

**‘Are undocumented migrants condemned to remain invisible
as persons before the law?’**

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Dedication

For Patrick, Marcus, Simon and Julia

and

Stephen, my best friend

Abstract

In this dissertation, it was shown that the modern undocumented migrant is to be found ever deeper in invisible activities, and increasingly in the form of the undocumented migrant female domestic worker meeting the demands of the demographics of modern society. The undocumented migrant is subject to layers of illegality which make it very difficult to align with the legal system at any level to secure meaningful redress, with some notable exceptions, in particular in the areas of access to health and education. There appears to be a slowly evolving jurisprudence in favour of applying fundamental legal rights to undocumented migrants, however, there is ongoing uncertainty in Irish jurisprudence. Bold initiatives are required to bring real improvement to the recognition of the undocumented migrant as a person before the law.

The research undertaken showed apparent difficulties in how principles of fundamental rights of the migrant are translated from the level of international law to domestic legislation and court rulings, in part due to the different treatment of citizenship in different parts of the world, and also through the complex interplay between the rights of migrants and the sovereignty of countries. Through the application of socio-legal, comparative-interpretative, and reform oriented methodological approach, the undocumented migrant was analysed as the subject matter of recognition and of legislation. The language used in regard to undocumented migrant can have a profound effect on public, media and policy makers' discourse. This dissertation regards the term 'undocumented migrant' to be most balanced, fair and least prejudicial.

The results of the research conducted reaffirmed that the situation of the undocumented migrant is tremendously complex and nuanced. The author found no easy solutions which would achieve a workable balance in the recognition of the undocumented migrant before the law. The author recommends the development of the principle of 'full protection' using amendment of the rules of the *locus standi* in Ireland and, exploring the prospects in the norms of *jus cogens*.

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Introduction: Preliminary Questions

The discussion to date in Ireland on the protection of rights afforded to non-national persons within a state has centred on questions of citizenship and on the rights of children and their parents, especially where those children are born within the state. There has been little, if any, focus in Ireland, however, on the status of the large number of undocumented migrants present in the country, frequently productive, non-dependent and who, for the most part, remain unnoticed by the State. These people can however, find themselves in an exceptionally difficult legal position, when they find that they must defend their fundamental human rights.

This thesis seeks to address the following questions:-

- What happens when such undocumented migrants seek to affirm their fundamental rights within the host state?
- To what extent are the principles of Article 6 of the Universal Declaration on Human Rights effectively transposed into national State law applicable to undocumented migrants?
- The question also arises as to the status of such undocumented migrants with respect to the categories of “citizens”, “non-citizens”, “refugees” and even “persons”. Article 6 of the Universal Declaration of Human Rights controversially defines ‘everyone’ as having the ‘right to recognition everywhere as a person before the law’.¹
- Is it certain whether irregular migrants qualify as “persons” under Article 6 of the Universal Declaration on Human Rights, as might be expected to be transposed into national State law?
- How can undocumented migrants be defined as “legal persons” as distinct from citizens, non-citizens (legal migrants) and refugees? The courts in Ireland have interpreted the Constitution as applying both to citizens and to legally resident

¹ The Universal Declaration of Human Rights 1948
<<http://www.un.org/Overview/rights.html>> accessed 20 January 2016

non-citizens, however, despite numerous cases dealing with constitutional claims by irregular immigrants, they have not expressly considered whether it applies also to irregular immigrants.²

- What effective legal protection is available to undocumented migrants in Ireland?

In the first instance, a legal migrant or indeed visitor to another state is afforded protection of their rights by the host state, usually with the expectation that this will be at least to the same level as that to the host state's own citizens. However, it appears that once the visitor or migrant crosses the threshold of the limits of their legal basis for their presence in the host state, there is suddenly little, if any, recourse to legislative and regulatory remedies or protections.³

- At what stage does the host state cease to be responsible to safeguard a migrant's rights?

Undocumented migrants are in a unique and unfortunate position where their very presence in Ireland is deemed unlawful. They are therefore unable to identify themselves, in almost any official setting. If even convicted criminals, denied for a time their right to liberty, can without fear seek protection of their other fundamental rights, such as healthcare, education, freedom of expression, etc., can it be sustainable that a great number of persons be trapped for years in a situation where they have effectively no such recourse to the law because of fear of detection and deportation? Dewhurst refers to 'a protection with consequences approach' wherein 'the irregular migrant could rely on Article 40.1 of the Irish Constitution to make out an equality claim, but would not be immune to potential detection by the immigration authorities, detention and eventual deportation.'⁴

² *Re Article 26* and the Illegal Immigrants (Trafficking) Bill 1999, the Supreme Court gave some consideration to the constitutional status of non-citizens and fundamental rights.

³ Elaine Dewhurst, 'Exclusionary or Inclusionary Constitutional Protection: Protecting the Rights of Citizens, Non-Citizens and Irregular Immigrants under Article 40-44 of the Irish Constitution', *The Irish Jurist* (2013) 99

<<http://login.westlaw.ie.ezproxy.gcd.ie:2048/maf/wlie/app/document?&srguid=ia744c0970000015689e75b532a3af02f&docguid=IB7A118FE82E04DCC99D22534323248E5&hitguid=IB7A118FE82E04DC99D22534323248E5&rank=3&spos=3&epos=3&td=5&crumb-action=append&context=6&resolvein=true>> accessed 12 July 2016

⁴ *ibid* 117

Noll affirms that '[W]hile human rights are practically inaccessible to undocumented migrants, this inaccessibility apparently does not detract from claims that human rights are universally applicable.'⁵ He criticises the efforts of international lawyers to research the position of undocumented migrants since this, he says, must be key if human rights law is to be considered truly universal, with very little research seeking to address these topics together. He proposes that human rights law should be treated as an 'empirical phenomenon' by observation of how the 'right to have rights' is addressed in the law on the one hand, and in political theory on the other.⁶ In a similar vein, Bihari notes that '[W]hile immigration law presupposes the capacity of the state to create distinctions between categories of residents, employment law has a universal mandate'⁷ and a preference for extending labour and employment protections to undocumented workers, an approach which he affirms 'is more compatible with the rights-based concerns and the policy objectives behind immigration and employment laws.'⁸

Nogales refers to significant conceptual gaps in the human rights framework regarding the undocumented, suggesting a 'three alternate approaches-substantial reform of the current human rights system state-based political responses, and social movements-to protect undocumented migrants and other vulnerable populations'.⁹

Dewhurst applies a comparative approach as to the differing reform processes and policies, ranging from regularisation through granting irregular workers the right to become regularised on the fulfilment of certain prescribed conditions, on the one hand, and on the other, the deportation of irregular migrants as a simple and popular method of prevention, and deterrent to further irregular migration.¹⁰

⁵ Gregor Noll, 'Why Human Rights Fail to Protect Undocumented Migrants?', 12 *Eur. J. Migration & L.* (2010) 241

⁶ *ibid* 242

⁷ Luiz Arthur Bihari, 'Clashing Laws: Exploring Employment Rights of Undocumented Migrants', 69 *U. Toronto Fac. L. Rev.* 9 (2011) 1

⁸ *ibid* (n 7)

⁹ Jaya Ramji-Nogales, 'Undocumented Migrant and the Failures of Universal Individualism', 47 *Vand. J. Transnat'l L.* 699 (2014) 699

¹⁰ Elaine Dewhurst, 'Access to Justice for Migrant Workers', *Hibernian L. J.* (2008) 151

<<http://login.westlaw.ie.ezproxy.gcd.ie:2048/maf/wlie/app/document?&suppsrguid=ia744d05f000001568adcd549248a50ec&docguid=IB9530E4ACF844794BC2001C91D1BDCC9&hitguid=IBB5CDDB3F72F45568F54E00C05DC3E0D&rank=3&spos=3&epos=3&td=4&crumb-action=append&context=10&resolvein=true>> accessed 9 July 2016

In Ireland, the former of these two approaches is reflected in the currently proposed Migrant Earned Regulation Bill 2015 which ‘proposes to give illegal immigrants an opportunity to acquire residency rights and have their status regularised.’¹¹

¹¹<<http://www.irishtimes.com/news/politics/finna-f%C3%A1il-proposes-immigrant-points-scheme-in-new-bill-1.2119338>> (accessed 10 January 2016)

Chapter 1: The Economic Undocumented Migrant

1.1 Introduction: The Economic Reasons of Migration

This Chapter intends to trace the development of undocumented migration from the earliest stages to the present day, showing an evolution that follows that of human society. The methodological approach in this Chapter is primarily socio-legal, since the issues addressed have been important, in some form, from the earliest settled societies, and even before perhaps, any organised system of law, and are now at the forefront of both international and national law. The Chapter will identify migration as innate to human kind from the earliest stages, and immigration and immigration controls as old as the earliest human settlements. The classical theories behind the drivers and motivations of migration will be discussed, and the profile of the traditional young migrant worker. Consideration will be given to the symbiotic relationship between the informal sectors of economies that provide opportunities for, and benefit from, the undocumented migrant worker, and the ambivalence of the receiving countries. Different approaches will be discussed relating to migration control and its drivers in social, political and economic terms. Migration has changed over the centuries, and this Chapter examines the changing nature of that informal economy due to the mechanisation and the formalisation of agriculture, factory and construction work, how modern travel and communications have simplified migration, while complex social and political factors have created a less purely economic, and broader perspective. The Chapter proceeds to discuss how the opportunities for the modern undocumented migrant are to be found ever deeper into invisible activities. Finally, the Chapter examines the phenomenon of the undocumented migrant female domestic worker and how she relates to the demographics of the modern society. Subsequently, in Chapter 2, the paper will address how undocumented migration has been legally defined, then in Chapter 3, how it has been addressed in international and domestic law, and in the final Chapter 4, the paper will review recommendations and present a conclusion.

1.2 The Undocumented Migrant as a Legal Phenomenon: ‘A Worker’

While some have attempted to put a date on when humans first migrated, the primary concern of the earliest migrations would have been following herds and seeking better environments and prospects. The earth’s small population was spread very sparsely,

with an emphasis on covering as much ground as possible to sustain a hunter-gathering subsistence. Early man would not, however, have been so concerned with demarking territory, until the Neolithic Revolution based on the development of settled farming, around 12,000 years ago when communities were very much tied to, and depended on, defined areas of land, which in turn led to settled cohabiting communities. Once people came to feel entitled to occupy and own territory, they would have begun considering how to treat and control new arrivals, and others seeking opportunities there would have been conscious of the need to either comply with requirements, or to remain unnoticed.

