employers or sponsors to maintain their legal status at another's behest. It is reasonable to categorize asylum seekers as temporary migrants while their requests for international protection are under review. The government and the ECHR acknowledge that these individuals may be classified as "unauthorized entrants" for certain legal purposes, even if EU legislation provides support for their claims.

The term "irregular" is commonly employed in international contexts to denote a presence that is inconsistent with domestic legal assessments of immigration status. Notably, the Global Commission on International Migration and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families utilize the term "irregular." While some conventions may employ "illegal" in specific contexts, the International Labor Organization (ILO) often favors the term "irregular migration" in its policy documents. In contrast, the EU frequently adopts the term "illegal immigration" with considerable emphasis.¹⁰

⁹ Elspeth Guild, *Who Is an Irregular Migrant?* (Brill Nijhoff, 2004)https://doi.org/10.1163/9789047406051_004.

¹⁰ Leonie Ansems De Vries and Elspeth Guild, "Seeking Refuge in Europe: Spaces of Transit and the Violence of Migration Management," *Journal of Ethnic and Migration Studies* 45, no. 12 (2019): 2156–66. De Vries and Guild.

Despite this usage, there was no EU-wide definition of "illegal" or "irregular" immigration prior to the implementation of the Return Directive (RD) in December 2008 and the Employer Sanctions Directive (ESD) in June 2009.¹¹ These measures reflect shared competencies regarding admissions, integrating elements from both EU and national frameworks. The EU's extensive institutional efforts against "illegal immigration" illustrate the complexity of these definitions, despite the absence of a universal legal definition. In this regard, "illegal" migration serves as both a distinct institutional category and a sub-phenomenon of immigration and citizenship law.¹²

2. The EU Policy on Labor Migration: The Case of Seasonal Migration in Spain

a. Agriculture Seasonal Migrant Workers in Spain

The COVID-19 pandemic has led to widespread border closures across various countries, significantly impacting the mobility of seasonal workers. Nations with predominantly agricultural sectors have experienced labor shortages, resulting in decreased labor efficiency and escalating production costs. Spain, which boasts one of the fastest-aging populations globally, has seen its average age increase by four years over the past decade. This demographic shift poses a substantial threat to Spain's post-COVID economic recovery, as there is a growing inability to find workers for EU-funded recovery projects, prompting industry associations to advocate for "transnational mobility." Despite high unemployment rates, Spain is in urgent need of foreign workers.

The regions of Huelva and Lleida are particularly noteworthy in Spain regarding temporary worker schemes. According to the Department of Climate Action, Food and Rural Agenda, the production of sweet fruit in Huelva has declined by nearly 30% as of October 2021.¹³ In response to this labor crisis, initiatives such as the AENEAS projects (2004-2006) and MARES I & II (2010-2013), implemented by the City Council of Cartaya in collaboration with the EU, sought to establish temporary worker programs.¹⁴ These initiatives aimed to promote co-development, mitigate illegal immigration, and address economic needs.

The Foundation of Foreign Workers of Huelva (*Fundación de Trabajadores Extranjeros de Huelva, FUTEH*) established in 2007 has also

¹¹ See GCIM, "Migration in an Interconnected World: New Directions for Action- Report of the Global Commission on International Migration", 10/2005.

¹² The term 'illegal immigration' is not unanimously used among EU institutions, however. See, e.g. European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund.

¹³ <https://agricultura.gencat.cat/ca/departament/estadistiques/agricultura/avancos-mensuals-produccions-agricoles/>.

¹⁴ Berta Güell and Blanca Garcés-Mascareñas, *Agricultural Seasonal Workers in Times of Covid-19 in Spain*, 2020.

played a significant role in the selection process and support for Moroccan women residing in Spain.¹⁵ In July 2022, Spain approved a comprehensive reform package aimed at reducing production costs while emphasizing flexibility and transparency in visa conditions. These reforms, which formalized procedures and enhanced responsiveness to labor market trends, have notably improved the situation for migrant workers. Spain's GECCO program, the primary seasonal worker initiative, has undergone significant process reforms. One key change introduced a four-year multiple-work permit that allows workers to reside and work in Spain for up to nine months each year, replacing the previously limited short-term work permits that corresponded solely to the duration of seasonal contracts. Provided that workers adhere to the stipulated regulations, they can extend their work permits for an additional four years or transition to a two-year work and residence permit.