It was not, however, until the 19th century that the first work was recorded to build a theory on the matter of migration. The description by Ravenstein¹² of the 'laws of push and pull' factors driving the migrant, appear relevant to the present day: the ambition, enterprise and motivation of the individual to escape conditions of deprivation and hardship, to seek opportunity in foreign territory.¹³ In essence, the process of 'push and pull' that drive migration are the very same as those that drive economics, both on a local basis, and on an international basis. They go hand in hand with the concepts of supply and demand. 'Trade policy and immigration are intimately linked', Bacon argues, and are in fact, 'elements of a single economic system.'¹⁴

A 'neo-classical perspective on theories on migration and incorporation' has been described, whereby immigration is simply, almost mathematically '...[t]he outcome of wage differentials between the region of origin and the region of settlement. Immigrants are on the move in order to better themselves and their actions are purely motivated by economic considerations'.¹⁵ From the earliest stages, therefore, the migrant is seen as a worker. He has no reason to migrate other than to seek advancement through work not available in his home country, and the receiving state has no reason to accept him, other than to benefit from his work. To this day, this characterises the relationship between the migrant worker and the host state. Whether or not one agrees that any human motivation, especially in regard to so important a

¹² Ernst George Ravenstein, 'The Laws of Migration', (1889), *Journal of the Royal Statistical Society*, 52(2), 241-305 <<http://www.jstor.org/stable/2979333>> accessed 13 June 2016

¹³ S McKay and A Bloch, *Undocumented Worker's Transition: Legal Status, Migration, and Work in Europe*, (Rutledge New York and London 2011) 29

¹⁴ D Bacon, *Illegal People: How Globalization Creates Migration and Criminalizes Immigrants* (Beacon Press, 2008) 181

¹⁵ Van der Leun J, *Looking for Loopholes: Processes of Incorporation of Illegal Immigrants in the Netherlands* (Amsterdam University Press 2003) 20

change in a life as a migration to a foreign land, could be defined in such certain and limited terms, it is welcome that some basis should be developed for exploring and discussing the key factors behind migration.

It has been argued that ‘the virtue of these explanations is that they identify a clear “principle of action” in human behaviour.’¹⁶ After all, the wish to improve their situation is often found to be an important motive behind immigration. Some argue that if these models can explain one type of immigration, it would probably be illegal immigration, because illegal immigrants are primarily seen as workers.¹⁷ Interestingly, it is also posited that ‘It is usually not the poorest people who migrate, but rather those with a slightly better perspective.’¹⁸ This reference to the migrant as being “not the poorest people” and having a “slightly better perspective” is important in characterising the relationship between the undocumented migrant and the host state. The migrant initiates the move to the host state, and seeks at all times to offer value to those in the host state, who can in turn offer employment. The migrant must, of course, also, offer discretion and anonymity to the employer, which comes at a cost to the migrant, since it means they must fend for themselves in every respect normally associated with formal protections and support. Only people above a certain threshold of personal ability and motivation can deliver consistently on this side of such an arrangement.

As civilisations progressed with greater centralisation of control of powers in state apparatus, the attitude and policies towards inward migration would have been influenced by landowners who needed seasonal increases in farm work capacity, which would have been met in many cases through immigrant workers from outside the state. As individuals, the migrants were relatively powerless, presenting no threat to the established powers, and once the requirement for their work ceased, they would, for the most part, move on to other opportunities. For all the changes involved in the industrial revolution, the attitude of capital holders and industrialists to immigration was similar. Immigrant workers represented a flexible human resource to advance their interests.

¹⁶ James S. Coleman, ‘Social Theory, Social Research, and a Theory of Action.’ *American Journal of Sociology* (1986) Vol. 91, No. 6, 1309-1335 <<http://www.jstor.org/stable/2779798>> accessed 13 June 2016

¹⁷ Van der Leun (n 15) 21

¹⁸ *ibid*

1.3 The Informal Economy and the Undocumented Migrant results in Exploitation

1.3.1 Characteristics of undocumented migrant: Why migrate illegally?

Further to the emphasis on employment as being 'the backbone of many theories on illegal immigration' reference is also made by several commentators on the nature of the prospective employers and employment opportunities in the receiving state. 'Illegal immigrants are first and foremost seen as economically motivated individuals who exploit informal economic opportunities in prosperous countries.'¹⁹ The factor of informality is key, both in the absence of formal protections and support to the undocumented migrant, but also in the availability of employment opportunity outside of formal economic arrangements. In addition to the control of taxation revenues, the formalising of employment relates substantially to the protection of workers' rights. The undocumented migrant must therefore commit to fend for themselves in this respect. They cannot afford to be sick, to grow tired of extended working hours, or to take time out to support children and family. On the other side of the equation, the employer, the host society and state, are also to some extent reliant on the undocumented worker. His disadvantage compels him to accept arduous and unpleasant work, for which there may be very little interest or acceptance amongst those with the options, supports and protections available to legally entitled workers.

In the first instance therefore, the receiving population may perceive the undocumented worker as primarily neutral: work that might otherwise be neglected, gets done, out of sight, and out of mind. Van der Leun affirms that 'The search for a better income on the part of the immigrant and the demand for low-paid and unattractive work in the receiving society are often seen as the driving forces behind illegal migration. Illegal immigrants are even equated with illegal workers.'²⁰

In this context, it has reportedly been found, through numerous studies, that many employers, in selecting prospective employees, are more interested in the ability, education, local language fluency and work experience, than in the formality of a permit to work.²¹ The employer expects to benefit from the worker resource, and perceives no

¹⁹ Van der Leun (n 15) 35

²⁰ *ibid* 25

²¹ *ibid* 26

cost or burden. There is, of course, a fundamental point here: if enforcement of laws on migrant documentation does not significantly impact the employer, then the advantages of employing undocumented migrants, to the employer and ultimately to the regional or state economy, will perpetuate the phenomenon of large scale undocumented migration and employment. The parties in the host state that benefit from the worker, see only just that: the worker. The people concerned and their rights remain invisible. The workers, for their part, know that these are the terms that they must comply with, and so long as they can survive, perhaps even prosper, under this arrangement, they may not suffer greatly due the absence of rights.

There is a distinction between an invasion of one's territory by a foreign force with the intention to take control, and the arrival of an individual or small groups seeking very much to integrate and prosper within the existing power structure. The immigrant accepts the host state's terms, because they have no alternatives. They are also, however, by their profile, particularly suited to meet these challenges of the undocumented migrant, to be productive, flexible, to present no burden and to be otherwise invisible. The typical undocumented migrant has been described as "more mobile than indigenous workers," because they have (at least on first arrival) no ties to specific geographical areas. As undocumented migrants they are less likely, than other groups of migrants, to be accompanied by their families. They generally arrive as adults, so that their countries of origin have borne the costs of whatever education and training they have had; they are over-represented within the under 40-year-old population and thus can be said to be in the "healthiest phase" of their lives, having overcome childhood illness and not reached the second phase of illness, in middle to old age. They are more "willing" or "accepting" of poor living and working conditions, in part because they view these as temporary challenges, which will be overcome through time and the gaining financial security but, more than this, because they have no alternatives.²²

1.3.2 The 'low cost, low burden, productive' undocumented migrant worker in the modern society

Increasingly however, in modern times, there are factors that mitigate some of the social and psychological pain suffered by the undocumented migrant, due to the perceived

²² S McKay and A Bloch (n 13) 1

shrinking of the world in terms of travel and communications. This has some important additional effects: the availability of relatively reliable information about the lifestyle and prospects in the receiving state, reducing doubt and uncertainty as to the migrant's motivation and plans, and the facilitation of prior planning of travel and employment, through contact with informal networks and communities. The old Irish expression, that "they never come back", referring to the terrible finality of the emigrant's decision to move far away from their homeland, family and friends, is still very relevant today, primarily now due to restrictions on travel from, and re-entry to, the undocumented migrant's chosen host country, rather than the cost and hardship of sea travel in the past. However, in many other respects, the separation is less final, at least in terms of ongoing communication, whereby it is at least possible to maintain some semblance of the ties of family and friendship.²³

The importance of market segmentation and imbalances has been highlighted,²⁴ as a significant factor in respect to the employment of undocumented migrant workers, since it is they who are invariably the most mobile and motivated to adapt to changing circumstances. In the absence of undocumented migrants, businesses may need to implement difficult and costly restructuring to suit the preferences of the documented workers, as and where they live.

It has been observed that illegal migration is highly correlated with total immigration, and that an increase in immigration has been associated with a substantial and rapid increase in the informal sector of the economy.²⁵

The inference by this author is that the swift development of informal sectors of an economy is a result of the benefits of exploiting undocumented migrant labour. The question arises as to what constitutes an "informal" economy in the modern highly regulated and networked economy. With the increasing, but by no means complete, mechanisation of agriculture, we should expect an increase in employment of undocumented migrants in domestic situations, such as for childcare and care of the elderly, which we will discuss later in this Chapter. This will shift the motivation for

²³ Slobodan Djajic (ed), *International Migration: Trends, policies and economic impact* (Routledge Taylor & Francis Group, London and New York 2001) xiv

²⁴ Chisato Yoshida and Alan D. Woodland, *The Economics of Illegal Immigration* (Palgrave MacMillan 2005) 7

²⁵ *ibid* (n 24)

accommodating undocumented, from business interests, to middle-class private interests.

There appears to be a natural balance between the characteristics of the undocumented migrant, as the low cost, low burden, productive worker, and the societies that need them, and therefore tolerate them. This tolerance is not necessarily just systematic or even industrial or business related. It is in society and the community also, perhaps primarily in the upper to middle socioeconomic classes. It is in the provision of childcare, the desire for low cost food outlets, clothes, etc. The community knows that the undocumented migrant is at a disadvantage, that their position is precarious, and that they therefore pose little threat or disruption, and brings substantial benefits. In the lower socioeconomic levels however, the undocumented migrant will be more noticeable. They may share workplaces, accommodation, and to the extent that public policy allows, public services and resources. They will also, of course, compete for these workplaces, accommodation and public services.

1.4 Formalised Migration and Migration Control

1.4.1 Restrictions and Obstacles for Undocumented Migrants

In times of much smaller populations, the earliest drivers for what we now know as immigration control, were basic fears of the stranger. From the first times, when an illness in a settled community was blamed on the recent arrival of a stranger, public health would have been foremost in the minds of established communities through an instinct for sheer self-preservation. The concept of immigration, and migration control, can be considered a result of settlement, and the perspective of settled people. ‘When restrictions were applied, exclusion of foreigners was based primarily on racial discrimination, public health considerations, and national security concerns rather than economic objectives.’²⁶

In other cases, however, rather than concerns that uncontrolled immigration would cause pressure on the existing population and resources, the impetus to regulate immigration appears to have arisen from concerns over the misuse of shipping services, avoidance of payment of fares, or the neglect or abandonment by shipping professionals

²⁶ Slobodan Djajic (n 23)

of their duties. This would appear also to be an early example of increased controls arising from a negative impact to business interests from illegal immigration. 'Netherlands was among the first countries to issue immigration restrictions, illegal entry was legally, but nevertheless vaguely, defined since the late nineteenth century but such immigrants were labelled "stowaways:" "paid off" or "deserted" seamen and not "illegals".'²⁷

And yet this fear would, even at the earliest stages, have been balanced by the promise that the recent arrival, the immigrant, could contribute to the established community, bringing new skills, resources and energy. There is then the prospect that a receiving society, and indeed the state, will tolerate rather than permit a certain degree of undocumented immigration, since it allows the benefits of the human capital to be exploited without the burden of accommodating the worker, their dependents and guaranteeing their family their social security, health and welfare. However, the position of the receiving state is more conflicted, and increasingly so. What was in earlier times a mutually beneficial arrangement, whereby casual movement of labourers across borders suited both the migrant and the landowner, has changed, so that the modern migrant is met by a more ambivalent host state.

In what the author sees as an evolution of thought around the theory of migration, it has been described how, in effect, a symbiotic relationship has developed between the undocumented or illegal migrant, and the receiving state. Van der Leun describes the undocumented immigrant as:

...[n]ot only passive recipients of policy measures. They can create their own opportunities and exploit the loopholes that arise from the inevitable ambivalence of policies that try to deal with illegal immigration. Moreover, although they are legally non-existent, they do not live in a social vacuum. Other parties help shape the "grey" areas or loopholes that illegal immigrants are dependent on, or point to them. In this respect, attention goes primarily to actors within public and semi-public welfare state organisations.²⁸

The author suggests that a key factor in such a model, is whether the extent of undocumented immigration, in combination with formal or legal immigration from the same countries and cultures, reaches a critical mass, so that the receiving country inevitably becomes more attuned to the immigrant's needs, and presents less resistance

²⁷ Frank Duvell (ed), *Illegal Immigration in Europe: Beyond Control?* (Palgrave MacMillan 2006) 23

²⁸ Van der Leun (n 15) 12

to their integration, albeit illegal. This view, however, must be balanced and contrasted with the frequently heavy social and political challenges, and sometimes burdens, made on communities in integrating larger numbers of migrants. Business interests, and certain state interests, may be motivated to turn a blind eye to these factors, but eventually, unchecked, large inward migrations can create an impact too great to ignore. The undocumented migrant may remain unseen to those providing formal protections and support, and to those who otherwise benefit from their work, but may be more apparent to other members of the population and workforce with whom they share, and at time compete for, space and resources.

1.4.2 Immigration Procedure in New Zealand and Australia: Skilled Workers as Tax Payers

While some modern states such as New Zealand and Australia seek to formalise a process of selecting the best candidates as immigrant workers, this of course also requires of the receiving state and the eventual employers a greater recognition of the rights of those migrants once permitted entry to state. 'For New Zealand, official statements define goals such as "to allow entry to migrants who would make the highest contribution to employment and income growth" and "to maximise the gain in productive human capital while maintaining provisions for migrants to enter New Zealand for social and humanitarian reasons".'²⁹ Similarly, for Australia, one finds quotes that immigration should deliver an intake that 'has broad-based skills with the capacity to contribute to Australia's economy.'³⁰

This recognition of the migrant as a person, however, comes at a cost. In states where there is much less demand for foreign immigrant workers, such formal permission is much harder to secure, and yet, there are still interests within the receiving nation that benefit from an undocumented immigrant. The obstacle of entering, remaining and working in a foreign state without documented permission, presents a challenge that only a certain type of person can surmount. This creates an unintended filter, whereby the destination state receives only those who are most determined, most motivated to prosper, and also, at least initially, less likely to present an economic burden. The result is that they are accepted, even appreciated as workers, but are otherwise invisible.

²⁹ Slobodan Djajic (n 23) 8

³⁰ *ibid*

The author proposes considering the migration of people to be an established norm of humanity, and the comparatively much more recent introduction of control of entry, residence and employment through documentation, to be the anomaly. Modern states, it could be said, are attempting to stem a very natural and powerful tide. The same forces that have always existed, driving people to migrate and settle in foreign territories continue unabated, and are facilitated more than ever by communications technology and cheap travel.

And so, while borders and migration have always existed, it is the advent of documented permission as a means of control of travel, work and entitlements that most clearly gives rise to the contrasting fate of the regular and irregular migrant. ‘...[I]t was only when States were in a position to formulate rules governing the entry and residence of foreigners and to enforce them that contravention of those rules – and consequently the concept of illegal immigration- became possible.’³¹

It is not within the brief of this dissertation to discuss the rights of nations to define borders and to control entry into their territories. The question arises, however, how can states balance the protection of their legitimate interests with the protection of human rights of people who, for whatever reason, are to be found within their territory?

1.5 The Modern Undocumented Migrant: The ‘Invisible Man’

1.5.1 The Netherlands as pioneer to controlling Immigration in Europe

Europe has always been a special case in regard to migration, with so many different states without natural borders. It is perhaps not surprising that one of the first recorded attempts to control immigration was in the Netherlands, a country where land and space is at such a premium, and where shipping interests created worldwide travel connections. Europe has a deep colonial history, creating bonds and entitlements to migrate here, from many far flung parts of the world. With the advent of the world wars, with the resulting turmoil and post-war movement of people, the world saw large scale migrations away from the continent, with many crossing the Atlantic to the United States and Canada, others from the south to the north of Europe, primarily driven by economic decline in the southern states and the opportunities driven by the

³¹ Duvell (n 27) 22

reconstruction of northern Europe after the war.³² Some of the largest economies in the world are located in Europe, and with no natural borders, are accessible by anyone who can travel across land from the Far East or the southern coasts. The greatest obstacle, to accessing all of this opportunity, is documentation.

The drivers for migration are also changing from the traditional, almost purely economic model of the migration of workers seeking better pay. As the developed economies of the Europe, united in the European Union (the 'EU') political structure, strengthen also in the rule of law, in their social support systems, and in their political stability, there are many who will be driven to seek refuge here, rather than remain in other more fraught conditions. And, since they will most frequently not qualify as refugees, they will enter the world of the undocumented migrant, seeking to create opportunity and stability, while also remaining invisible. As described by one commentator: "It is obvious that the dynamic of globalization are producing what Vitale (2006) calls the "modern migrant" – that is, the migrant who decides to leave the country as the result of material or moral discontent or suffering, poverty and economic inequality, political persecution, discrimination, natural disasters, war and more."³³

The combination of globalisation and cheaper and more accessible travel means also that the traditional, more predictable patterns of migrants crossing adjoining borders, can no longer be relied upon. 'Today, migrants can originate from any country in the world and, on the same premise, could enter any country.'³⁴ Since we cannot rely on those traditional patterns of migration, we must look to other drivers to explain and predict migration. After first highlighting the common theme of undocumented migrants, that is, their invisibility to officialdom, Van der Leun sets out three primary factors driving undocumented migration in Europe:

Despite the invisibility in migration statistics, there is a wide held consensus that large and increasing numbers of unregistered immigrants are present in all European countries. First, because the 'fortification' of Europe has to a large extent closed the door to primary immigrants and pushed them toward illegal and clandestine channels. Secondly, because European countries reject more asylum seekers than they grant refugee status, while most of the unrecognised asylum seekers are never returned to their home countries. Thirdly, because an

³² Duvell (n 27) 14

³³ Van der Leun (n 15) 11

³⁴ *ibid* (n 15)

unknown number of tourists who enter the country legally overstay their rights and become illegal immigrants in the course of time.³⁵

While it is common in modern legislation that states seek to control immigration, there is the added factor in Europe that internal migration of European citizens is strongly supported and encouraged, reducing even more the likelihood of the migrant from outside the EU from being required and accepted into the EU workforce. The freedom of movement of people within the EU creates an added motivation on behalf of several EU states, the most prosperous in particular, to combine forces and resources to prevent undocumented entry into any of the EU states. Because of these factors, it is suggested by the author and other commentators that the EU is unique in terms of immigration. 'It is stressed that undocumented migration to Europe is, to some extent, unique, that therefore the applicability of US studies is limited, and that separate European research is required instead.'³⁶

1.5.2 The 'Black Economy' and Infringement of Basic Rights of the 'Invisible Man'

A key issue in regard to the evolution of controls on migration, is whether the changing nature of modern migration and the modern undocumented migrant will change the nature of the burden placed on the receiving states and societies. Under traditional models, controls on migration appear to be motivated primarily on political and social grounds rather than economic. The undocumented migrant who can no longer find work, has no motivation to remain where he theretofore found it, and so presents little burden on society, other than to workers who perceive that they have been displaced, or who perceive that their wages have been lowered as a result of the existence of the undocumented workers. However, this perception of displacement or competition only arises to the extent that the undocumented migrant is noticeable, and, it appears, that the key characteristic of the undocumented migrant, their invisibility, is if anything, strengthening. Duvell concludes that:

... [U]ndocumented migration has become a historically significant structural phenomenon at the end of the twentieth century. There appears to be a strange and unintended relation between migration, restrictions, continuing migration and its irregularisation; the restrictions, instead of having a deterrent effect,

³⁵ Van der Leun (n 15) 14

³⁶ Duvell (n 27) 9

rather provoke migrants to dive deeper into invisible activities. There they are not only out of the reach of enforcement authorities, but also out of the reach of those institutions that safeguard basic social and labour rights, from which undocumented immigrants are widely excluded.³⁷

The above statement highlights the extent to which, at least some parts of society, can exist, function and even prosper, without the support or even consent of the state authorities. It is not only, of course, the undocumented migrant who prefers to stay in these shadows; non-tax-compliant employers (both business and private), people traffickers, criminal enterprises and organisations, all seek to operate in this sphere. This increases the likelihood that the undocumented migrant may suffer infringements of their rights as persons.

The author would add to the list of unintended consequences of undocumented migrants the strengthening of the informal or “black” economy. The undocumented migrant is the perfect human resource for the unscrupulous employer in the informal or “black” economy: they are untraceable, they declare no taxes and so the proceeds of the work for the employer are also untraceable for tax purposes, and, depending on the legal treatment of the undocumented worker in the state concerned, they have little, if any, redress for unfair treatment, poor conditions or fraud. They are also invariably motivated, since their very presence in the foreign state is driven by the motivation to succeed in earning a living and to improve their living standards. The result can be that businesses, industries and indeed entire regional economies can develop and prosper, and, in turn, come to depend on the work of undocumented migrants.

What would happen where an undocumented migrant were forced to exercise their rights, either as a worker, or simply as a person? They would present, in that moment, a very different and less welcome prospect to their employer or to their host state. They would cease to be a resource and become a burden. However, this rarely occurs, since the undocumented migrant is exposed to penalisation the moment he reveals his position, and therefore both he and those around him are complicit in concealing it. ‘They are the “invisible men” of contemporary societies.’³⁸

1.6 The Undocumented Migrant Female Domestic Worker and the Modern European Working Woman

³⁷ Duvell (n 27) 21

³⁸ Van der Leun (n 15) 10

The author discussed above the informal sectors of economies that provide opportunities for, and benefit from, the undocumented migrant, and the changing nature of that informal economy due to the mechanisation and the formalisation of agriculture, factory and construction work. In particular, it was discussed how the opportunities for the modern undocumented migrant are to be found ever deeper into invisible activities.³⁹ Perhaps the final stage of this process is the phenomenon of the undocumented migrant female domestic worker.

It has been proposed by a number of commentators, that the increasing level of education, aspirations and workplace participation of native female populations, combined with an increase in the aged population and pressure on state social support services, have created a widespread demand for low cost, but reliable, domestic workers. They are required to perform all of the duties associated traditionally with the lead female role in the home, to clean, to cook, and to care for the young and the elderly.

Domestic work, in people's homes, and not the grand expansive properties of the past wealthy, with separate living and working quarters for "the help", but in the modestly sized and compact houses and apartments of the modern middle to upper middle classes, is unique for several reasons. There is an inevitable intimacy to the workplace setting, and there is a requirement for mutual trust between the worker and their employer.

The result is that domestic work is highly gendered: the overwhelming majority of domestic workers are female. And in developed economies such as Europe and the United States, native women are increasingly unwilling to forego careers and earning opportunities outside the home.

The effect has been to shift the profile of the typical undocumented migrant, from young unattached male with few, if any, dependents, to female, with in many cases, a number of dependent children herself, left in her home country in the care of other, frequently elder, female family members.

³⁹ Duvell (n 27) 22

However, the shift in profile is also continuing towards an ever increasing remove from formality and state control structure and supports. Work in the home is traditionally unpaid, or informally compensated, and so there are few, if any, channels for official state authority to oversee or inspect working conditions, or to audit payments. Even in the documented, legal economy, domestic work in people's homes is explicitly excluded from a number of legal protections.⁴⁰

The undocumented migrant worker is, more than ever, invisible as a person before the law.