In most EU countries, seasonal workers are typically issued short-term work permits lasting up to nine months, necessitating annual visa applications for continued employment. This system creates significant uncertainty for migrant workers and poses challenges for employers, who must navigate the complexities of re-hiring previously trained workers or seeking new, untrained personnel. The duration of employment permitted under a Spanish work visa can yield several advantages, including reduced administrative costs for both workers and employers, as maintaining stable legal status minimizes labor costs and mitigates the consequences associated with illegal employment. Moreover, as workers accumulate skills and experience over multiple seasons, employers benefit from enhanced productivity. Additionally, fewer annual visa renewals can lead to decreased public expenditure by the government.

In addition to reforming work visa procedures, enhancing labor mobility is crucial for combating illegal migration. Without the establishment of large-scale, orderly labor migration pathways to meet global labor demands, illegal migrant labor services are likely to proliferate, attracting vulnerable individuals to risky situations. Ineffective mobility often results in illegal work arrangements; thus, well-managed labor mobility systems can provide legitimate alternatives to irregular routes, curtailing migrant smuggling while addressing critical labor market needs.

Spain's labor mobility partnerships with Latin America exemplify effective collaborative efforts. With approximately one-third of the population in many Latin American countries living in poverty and national economies struggling to generate stable, quality jobs, migration from this

¹⁵ Rutvica Andrijasevic, "The Difference Borders Make: Legality, Migration and Trafficking in Italy Among Eastern European Women in Prostitution," in *Uprootings/Regroundings Questions of Home and Migration* (Routledge, 2020), 251–71.

region has nearly tripled over the past 30 years.¹⁶ This growing mobility illustrates a fruitful solution to the relationship between Spain and Latin America, characterized by innovative programs, projects, legal frameworks, and migration management mechanisms.

Expanding the GECCO program to select countries within Latin America could serve as a model for well-managed migration, fostering a collaborative approach that enhances labor mobility. Such initiatives could lead to broader economic benefits, as agricultural wages in Spain can significantly increase workers' incomes, often tripling what they might earn in their home countries. This stands in stark contrast to traditional local development programs. Furthermore, cooperation between Spain and Latin America could inspire better labor mobility solutions in other EU countries facing similar labor challenges, potentially encouraging the EU to expand its strategic partnerships regarding labor mobility.

b. The EU Protection on Migration Labor

The European Union (EU) published its proposal for a directive on migration for “highly qualified employment” on October 23, 2007. The term “higher education qualification” encompasses any degree, diploma, or certificate issued by a recognized authority, attesting to the successful completion of a higher education program. This definition emphasizes that EU member states must acknowledge the certifications from educational institutions in third countries. Such recognition is vital for identifying highly qualified immigrants.

Properly managed migration serves as a crucial tool for enhancing the viability of welfare systems across EU nations and promoting sustainable economic growth within the region. The EU faces pressing demographic challenges, including increasing automation, aging populations, and declining birth rates, necessitating the influx of new workers with diverse skills. By attracting talent, the EU can better align its immigration policies with the labor market demands of its member states.

Directive (EU) 2016/801 establishes the entry and residence conditions for third-country nationals involved in research, study, training, volunteering, or student exchange programs. Notably, the directive grants researchers and students the right to remain for at least nine months post-completion of their studies to seek employment or start a business, thereby enabling EU member states to capitalize on the availability of foreign workers. Furthermore, researchers are permitted to bring their families with them. In 2017, 529,994 initial permits were issued on academic grounds.

Despite these provisions, many low-skilled migrant workers continue to engage in lower-wage domestic or part-time employment, such as domestic assistance or factory work. A significant portion of this labor migration

¹⁶ <https://lampforum.org/2023/03/28/spains-upcoming-eu-presidency-a-chance-to-boost-implementation-of-efficient-migration-pathways/>.

remains informal and illegal, as many individuals are compelled to flee their home countries as refugees. While high-skilled immigration is predominantly legal due to a demand-supply imbalance, low-skilled immigration often exists in a legal gray area.

Although the EU has expressed intentions to include protections for individual migrant workers and their families, the existing legal framework regarding migrant workers in the EU Code lacks specificity. A 2018 study by the European Parliamentary Research Service (EPRS) indicates that implementing a coherent set of entry provisions within the Schengen Area will enhance immigration control and improve planning and coordination of post-entry immigration procedures. Moreover, the EU's involvement in these matters is expected to reduce costs associated with human trafficking, smuggling, border management, and irregular migration. Ultimately, this approach aims to establish a comprehensive management system for the EU's external borders, in alignment with fundamental rights.