*"I am invisible, understand, simply because people refuse to see me."*⁴¹

⁴⁰ Employment Protection Act 2010 and National Minimum Wage Act 2000

⁴¹ R Ellison, *Invisible Man* (Signet, New York 1952) 7

Chapter 2: Defining the “Undocumented Migrant”

2.1 Introduction

The objective of this Chapter is to define what an “undocumented migrant” is and the manner in which they are recognised as persons before the law. The methodological approach is comparative-literal, since the definition of the undocumented migrant varies strongly over time and geographically, and socio-legal, as it varies as social attitudes, policies and laws evolve. It is important to identify the specific legal position of the undocumented migrant since that profile is characterised as much by how the law is silent in this regard as it is by what the law states.

In this Chapter, the author will review how the undocumented migrant has been defined by academics and through legislation. Undocumented migrants are at times defined as a particular class of person, and at other times as persons involved in a particular activity or situation. The relevance to this dissertation, and to the question posed, is the extent to which the choice of terminology can have a profound effect on public, media and policy makers’ discourse, with terminology ranging from the most benign to the most prejudicial. The author regards the term “undocumented migrant” to be the most balanced, fair and least prejudicial, since it refers only to the migrant’s specific and temporal lack of documentation relating to migration status. The author welcomes the proposed Migrant Earned Regulation Bill 2015 wherein the undocumented migrant is referred to as an “applicant” who is a ‘non-European Economic Area (EEA) nationals, whose presence in the State is other than that in accordance with a permission granted by or on behalf of the Minister, in accordance with section 5 of the Immigration Act 2004 or otherwise.’⁴²

2.2 The “Immigrant”: Terminology and Definition

This dissertation should begin by defining the term “immigrant”. While the terms immigration and migration are often used interchangeably, the term “immigration” implies the intention of the person moving from one state to another to settle permanently in that destination state. The corollary is that the person seen from the

⁴² Migrant Earned Regulation Bill 2015, s 5(2)

perspective of the destination state as an “immigrant”, is referred to as an “emigrant” from the perspective of his homeland.⁴³

As examined in Chapter 1, the term “migration” relates more generally to movement of people between locations and regions, and across borders, without necessarily having the intention to settle permanently outside their homeland. In this sense of the term, “international migration” is described in an article published by Human Resource Health as ‘the movement of people from one country to another to take up employment, to establish residence or to seek refuge from persecution, either temporarily or permanently.’⁴⁴ And so, while migration may result eventually in the person becoming permanently resident in their destination, the term is more usually used to refer to people who intend to move temporarily, as, for example, to engage in seasonal work, or for a planned period, to earn and build up savings.⁴⁵

The emphasis, in this dissertation, is on the immigrant with the intention to establish themselves permanently, or at least over the long term, in the receiving state. Duvell defines the “immigrants” whom ‘often enter countries beyond the law, either because there are simply no mechanisms to administer their entry, or because they are excluded from regular access. They are labelled and defined as spontaneous, undocumented, unauthorised, irregular or illegal.’⁴⁶

2.3 The “Undocumented”: voluntary migration and involuntary migration

In regard to the term “undocumented”, the author confirms that this Thesis refers to voluntary migrants, by which we mean that the person has made a decision to seek opportunities for a better life, albeit that their living circumstances in their homeland may have been far from ideal. The key point is that voluntary migration is movement to another state by choice.

In contrast, involuntary migration refers to the forced relocation of people who become refugees and asylum seekers because of intolerable conditions, persecution or disaster in their homeland. It would refer also, obviously, to people trafficking and slavery.⁴⁷

⁴³ R Bailey, *Immigration and Migration* (Infobase Publishing New York 2008) 3

⁴⁴ *ibid* 5

⁴⁵ *ibid* 4

⁴⁶ Duvell (n 27) 15

⁴⁷ Bailey (n 43) 7

While the circumstances of such people will invariably be more severe than the undocumented immigrants, subject of this dissertation, they will in most cases be in a position to make a formal application for asylum or refugee status, so that the status of their presence in the receiving state becomes that of a documented migrant with access to the associated state supports and resources, and to the protections of law. There is obviously a spectrum of circumstances from involuntary to voluntary: the migrants' life in their homeland may not be entirely intolerable, but may present great difficulties and hardship. However, if on balance, the migrant has some degree of reasonable choices available to them, then they will be deemed to be voluntary migrants.

2.4 Illegal, irregular, clandestine, undocumented and unauthorised immigration

The significance of terminology used, is that it can have a strong bearing on public discourse, on the attitudes of policy makers and on the expectations of the general public regarding the treatment of undocumented migrants. Regine states:

The terminology used in the literature is extensive, inconsistent and generally problematic through lack of definition. Such terms include 'clandestine', 'irregular', 'illegal', 'unauthorised', 'undocumented', '*sans papiers*', we do not find it useful here to rehearse the arguments for and against any particular terminology.⁴⁸

Because the history of migration is primarily of mutual benefit to the migrant and the receiving state, and that, even today, there is such ambivalence towards the undocumented migrant, it is not at all surprising that there should be some difficulty in defining the illegality of the modern undocumented migrant. A number of commentators have noted the vague and unsatisfactory language used to describe undocumented immigrants, each implying a different level of disapproval. Delaunay and Tapinos are of the view that '[T]he proportion of immigration movements that escapes regulation and registration is commonly labelled illegal, irregular, clandestine, undocumented or unauthorised immigration.'⁴⁹

It has been suggested that there is an absence of a single theoretical framework particular to undocumented migration, because, the motivation, experiences and profile

⁴⁸ Martin Baldwin-Edwards and Albert Kraker, *Regime: Regularisations in Europe* (Pallas Publications, European Commission/Amsterdam University Press Amsterdam 2009) 4

⁴⁹ Van der Leun (n 15) 14

of the undocumented migrant are so varied, and are never formally recorded.⁵⁰ This uncertainty is also reflected in the variety of terms used to describe undocumented migrants, which in turn is influenced by the motivation of the party involved. Flynn suggests that:

Governments favour the term “illegal” as a means of framing some migrants as a threat. “Irregular” and “undocumented” are preferred by many non-government actors, including some academics, as they better reflect the reality of an individual’s situation and move away from the idea of an individual as illegal.⁵¹

The definition of undocumented immigrants is further complicated by the different types of permission available to a migrant and how these typically change over time. There are three stages at which the migrant may be deemed to be in non-compliance with formal permission: when they first enter the state crossing the border; after a period of time when they may over stay their permitted residence; and when they carry out some activity not permitted under the permission, most usually to perform paid work.⁵² Therefore, the migrant can be resident and employed one day, entirely in compliance with the law, and the next day, without doing anything different, be breaking the law on both counts. As a number of commentators have stated, the undocumented migrant as an “illegal”, is a result, primarily of the regulation of migrations as old as humanity. Van der Leun accepts that:

The presence of illegal immigrants is a corollary of large-scale movements of people across national borders on the one hand and governmental attempts to regulate immigration on the other. Without the coincidence of these two processes, and without the imperfection or the imperfect application of regulations, there would be no illegal immigrants.⁵³

The section involves a comparison of the terminology and definitions of the undocumented migrant in a number of key jurisdictions, such as the United States of America, the European Union, The Netherlands and Ireland. This selection of jurisdictions reflects the diverse historical and cultural origins of legal principles in relation to migration. The Netherlands is, as discussed in Chapter 1, a special case in the European context due to their strong history of shipping and trade which resulted in

⁵⁰ A Bloch and S McKay, *Living on the Margins: Undocumented Migrants in a Global City* (Policy Press Great Britain 2016) 5

⁵¹ *ibid*

⁵² Duvell (n 27) 15

⁵³ Van der Leun (n 15) 9

them becoming pioneers in addressing questions of policy on migration. It is intended that an examination of those jurisdictions will provide a strong contextual backdrop against which to review the development of Irish law in this regard.

2.5 United States definition

In the United States, the government classifies “illegal entrants” under two categories, and undocumented migrant workers, under three categories. The illegal entrants are either classed as ‘enter without inspection,’ which is considered typical of the undocumented migrants from Mexico, or, in the case of persons who enter with legal visas but then stay beyond the permitted time, “visa overstayers” or “visa-abusers”, which is more common amongst migrants from countries other than Mexico. The three categories of undocumented migrant workers in the United States are: “settlers” who intend to stay permanently, “sojourners” who intend to return to their country after a prolonged stay, and “commuters”, who work in the receiving country during the day, but cross the border every night to return home.⁵⁴

These descriptions of the different categories of undocumented migrants highlight the breadth of different experiences and circumstances in which they can find themselves, from the permanent resident, intending to build a life and probably raise a family in the receiving country, all the time without documentation, to the daytime visitor, who does not even stay overnight.

In the case of “settlers” in particular, who may be as invested in and committed to their host society as any citizen, the shifting attention, motivations and preoccupations of the wider public and of policy makers can result in very incongruous language, and sometimes actions, against them, for example, the use of term “law breaker” and calls for punishment, without reference to any specific legislation or crime, other than their presence in the state. This is especially relevant given that there are an ‘estimated 11.2 to 11.5 million unauthorized immigrants in the United States.’⁵⁵ Lorentzen defines these “law breakers” as follows:

The undocumented are for the most part working people with children who have lived in the United States for a decade or longer. Yet public debates on

⁵⁴ Chisato Yoshida and Alan D. Woodland (n 24) 7

⁵⁵ *ibid* 10

immigration reform emphasize national security, border control, amnesty, English competency, economic impact, and the need to punish “law breakers”.⁵⁶

As a reaction against this strong use of language and pejorative terms, Goldring, Berinstein and Bernard have moved to moderate the language used to describe undocumented migrants ‘...[i]n the North American context some academics use the term ‘non-status’ or ‘precarious legal status’ as a better representation of reality.’⁵⁷

The author recognises a pragmatic and non-judgemental terminology in defining the undocumented migrant in the United States, reflecting their non-exclusionist ethos and aspirations in regard to migrants as persons before the law.

2.6 The European Perspective

2.6.1 Definition of “Illegal Stay” under Article 3(b) of the Return Directive: Directive 208/2011/EC of the European Parliament and of the Council of 16 December 2008

The author will outline the approach taken by the institutions of the European Union and examine the term “illegal stay.” The Return Directive⁵⁸ defers to the national states the requirements for entry, residence and employment. In 2009, Regine expressed the current difficulty in Europe when defining what an undocumented migrant is, and preferred instead to give a definition of “illegal stay” as follows:

Defining “illegal stay” is notoriously difficult and globally, states’ practices vary widely in regard to whom they regard as illegally resident. In the European Union, the recently-agreed Return Directive adopts a common definition of illegal stay, which also has been used in other relevant draft directives from the European Commission.⁵⁹

Article 3(b) of the Return Directive stipulates:

[I]llegal stay means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry

⁵⁶ Lois Ann Lorentzen (ed), *Hidden Lives and Human Rights in the United States: Understanding the Controversies and Tragedies of Undocumented Immigration, Volume 1: History, Theories and Legislation* (Praeger 2014) 9

⁵⁷ Alice Bloch and Sonia McKay (n 50) 5

⁵⁸ Return Directive: Directive 208/2011/EC of the European Parliament and of the Council of 16 December 2008, art. 3(b)

⁵⁹ Martin Baldwin-Edwards and Albert Kraler (n 48) 3

as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State.⁶⁰

It appears to this author that the use of the term “illegal stay”, describing a condition or a circumstance rather than a person, is deliberately and laudably intended to avoid condemning persons with pejorative labels. Bloch and McKay prefer the term ‘undocumented’ with an awareness of the problematic nature of terminology, and that the terms used are both contested and political.⁶¹

2.6.2 The ‘illegal and undesirable alien’ in The Netherlands

In addressing the basis on which a person, or their residence in a country, can be referred to as “illegal”, Leerkes notes that ‘... [i]llegal migrants are persons of foreign nationality, or no nationality, who reside illegally within the territory of a state, in this case the Kingdom of the Netherlands’⁶² and then proceeds to argue:

The predicate “illegal” does not refer to a characteristic of a person, but rather describes a relationship between him or her and the state in a certain jurisdiction. Whether or not residence is considered illegal, and whether or not the state attaches consequences to illegal residence, largely depends on the state itself. In other words, illegal residence has the character of a social (or state) construct, over which the individual concerned has hardly any influence.⁶³

The author infers from these points, that the concept of illegal migrant is as much, if not more, a social and political construct, rather than a legal one, because there is no underlying wrong being committed. Movement of people is, as we stated earlier, as natural and as old as humanity itself. The variable is social and political policy. The term “illegal” is therefore, a misnomer, loaded unhelpfully against the migrant. Further in this regard, if we are to consider ‘illegal migrant’ as a social construct, it has been noted, again in the example of The Netherlands, that:

[T]here is no agreement in the social sciences about what term should be used to refer to this category of migrants. The formal legal term is “illegal aliens”, though this term is rarely used. Most researchers prefer to replace the term alien by migrant or immigrant, and a considerable number prefer not to use the term

⁶⁰ Martin Baldwin-Edwards and Albert Kraler (n 48) 3

⁶¹ Alice Bloch and Sonia McKay (n 50) 5

⁶² A Leerkes, *Illegal Residence and Public Safety in the Netherland* (Amsterdam University Press 2009) 33

⁶³ *ibid* 34

“illegal”. This has produced the neologism ‘undocumented migrant’ and ‘irregular migrant’ in the social science literature.⁶⁴

Leerkes goes on to note that so called illegal residence is not punishable in the Netherlands, since, while the authorities may hold an illegal migrant in custody with a view to deportation, this is not formally or legally, a punishment. It is only in certain circumstances that repeated illegal presence in the territory may result in the migrant being declared an ‘undesirable alien’,⁶⁵ which is considered a crime against the authorities. In an extraordinary statement reflecting a view of the state as overbearing, and seeking to restrict and control a natural and inoffensive human activity, Leerkes posits, that ‘From such critical perspective the restrictive immigration regime could perhaps be understood as *state crime*, and the legal notion of the “illegal alien” as a form of symbolic violence.’⁶⁶

There is, characteristically it appears for this topic, little agreement between commentators. While one will argue that ‘irregular migration is not an independent social phenomena [...] but exists in relation to state policies and is a social, political and legal construction,’⁶⁷ another will argue illegality is, according to Chavez, ‘...[s]ocially, culturally and policitically constructed’, something that is produced as a consequence of political decisions.’⁶⁸

The author recognises an unacceptable lack of clear definitions based on legal principles applicable to the undocumented migrant. The spectrum of treatment of undocumented migrants, from conveniently cheap and discrete labour, to egregious trespass or invasion, is unfair and unsustainable.

2.7 The Irish Perspective

2.7.1 The “New Irish”

The Irish experience has been similar in many respects, to those set out above. The debate in Ireland on inward migration is much more recent than in very many other territories, since we are long accustomed, almost genetically inclined, to outward

⁶⁴ Leerkes (n 62)

⁶⁵ *ibid* 35

⁶⁶ *ibid*

⁶⁷ Alice Bloch and Sonia McKay (n 50) 6

⁶⁸ *ibid* 27

migration. Perhaps, for this reason, a number of seemingly core principles in Irish discourse have been found incongruous to the new realities of modern Ireland. As noted by Wimmer and Schiller ‘Immigrants are perceived as alien to the community of shared loyalty towards the state and the shared rights guaranteed by the state.’⁶⁹ Fanning and Munck looked at the issue of citizenship and stated:

This nation-statist discourse was particularly open in Ireland where migrants were classified as “non-nationals” and where the 2004 Citizenship Referendum set about rectifying the constitution to reaffirm the citizenship priorities of the “truly” Irish as against the transient non-national populations.⁷⁰

Very soon, however, and in common with the experience of other territories, certain parties decided that this was an overly exclusive approach and so sought to moderate the language used by stating that ‘[T]here was even recognition that the early term of “non-national” used for migrants could be seen as pejorative and it was replaced by the well-intentioned term of “new Irish”.’⁷¹ The term “new Irish” is indeed very apt, since the matter of inward migration, is in general a new phenomenon to Ireland. It also highlights the lack of a consistent and internationally agreed legal basis for definition of undocumented migrants, so that even at this late stage of development of the matter, it appears that we cannot draw on any solid experience of prior resolution of these questions.

2.7.2 The Examination of the Irish Legislation of the “Undocumented Migrant”

The definition of immigrants in Irish legislation can be traced back to the Aliens Act 1935, which refers to an “*alien*” as a person who is not a citizen of Saorstát Eireann. This appears to be strongly aligned with the emphasis of the status of the citizen in the Irish Constitution of 1937. The term “alien” was replaced through the enactment of the Immigration Act 1999, which refers to ‘non-national’. Section 1 of the Act defines a “non-national” as an alien within the meaning of the Aliens Act 1935.

⁶⁹ Andreas Wimmer and Nina Glick Schiller, ‘Methodological Nationalism and Beyond: Nation-State Building, Migration and Social Sciences’ (2003) 3

<<http://www.sociologyofeurope.unifi.it/upload/sub/documenti/Wimmer-Glick-Schiller-methodological-nationalism.pdf>> accessed 30 June 2016

⁷⁰ Bryan Fanning and Ronaldo Munck (ed), *Globalization, Migration and Social Transformation: Ireland in Europe and the Words* (Routledge Francis & Taylor Group, London and New York 2016) 8

⁷¹ *ibid* 1

The Immigration Act of 2003 and the Immigration Act of 2004 again defined the ‘non-national’ as having the meaning assigned to it by the Immigration Act 1999, which translates as a ‘non-citizen’. The 2004 Act required that ‘No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission given under this Act after such passing, by or on behalf of the Minister.’⁷² It also states that ‘A non-national who is in the State in contravention of subsection (1) is for all purposes unlawfully present in the State.’⁷³

An indication of a change in the approach to referring to immigrants can be seen in the Immigration, Residence and Protection Bill 2010, which refers to “foreign national” which is defined in the Bill as ‘a person who is neither (a) an Irish citizen, nor (b) a person who has established a right to enter and be present in the State.’⁷⁴ An examination of The Irish Protection Residence Act 2015 and The Earned Migrant Regulation Bill 2015 will be conducted below.

2.7.3 Definition of “Irregular Person” and “Irregular Worker” in Irish Law

Advocates in Ireland, such as the Migrants Rights Council of Ireland, Immigrant Council of Ireland and ENAR Ireland support the use of the term “undocumented migrants” and interchangeably refer to ‘[M]any of the cases supported by MRCI involve non-EEA migrants who do not have a current work permit, often referred to as undocumented workers.’⁷⁵

This author has reviewed with interest, a substantial amount of material published by Elaine Dewhurst. In particular, Dewhurst makes very frequent references to the terms “irregular person” and “irregular worker” as relevant to Irish law on this matter. The use of these terms does not, however, appear to be supported by other sources. There is no reference in the 2004 Act, nor in the 2010 Bill, to either term “irregular person” or “irregular worker”, nor even the word “irregular”. Dewhurst states:

⁷² Immigration Act 2004, s (1)

⁷³ Immigration Act 2004, s 5(2)

⁷⁴ European Communities (Aliens) Regulations 1977 (S.I. No. 393 of 1977), European Communities (Right of Residence for Non-Economically Active Persons) Regulations 1997 (S.I. No. 57 of 1997) or the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006)

⁷⁵ Migrant Rights Centre Ireland, ‘Accessing Redress for Workplace Exploitation: The Experience of Migrant Workers’ (MRCI 2006) 13

<<http://www.mrci.ie/resources/publications/leaflets-reports/accessing-redress-for-workplace-exploitation-the-experience-of-migrant-workers/>> accessed 30 June 2016

The legislature has made concerted efforts to define the concept of irregularity and persons who could be described as irregular. An irregular person is one who is in the State other than in accordance with the permission given to him or her by the Minister for Enterprise, Trade and Employment. However, the concept of an “irregular worker” is somewhat wider and includes those who could be defined as irregular persons who are engaged in employment and those persons who are present in the State with the permission of the Minister for Enterprise, Trade and Employment but who are acting outside the scope of this permission...[A]n irregular worker can be defined as including all persons who are engaged in paid activities which are in themselves lawful but which are ‘not declared in conformity with national law and practices’ because the persons so employed are acting outside the scope of their permission, whether or not they have such permission to be present in the State. This definition is wide-ranging and inclusive of many workers in Ireland and not just those typically considered to be irregular. The result of this is that many workers in Ireland are excluded from the employment legislation merely because they fall into this category.⁷⁶

In an apparently less than entirely clear representation of the language used by the Irish legislature, Dewhurst affirms the ‘The 2010 Bill defines irregular entrants as “unlawful” foreign nationals.’⁷⁷ However, she continues in the same article to explain that ‘[I]t provides that the entry into the State of a foreign national is lawful if, and only if, it is in accordance with permission given or deemed to be given to him or her by the Minister for Justice and Law Reform, to enter the State.’⁷⁸

To this author, it is clear, as explained earlier in this Chapter, that the Irish legislature, in common with the European legislature, has deliberately chosen to address the law to the activity or circumstance of unlawful residence, expressly without defining the persons concerned as ‘unlawful’. Dewhurst continues ‘[W]ithout this permission, the entry is unlawful and the immigrant is defined as an irregular entrant.’⁷⁹ The first part of this statement is true, however, as stated above, the term irregular entrant, or even the word ‘irregular’, does not appear once in the 2010 Bill.

⁷⁶ Elaine Dewhurst (n 10) 8

⁷⁷ Elaine Dewhurst, ‘The Immigration, Residence and Protection Bill 2010 and Defining the Irregular Immigrant in Irish Law’, *Irish Law Times* (2011)
<<http://login.westlaw.ie.ezproxy.gcd.ie:2048/maf/wlie/app/document?&srguid=i0ad8289e000001568d0624fafcc48def&docguid=I1512AC37A1564FCB99485B4A3D6871A3&hitguid=I1512AC37A1564FCB99485B4A3D6871A3&rank=4&spos=4&epos=4&td=5&crumb-action=append&context=5&resolvein=true>> accessed 20 July 2016

⁷⁸ *ibid*

⁷⁹ *ibid*

2.7.4 The Irish Protection Residence Act 2015 and The Migrant Earned Regularisation Bill 2015

The Irish Protection Residence Act 2015 is entirely focused on the protection and regulation of refugees, who engage with the state authorities, and are, therefore, documented from the outset of their residence in Ireland. The author has examined this legislation and has found no definition of the undocumented migrant. As will be elaborated in Chapter 4, this absence of definition and recognition in regard to the undocumented migrant is due to the apparent unwillingness and difficulty in addressing illegal residence through legislation. In summary, there is a conundrum of how the law can be used to address issues of illegality without undermining its own authority.