The current landscape of migration is significantly influenced by ongoing global challenges, notably the COVID-19 pandemic and the conflict between Russia and Ukraine. Many individuals migrate voluntarily without fully comprehending the implications of their movements. Resettlement involves the selection and relocation of legitimate immigrants from one country to another. Notably, between April 2016 and December 2018, over 18,000 Syrian migrants were resettled from Turkey as part of the EU-Turkey Declaration.¹⁷

Additionally, the Erasmus program provides a range of projects and scholarships aimed at facilitating the mobility of students and workers. The European Commission advocates for public and private funding programs, drawing inspiration from the Canadian model, as a potential strategy for ensuring safe accession to the EU. At the EU level, funding is defined as the responsibility of a person, group, or organization to provide financial resources and social support to individuals or families who have been resettled within a specified timeframe. The goal of these initiatives is to minimize the risk of losing control over migration systems while promoting social integration and security, thereby reducing the occurrence of misguided arrivals.

While there are currently no formal EU partners in this context, several member states have launched public and private funding initiatives, with donors bearing the majority of the costs. Although similar schemes have been implemented in up to 14 countries, only Italy, France, and Belgium have actively pursued the establishment of humanitarian corridors, as noted in recent literature. These corridors enable immediate and effective

¹⁷ Taulant Guma and Rhys Dafydd Jones, “‘Where Are We Going to Go Now?’ European Union Migrants’ Experiences of Hostility, Anxiety, and (Non-) Belonging During Brexit,” *Population, Space and Place* 25, no. 1 (2019): 2198.

responses to protect vulnerable populations without direct government involvement. Sponsors, often social movement organizations or religious groups, provide essential support in terms of travel, accommodation, settlement, and integration assistance.

A key component of the EU's external policy involves forming regional agreements with third countries that utilize trade, investment, and development finance mechanisms to foster robust partnerships. Through these initiatives, the EU aims to promote long-term growth and development in partner countries by linking migration to policy development. This includes improving local living conditions, streamlining visa processes, increasing legal mobility, and enhancing trade relations. Moreover, these partnerships facilitate the re-entry and repatriation of unauthorized immigrants, contributing to the reduction of overall migration flows. The EU-Turkey Declaration of March 18, 2016, exemplifies such cooperation, effectively disrupting traffickers' business models and enhancing administrative collaboration while aiding migrants' entry into Turkey.

Numerous documents address migration, encompassing both hard and soft law; however, many Asian countries tend to favor soft law approaches. There is a marked absence of binding agreements, such as the EU-Turkey Declaration, between Asian nations and the EU. A significant portion of undocumented labor in the EU originates from developing countries, including Vietnam, Cambodia, and Malaysia. For instance, while Vietnam's authorities have engaged in the Global Compact for Migration (GCM), they have not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), a binding treaty. This trend is evident in the broader context of migration governance among Asian countries.

C. Conclusion

EU legislation and regulations create a framework that treats immigrant status as a binary construct, serving both as a legal classification and an analytical framework. While the "binary structure" of legal epistemology is a common characteristic, asserting that the law can solely interpret human behavior in terms of legality or illegality would be an overgeneralization. The EU establishes criteria for legitimate admission and residency concerning regular immigration; however, member states retain the authority to regulate the number of applicants from outside the EU.

Despite EU policies aimed at addressing the status of migrant workers and various regulations governing labor mobility, many undocumented migrant workers continue to encounter significant challenges related to their residency status. Consequently, "illegal" migration persists within the labor migration market. This ongoing issue highlights the difficulties in addressing the "binary" nature of migrant labor, wherein there is a notable disparity

between the management of high-skilled labor and the regulation of low-skilled labor across the EU and many other countries.

In researcher's view, authorities often seek to reinforce their legal frameworks by imposing restrictions on the entry of migrants, motivated by a desire to uphold national sovereignty. There are numerous documents, including both binding and non-binding agreements concerning the rights of migrant workers, even for those in an irregular status, promulgated by the United Nations. One potential solution to control undocumented migration flows is the ratification of binding international instruments, such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).

The status of migrant workers is inherently binary, as international labor integration and the management of irregular workers must occur concurrently. Spain's recent measures exemplify a proactive approach in this regard, as the government has implemented direct actions to extend work visas and foster cooperation with partner countries. These initiatives have effectively addressed two critical challenges: reducing the number of illegal migrant workers and enhancing strategic partnerships related to labor mobility.

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