In common with the 2010 Bill, neither the Immigration Act 2004 nor the International Protection Act 2015 makes any reference to the term “illegal” or “irregular” migrant. The focus of the 2015 Act is on the applicant for refugee status, and there is no treatment of the undocumented migrant.

The Migrant Earned Regularisation Bill 2015 proposed on 5th March 2015 could represent a milestone in the recognition of undocumented migrants under Irish law. The 2015 Bill provides that:

The Minister shall provide for the establishment of a scheme, for the purposes of permitting non-European Economic Area (EEA) nationals, whose presence in the State is other than in accordance with a permission granted by or on behalf of the Minister, whether in accordance with section 5 of the Immigration Act 2004 or otherwise, to make application to the Minister to acquire permission to be lawfully present in the State.⁸⁰

The Bill of 2015 in its preliminary page requests the Houses of the Oireachtas the approval of ‘an Act to provide for the establishment of a scheme to enable certain foreign nationals whose presence within the State is other than in accordance with a permission granted by or on behalf of the Minister to apply for and earn permission to remain within the State.’⁸¹ Furthermore, the 2015 Bill provides that a ‘non-EEA

⁸⁰ Migrant Earned Regularisation Bill 2015, s 2(1) proposed in the Houses of the Oireachtas on 5th March 2015, introduced by Deputy Niall Collins

⁸¹ *ibid* 3

national submitting an application [...] shall be referred to as an “applicant” for the purposes of this Act.⁸²

The terminology used in this 2015 Bill is of particular importance in that it refers only to ‘presence in the state’ in the absence of ‘permission granted’. There is no reference to illegality or any other prejudicial terms. This author identifies in this Bill a strongly positive development of approach in the Irish legislature towards the undocumented migrant in comparison to past legislation in Ireland. The effect of the 2015 Bill, if passed, would constitute an alternative for unsuccessful applicants under the Irish Protection Act 2015 which will entitle the applicant as follows:

[F]or so long as that permission remains in force to [...] (a) reside within the State, (b) enter employment and to engage for gain in any business, trade or profession and to engage in a course of education, training, apprenticeship or study in the State, (c) be issued with temporary, renewable travel documents and to travel to and from the State providing that they shall not be absent from the State for any continuous period in excess of 45 days and any aggregate periods in excess of 60 days in any 12 month period, (d) equivalent medical care and services and social welfare benefits as those which a citizen of the European Economic Area is entitled.⁸³

The author notes that the 2015 Bill is intended to give the applicant the opportunity to regularise their presence in Ireland. It does not however provide for the circumstance in which the applicant is unsuccessful in their application. It is uncertain, therefore, as to whether an unsuccessful outcome of an application under the 2015 Bill would result in deportation or imposition of fine or punishment in accordance with the Illegal Immigration Act 2004.⁸⁴

2.8 Are undocumented migrant workers “persons” before the law?

To brand a person as “illegal” is perhaps one of the greatest injustices in regard to their recognition as a person before the law.⁸⁵ Even a murderer is branded only by the specific action they have been convicted of in a court of law. The “illegal” person is prejudged not only as guilty, but as inherently contrary to the law. The use of the term “illegal” could be considered a crime against the person, as according to some, a human

⁸² *ibid* (n 80) s 5 (2)

⁸³ Migrant Earned Regularisation Bill 2015, s 8(4)(a)-(d)

⁸⁴ Illegal Immigration Act 2004, s 5

⁸⁵ The Universal Declaration of Human Rights 1948 (the ‘UDHR’ 1948) in its Article 6 states ‘Everyone has the right to recognition everywhere as a person before the law.’

acquires the status of person before the law from the moment of conception, so that the term “illegal migrant”, or indeed, “illegal” human, in any respect, is an attack against that person. Is anyone to be deemed an illegal entity to their core? As noted above, there is a clear move away from such language in the Migrant Earned Regularisation Bill 2015, which is very much to be welcomed in that it leads the way toward progressive legislation with a much more positive less prejudiced approach.

Chapter 3: Legislation and Case Law: A Comparative-Literal Approach

3.1 Introduction

The objective of this Chapter is to review how the undocumented migrant has been addressed in international law, from Conventions on rights through to domestic legislation and cases. In addition, the author will seek to explain in this Chapter the origins of different treatments of citizenship and associated rights in different Constitutions, and how this affects Court decisions, especially in Ireland.

A comparative-literal approach will be employed in examining how difficult legal questions are translated from the level of international law to court rulings, and how principles of fundamental rights of the migrant are affected by the different treatment of citizenship in different parts of the world, and socio-legal approach, since the law on migration, is at all levels, a reflection of a strong tension between increasing migration control and emphasis on the rights of citizens, on the one hand, and an increasing realisation on the other, that exclusionary policies and laws may not best serve the needs of either the nation states or the migrant. The examples selected for comparison, including the United States of America, the European Union, Greece and Germany represent a diverse set of historical and cultural conditions for the development of legal principles in relation to migration. The protection under the Greek Constitution of rights of people resident in the territory regardless of citizenship, is influenced by the links between Greece, and members of the Greek minorities in Egypt, Albania and Turkey and the Greek Cypriots. The German Constitution provides a useful and contrasting example of emphasising the protection of rights of citizens, albeit with scope for flexibility in interpretation by the courts. The author will carry out an examination of those jurisdictions in the hope of providing a strong contextual backdrop against which to review the development of Irish law in this regard.

The author demonstrates in this Chapter how the undocumented migrant is subject to layers of illegality which make it very difficult to align with the legal system at any level to secure meaningful redress, and how issues of access to health and education appears to the front line for a slowly evolving jurisprudence in favour of applying fundamental legal principles of rights to resident undocumented migrants.

This Chapter intends to provide for a comprehensive examination of the current legal and jurisprudential materials up to the current date. The author has provided an observation relating to the ongoing uncertainty in Irish jurisprudence reading the undocumented migrant's rights.

3.2 International Law: The Universal Declaration of Human Rights 1958, The International Covenant on Civil and Political Rights 1976, and The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families 1990

In an examination of international and national law relating to the undocumented migrant, it appears that there are many obstacles between the broad policies and aspirations set out in the Declarations, Covenants and Constitutions, and real remedies sought by the undocumented migrant. At the level of international law, the nature and status of fundamental rights are stated in positive, absolute and universal terms. There appears to be no basis for doubt or compromise.

The Universal Declaration of Human Rights 1948 (the 'UDHR') reflects the aspirations of the international community after the two World Wars. Article 6 of the Declaration is unequivocal when it provided that 'Everyone has the right to recognition everywhere as a person before the law.'⁸⁶ Article 7 of the UDHR states that 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.'⁸⁷ Article 8 of the UDHR further provides that 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law.'⁸⁸ There would appear to be little scope for anyone to fall through the net of these protections, including the undocumented migrants. In addition, the Migrant Workers Convention (the 'ICRMW')⁸⁹ appears conclusive and unambiguous when it provided that:

⁸⁶ The Universal Declaration of Human Rights 1948, art. 6

⁸⁷ *ibid*, art. 7

⁸⁸ *ibid*, art. 8

⁸⁹ The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (known as 'The Migrant Workers Convention', 18 December 1990)

[A]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall[...] guarantee to all persons equal and effective protection against discrimination on any ground such as [...] national or social origin [...] or other status.⁹⁰

On the 18th December 1990, The Migrants Workers Convention addressed the more specific case of the migrant worker.⁹¹ The aspirational sense and tone of the policy makers continue, apparently free from doubt, but not entirely free from qualifications when under Article 7 it required that state parties to the Migrant Workers Convention ‘undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind.’⁹² However, as will be elaborated in Chapter 4, DAuvergne highlights the apparent exclusion of undocumented or irregular migration status from the list of criteria for distinction.⁹³

3.3 The “Full Protection Approach” in the European Union Law: The European Convention on the Juridical Status of Immigrant Workers 1977 and The European Convention on Social Security 1972

The two primary Conventions of the Council of Europe relating to the rights of non-European nationals are The European Convention on the juridical status of immigrant workers 1977 and the European Convention on Social Security 1972, which ensure equality of treatment in regard to social security for nationals of all contracting parties, for refugees and for stateless persons.⁹⁴

It is established EU Law that the courts must look to interpret and give effect to the intention and the spirit of the law of the Conventions and Treaties, and not be overly or unhelpfully constrained by a strict or literal interpretation of the text of that law. The European Court of Justice follows rules of interpretation set out in the Vienna Convention of 23 May 1969 on the Law of Treaties based on long established principles

⁹⁰ Article 26 of the International Covenant on Civil and Political Rights 1976

⁹¹ *ibid* (n 89)

⁹² The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (18 December 1990 “The Migrant Workers Convention”), Art. 7

⁹³ Catherine DAuvergne, *Making People Illegal, What Globalization Means for Migration and Law* (Cambridge University Press 2008)

⁹⁴ George Katrougalos, ‘The Rights of Foreigners and Immigrants in Europe: Recent Trends’

<<http://www.bailii.org/uk/other/journals/WebJCLI/1995/issue5/katart5.html>> accessed 12 July 2016

that individual provisions of the Conventions are not to be considered literally, in isolation, or in a vacuum, but rather, the Court is required to ascertain the ordinary meaning to be given to the words in their context and in light of the object and purpose of the provision from which they are drawn.⁹⁵

However, the true credibility of this resolve and clarity can be seen in the limited extent of ratifications by member states of the measures. The Conventions make reference to their applicability to contracting parties only. It appears that the broad, even sweeping protection of the International and EU Conventions and Treaties, present too great a challenge to the national legislatures. As Dewhurst notes, '[o]ne of the major difficulties with the ICRMW is the low ratification level, particularly among EU Member States, which is due in part to disagreement over the 'full protection approach'.⁹⁶

The 'full protection approach' refers to a policy to treat the status of the person as separate and irrelevant to the exercise of their rights, so that the person is not kept in fear of deportation or other action when they present themselves to authorities seeking justice. The author is of the view that this approach is the logical conclusion of a sincere policy to ensure effective and real implementation of rights, even where the person concerned is, in other respects, vulnerable and at odds with the law. The author further notes Dewhurst's distinction of levels of protection by describing three primary headings in this regard: the 'non-protection' approach; the 'protection with consequences' approach; and the 'full protection' approach. She also describes some sub-headings relating to court decisions and the extent to which judgements of the courts explicitly state the grounds on which they apply each approach, including the 'inclusion without explanation' approach.⁹⁷ This will be elaborated further in this Chapter and Chapter 4.

When addressing the practical measures in safeguarding of migrant rights, the EU is faced with the difficulty of identifying and stating a general set of principles based on common policies across the EU, under the headings as described above, but also for

⁹⁵ The Vienna Convention on the Law of Treaties 1969, Art. 31(1)

<<http://www.iilj.org/courses/documents/VCLT31-33.pdf>> accessed 12 July 2016

cf European Courts of Human Rights, 'Guide on Article 4 of the Convention on Human Rights' (2014) 5 <http://www.echr.coe.int/Documents/Guide_Art_4_ENG.pdf> accessed 12 July 2016

⁹⁶ Elaine Dewhurst (n 3) 124

⁹⁷ Elaine Dewhurst (n 3) 103

other historical and geographical reasons. As highlighted in previous chapters, the EU is a special case: the EU has limited natural borders between many of its states; there is a common and open travel area with minimal border controls; and all states in the EU are expected to cooperate to prevent undocumented inward migration. However, many of the member states have markedly different policies in regard to inward migration due to their history, colonial connections, common languages and long standing alliances with non-EU countries.⁹⁸

It has been deemed acceptable in the EU that nation member states can give preferential treatment to nationals of countries with which they have had closer links. For example, in Spain, nationals from their former colony The Philippines are given preferential status in immigration matters, and in Portugal, nationals of countries with Portuguese as their official language enjoy special rights and treatment, either by bilateral agreements or by law.⁹⁹ In Greece, there are special provisions regarding members of the Greek minorities in Egypt, Albania and Turkey and the Greek Cypriots.¹⁰⁰

There are, therefore, reasons why it is difficult for the EU to translate international and EU laws into prescriptive rules that the migrant can depend on. However, perhaps the most difficult obstacle is the fundamental question as to whether the undocumented migrant is seen as a person before the law at all. It is very instructive to examine the stage at which the translation and implementation of fundamental rights into policy and direct action, begins to present complications and challenges to undocumented migrant.

The first qualification on fundamental rights referred to, is whether the person has entered into a lawful contract of employment. As noted by Katrougalos 'The Social Charter contains an Article 18f which secures for migrant workers the right to engage in gainful occupation with other Contracting Parties, subject to restrictions based on cogent economic and social reasons.'¹⁰¹ This reference to 'cogent economic and social reasons' opens the door to restrictions on the basis of employment contracts deemed

⁹⁸ Joanna Apap, 'The Rights of Immigrant Workers in the European Union, An Evaluation of the EU Public Policy Process and the Legal Status of Labour Immigrants from the Maghreb Countries in the New Receiving States,' (Kluwer International 2002) 9

⁹⁹ Portuguese Law 233/82 (D.L. n.º 233/82, de 18 de Junho: regula a situação de estrangeiros não residentes em Portugal e que já são residentes em Macau); *cf* Portuguese Law 126/72 (Convenção sobre Igualdade de Direitos e Deveres entre Brasileiros e Portugueses: assinada em Brasília em 7 de Setembro de 1971)

<<http://www.verbojuridico.net/doutrina/outros/guiacidadaoimigrante.pdf>> accessed 12 July 2016

¹⁰⁰ George Katrougalos (n 94)

¹⁰¹ George Katrougalos (n 94)

void due to illegality. As discussed in the Chapter 2, the defining characteristic of the unauthorised, irregular or undocumented migrant, is that they are, or seek to be, workers, and, if it is a precondition to lawfulness in contracts of employment that the worker must have a valid work permit, then is the undocumented migrant not excluded from the outset from the protections of the law?

The next qualification to the rights of the migrant rests on whether the person has permission to enter or reside in the receiving state. This qualification of rights is described by Katrougalos '[O]n the other hand, neither the European Convention on Human Rights (ECHR) nor the Social Charter secure an alien's right to enter, reside or settle in a European Country' [...] and that 'the Appendix states that this right is not to be confused with a right of entry in the national territory and applies only to foreigners who are already lawfully therein.'¹⁰²

This sequence of layers of legality: of entry, of residence, of permission to work and of employment contract, each latter one depending on the former, leads to the exclusion of the undocumented migrant from recognition as a person before the law. This will be elaborated further in this Chapter, in particular in relation to Irish case law.

3.4 The National Constitution of States: Aspirational Approach

If the European Union, with a common exterior border, must rely on the member states to determine and apply their own immigration policies, then the next level of law is in the national Constitutions. The emphasis, and explicit reference, in the Constitutions of certain member states, to the applicability of particular classes of rights, to citizens or nationals of the territories concerned, is most probably a reflection of the sentiments and anxieties of the authors at the time those constitutions were written, with the primary sentiment being a desire for the vindication and advancement of their own kind in their own territory, and was probably not intended to result in an exclusion of rights to the occasional migrant worker. At the time of writing of many EU Constitutions, the World Wars were fresh and raw in the minds of the entire continent, and so incursions of outsiders into ones territory was feared in the form of invading armies, and enforced mass plantations, rather than unarmed and hopeful migrants. The challenge then arises

¹⁰² *ibid*

today, to balance a literal interpretation of those constitutions with the principles of universality of rights of man.

3.4.1 The Greek Constitution of 1975, and The Constitution of Ireland (*Bunreacht na hÉireann* 1937)

Whereas the Constitution of the home of democracy is reassuringly clear on the matter, for instance, the Greek Constitution states that ‘All persons within the Greek State enjoy full protection of their life, honour, and freedom, irrespective of nationality’,¹⁰³ which is certainly influenced by the links between Greece, and members of the Greek minorities in Egypt, Albania and Turkey and the Greek Cypriots.¹⁰⁴

The Constitution of Ireland¹⁰⁵ is, unfortunately, in the literal sense, one of the most inflexible in this regard. Determined as its authors surely were, to vindicate the new and bitterly hard won status of the Irish nationals as citizens of their own territory, the Irish Constitution, as described by Dewhurst,

... [e]xpressly confers certain rights on citizens including the right to equality before the law, personal rights, life, person, good name and property rights, liberty, inviolability of the dwelling, free expression, free assembly, free association and free expression of religion. The Articles protecting these rights refer exclusively to the word “citizen”.¹⁰⁶

While a literal interpretation of these articles of the Irish Constitution would suggest that they can only apply to Irish citizens, the Irish Courts have taken various approaches, usually in favour of some form of application of constitutional rights to non-citizens, but often without explaining their judgement, in particular in the Supreme Court, and leaving little usable jurisprudence.

The most forthright and inclusive approach was taken by Teevan J in the High Court, when he stated that rights do ‘not owe their existence to the Constitution’. While the Constitution, governing the rights and duties of citizen to citizen, citizen to State and State to citizen, can guarantee the preservation, maintenance and enforcement of those rights and duties only to citizens, the author endorses Teevan J judgment that citizens of the Irish State are not obliged to deny the constitutional protection of those natural

¹⁰³ The Greek Constitution 1975, art. 5 al. 2

¹⁰⁴ iGeorge Katrougalos (n 94)

¹⁰⁵ The Constitution of Ireland (*Bunreacht na hÉireann*) 1937

¹⁰⁶ Elaine Dewhurst (n 10)

rights enshrined in the Constitution to every non-citizen merely on the ground of his non-citizenship, even to a person who not only lacks citizenship but is also not resident here.¹⁰⁷

In the same case in the Supreme Court, the judgment did not address the question, but instead applied the ‘inclusion without explanation’ approach. Dewhurst expresses the view that the Supreme Court’s ‘judgment in *Nicolaou* left a real uncertainty in Irish constitutional jurisprudence as to the issue of citizenship and constitutional rights.’¹⁰⁸ In addition, Dewhurst remarks, ‘The manner in which this has been achieved has been *ad hoc* and unsatisfactory in many respects and the exact scope of the extension to non-citizens has yet to be fully determined’.¹⁰⁹ This situation remains up to the most recent Supreme Court cases and the present day.

3.4.2 The Constitution of the German Republic 1949 (The *Deutschenrechte*) and The Constitution of Ireland (*Bunreacht na hÉireann* 1937)

Other nations have also succumbed to the temptation to emphasise the special place in their Constitution for citizens, including, as Dewhurst explains,

Germany, where the *Grundgesetz* differentiates in a similar manner between rights applicable to “citizens” (*Deutschenrechte*) and rights applicable to all persons. The *Deutschenrechte* [...] have been interpreted as providing that only citizens are rights-holders (*Grundrechtsträger*) as expressly provided for in the *Grundgesetz*.¹¹⁰

Whether it was a deliberate measure by the authors of the German Constitution, or whether the German Courts have sought out a flexible interpretation to balance this emphasis on the citizen, there is, as Dewhurst rightly points out:

...[o]ne significant difference between the *Grundgesetz* and the Irish Constitution. This is the right to free development of personality under Article 2(1) of the *Grundgesetz*, which has been interpreted as applying to all persons and not exclusively to citizens: a right that has been described as a ‘catch-all’ provision allowing non-citizens to claim specific rights such as assembly and association.¹¹¹

¹⁰⁷ *State (Nicolaou) v An Bord Uchtála* [1966] 1 IR 567 at 599 (per Teevan J)

¹⁰⁸ Elaine Dewhurst (n 3) 100

¹⁰⁹ *ibid*

¹¹⁰ *ibid* 101

¹¹¹ Elaine Dewhurst (n 3) 101

This author notes that there is no such provision of general application available to the Irish Courts in the Irish Constitution. In this Chapter, the author will examine the Irish Constitution, other Irish legislative provisions and jurisprudence, and outline whether the undocumented migrant may have a basis in vindicating the most fundamental basic right of recognition as a person before the law.

3.4.3 The Constitution of the United States of America 1787 and Jurisprudence

The manner in which these questions have been treated in the United States of America ('USA'), from the Federal Constitution, down to court decisions, is very instructive as to how a country's ethos, which, in the United States, is perhaps a founding ethos, can be guided through the obstacles and challenges of pragmatism and nationalism, to providing real remedies to undocumented migrants, at least in the most important areas of life. Through the examination of international legislation and cases and varied application of those principles in law, the United States, in addition to classical legal and rights considerations, is also heavily influenced by its largely positive history of immigration and the associated aspirations.

Life can be hard, and the life of any migrant will present life affirming or life threatening challenges. If one considers the aspirations and symbolism in the words of Lazarus, one can only conclude that there is a generosity and a will so strong as to cut through all such layers of illegality, to make the rights of a person before the law meaningful and real: 'Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!'¹¹²

This reality appears also to be embedded in the culture of the United States. If one considers Steinbeck's *Of Mice and Men*, where the Afro-American character, Crooks, speaks about the dream of George and Lennie, two dispossessed migrant field workers: 'I seen hundreds of men come by on the road an' on the ranches, with their bindles on their back an' that same damn thing in their heads ... every damn one of 'em's got a little piece of land in his head.'¹¹³

¹¹² Emma Lazarus, 'The New Colossus,' written in 1883 and engraved on the pedestal of the Statue of Liberty in 1903 <<https://www.nps.gov/stli/learn/historyculture/colossus.htm>> accessed 12 July 2016

¹¹³ John Steinbeck's *Of Mice and Men* (1937) <<http://eienglish.org/omam.pdf>> accessed 12 July 2016

The question here, then, is whether such people, today, when wronged, can turn to the state and be recognised as persons before the law. The quotation from the character Crooks reflects a powerful message running through the entirety of American culture and history, which has been recognised from an early stage as being founded on immigration and diversity, on the one hand, and the search for a better life, on the other. As Katrougalos observes,

Although the difference between the American and the European juridical attitude towards illegal migration seems *prima facie* curious, it is explained by the fact that the concept of multi-nationality (the famous ‘melting pot’) has been always considered a basic component of the American way. Accordingly, the Supreme Court traditionally protects migration, since the famous *Church of the Holy Trinity v US* case (1892): A federal law of this period declared it a crime to assist or encourage the importation or the migration of any alien into the country, with exceptions only for artists, actors, domestic servants and a few others, but not for pastors. The court overturned the law because ‘it went against the whole history and life of the country.’¹¹⁴

The Fourteenth Amendment of the Constitution of the United States provides that ‘[n]o state shall [...] deny to any person within its jurisdiction the equal protection of the laws.’¹¹⁵ The Courts of the United States have found that this Amendment is ‘essentially a direction that all persons similarly situated should be treated alike.’¹¹⁶ Although the Fifth Amendment, relating to the federal government, does not explicitly contain a similar provision, the United States Courts have ruled that, ‘[t]he liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.’¹¹⁷ This inclusive policy and jurisprudence is not, however, entirely established and without challenge in the United States, and it remains somewhat aspirational. Tensions appear when different arms of the state, applying different laws for different aims, become aware of an undocumented migrant. It is a recurring characteristic of such situations, that the undocumented migrant is invisible until they are forced to raise their heads due to intolerable conditions, and in doing so, they meet some parties willing to assist them, and others intent on deporting them. In this regard, the United States is no

¹¹⁴ George Katrougalos (n 94)

¹¹⁵ The Fourth Amendment of the United States Constitution 1868

¹¹⁶ *City of Cleburne v. Cleburne Living Ctr.* 474 US 432 (1985)

¹¹⁷ *United States v. Windsor* 133 SC 2675 (2013).

different. In the employment discrimination case *Rivera v. Nibco Inc.*¹¹⁸ Wherein the defendants sought to discover information about the immigration status of the plaintiffs. The Court expressed concern that allowing employers to ‘inquire into workers’ immigration status’ and ‘raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or undocumented, reports illegal practices or files a Title VII action.’¹¹⁹ The Court was reluctant to ‘effectively grant all future employers the right to discover the immigration status of any of their employees who choose to assert a Title VII national origin claim.’¹²⁰

3.5 United States of America’s Current Immigration and Political Policy: “We (the USA) will build a wall”

In the recent political sphere, the current President on the United States of America, Barack Obama, announced in November 2014 executive actions on US immigration policy to improve access to regularisation for undocumented migrants. He remarked that these processes reflected “who we are as a country, and who we want to be for future generations”.¹²¹ He argued that change was required to allow people ‘to come out of the shadows’ and that “[W]e need more than politics as usual [...] we need reasoned, thoughtful, compassionate debate that focuses on our hopes, not our fears.”¹²²

However, the plan, which authorised the administration to provide work permits for millions of undocumented workers, was strongly resisted by other sections of the government. The Speaker of the House of representatives, John Boehner, stated “We do not take this action lightly, but simply there is no alternative. This executive overreach is an affront to the rule of law and to the constitution itself.”¹²³

During the presidential candidature elections’ campaign of 2016, Donald Trump, appeared to bring the “Golden door” ideal, to a complete reversal with the claim that “We (the USA) will build a wall”¹²⁴ along the full extent of the Mexican US border, to

¹¹⁸ *Rivera v. Nibco Inc.* 364 F.3d 1057 (9th Cir. 2004)

¹¹⁹ *Puente Arizona et al v Joseph M. Arpaio*, No. CV14-1356 PHX DGC US, Order of District Court David G. Campbell J, 21 January 2016

¹²⁰ *ibid*

¹²¹ Alice Bloch and Sonia McKay (n 13) 5

¹²² *ibid*

¹²³ <<http://www.thejournal.ie/immigration-reform-obama-1882620-Jan2015/>> accessed 20 July 2016

¹²⁴ Lindsey Cook, ‘President Trump Will Probably Try to Build His Wall’ (28 March 2016)

<<http://www.usnews.com/news/blogs/data-mine/articles/2016-03-28/president-trump-will-probably-try-to-build-his-wall>> 20 July 2016

prevent any unauthorised crossing. He compared the proposed wall to that between Israel and neighbouring territories. However stark and adversarial this position may seem, it is not at odds with the sovereign right of the US to control its border. It does not necessarily mean that there will be any change in the law regarding legal immigration of Mexicans into the US (since presumably the wall will have at least one gate in it).

Nor, crucially to this debate, is the position necessarily contrary to a policy of 'full protection' to the rights of undocumented immigrants resident in the US as favoured by the Supreme Court in *Plyler v Doe*¹²⁵ a case related to attempts in Texas to exclude undocumented migrant children from public schools were ruled against, without exposing the children to deportation. If such a physical barrier to undocumented entry were to be created, then eventually, the United States would be forced to formalise provisions for legal immigration required to sustain a large proportion of the economy of the southern states of the United States, and to allow employment of people to meet the care needs of changing US demographics. In many ways, this may be a less hypocritical and ultimately fairer system.

If one considers, by way of comparison, the situation in southern Europe, similar to that in the southern United States, where a very substantial underground economy is based on the over-exploitation of undocumented migrants. Katrougalos notes that it is common in these countries 'to find draconian legislation co-existing with *de facto* lenience toward the irregulars, as the latter are satisfying functional necessities of the labour market, offering cheap work in unwanted and heavy jobs.'¹²⁶

The inevitable solution to these periods of increasing numbers and exploitation of undocumented migrants is to allow large scale amnesties and mass regularisations of migrant status. However, unless the root causes of undocumented migration and exploitation are addressed, by effectively securing borders and optimising legal routes to immigration and work permits, and through policing of employment practices (and accepting the economic consequences that follow) then the cycle begins again and continues for years between each regularisation.

¹²⁵ *Plyler v Doe* 457 US 202, 102 SC 2382 (1982)

¹²⁶ George Katrougalos (n 94)

3.6 The Right to Health and Education as basic fundamental human rights: The Front Line

Regardless, however, of how modern methods and technologies might secure borders across the world ever more effectively from unlawful entry, the question will remain as to how to deal with the rights of undocumented migrants, and their children, when they are already resident in a foreign territory. Perhaps the front line for these discussions is the provision of health and education services. Between the extremes of full protection and summary deportation,¹²⁷ a balance, perspective and workable solutions are sought. This balance appears to centre on the extent to which illegality in one respect can be deemed to shut down or cut short other headings for justice.

It is very noteworthy how the strong emphasis in this European case, as a reflection of a broader European culture, is on finding practical solutions that are to the benefit of the receiving nation, while also meeting requirements to uphold fundamental human rights. A European example of this question is described by Katrougalos:

“Illegal” foreigners are modern pariahs. They cannot claim any rights. They are not eligible for any welfare schemes, due to the impossibility of presenting any official documents (identification, residence or work permit, etc.) regarding their status. Only on marginal occasions, are they in position to benefit from some social services (for instance, first help medical aid in case of emergency). However, there are serious reasons for a change in this situation, regarding at least the recognition of two rights, the right to health and the right to education (for their children). Apart from ‘practical implications’ (e.g., lack of health care could be a possible source of contagion and exclusion from education creates what they call in France “*a classe dangereuse*”¹²⁸ the deprivation of basic health care and education is unacceptable and from a legal point of view: it represents a general degradation of human dignity.¹²⁹

It is very noteworthy and illuminating how practical implications to the receiving nation are stated alongside references to the aspiration and requirement to defend fundamental human rights. The perception that the receiving nation concludes that, if undocumented migrants and their children will inevitably remain within their territory, they should be kept free from illness and educated so as not to become a peril to society. By contrast,

¹²⁷ *De Souza Ribeiro v France* App No. 22689/07 (ECtHR, 13 December 2012)10

¹²⁸ D Thranhardt (ed), *Europe, a New Immigration Continent: Policies and Politics in Comparative Perspective* (LIT Verlag 1996) 142

¹²⁹ Cf. The International Covenant on Economic, Social and Cultural Rights, Art. 12.1; The Universal Declaration of Human Rights, Art. 25(1); and The Convention on the Rights of the Child, Art. 39.

an “an audacious decision” in the case of *Plyler v Doe*,¹³⁰ the US Supreme Court favoured a more human rights based perspective and ruled that the Fourteenth Amendment Equal Protection Clause¹³¹ applied also to illegal aliens, and so guaranteed the right to education for their children. Katrougalos explains:

The case related to attempts in Texas to exclude these children from public schools. Justice Brennan, writing for the majority, remarked that the inestimable toll of that (educational) deprivation on the social, economic, intellectual and psychological well-being of the individual, and the obstacle it poses to individual achievement, makes it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.¹³²

The emphasis here is entirely on the rights of the children of undocumented migrants to individual achievement and well-being. However, this does not mean that the United States policy makers have conclusively decided this question in favour of human rights. As Katrougalos describes:

This generous jurisprudence will be tested again, against the recent and infamous Proposition 187 of the State of California, that makes illegal aliens ineligible for any kind of public social services, public health care services, and public school education at elementary, secondary, and post-secondary levels.¹³³

3.7 Enforcement of Immigration Policy and the rights under the *Moniteur* Belgian Case

The tension appears to arise from an argument that an ‘exclusion as a legitimate tool [...] in the execution of [...] immigration policy’.¹³⁴ There is very good example of this tension between enforcement of immigration policy and upholding rights in the *Moniteur Belgian case* in the Belgian Constitutional Court¹³⁵ where the judgment was to uphold federal legislation banning undocumented migrants from social assistance and welfare. The legislation was challenged as discriminatory, between undocumented migrants and Belgian citizens. The Court ruled that:

[I]llegal residence is an objective and a reasonable basis to exclude certain aliens and that this exclusion is a legitimate tool for the federal government in the

¹³⁰ 457 US 202, 102 SC 2382 (1982)

¹³¹ *Brown v. Board of Education of Topeka (No. 1)* 347 U.S. 483 (1952)

¹³² George Katrougalos (n 94)

¹³³ *ibid*

¹³⁴ *ibid*

¹³⁵ *Moniteur Belgian Case* 51/94 Cour d'arbitrage (29 June 1994)

execution of its immigration policy (i.e. to ensure that aliens who have been ordered to leave actually depart). The means used to achieve the goal (immigration control) are reasonable and do not amount to discrimination or violation of the equality principle.¹³⁶

However, it can be observed again, this time in Belgium that health and education appear to be the grounds on which state authorities draw the line between enforcement of immigration policy and upholding rights. Katrougalos explained:

It is noteworthy, however, that, despite this jurisprudence, in the Flemish part of Belgium, the Minister of Education accepted the enrolment in schools of children of irregular foreigners, stating that it is merely a matter of regularising an already existing situation.¹³⁷

3.8 The Irish Legislation and Jurisprudence

3.8.1 The Immigration Act 2004 and The International Protection Act 2015

The author notes that Immigration Act 2004 (the '2004 Act') and the International Protection Act 2015 (the 'IPA Act'), are however, even more so than in Irish jurisprudence, silent with regard to the undocumented migrant subject of this dissertation, as characterised by the unnoticed worker in the shadows of society and the economy.

The 2004 Act provides that a 'non-national coming [...] from a place outside the State shall, on arrival in the State, present himself or herself to an immigration officer and apply for permission to enter the State.'¹³⁸ There are several grounds under which the immigration officer is to consider granting such permission, including whether he is satisfied that the person intends to take up employment while not in possession of a valid employment permit. The migrant may well seek to satisfy the requirements of such an engagement with an immigration officer, however, they invariably cease to comply with those requirements as soon as they have entered the State and set about sustaining themselves. From that point on, they are 'for all purposes, unlawfully present in the State'.¹³⁹

¹³⁶ *ibid*

¹³⁷ *ibid* (n 132)

¹³⁸ The Immigration Act 2004, s 4

¹³⁹ *ibid*, s 5(2)

Anyone in contravention of many of the primary requirements of the 2004 Act is deemed to have committed an offence, and is liable on summary conviction to a fine not exceeding €3,000 or imprisonment for a term not exceeding 12 months or both.¹⁴⁰ It is in this respect that the 2004 Act is certainly relevant to the undocumented migrant; substantial fines and custodial sentences make clear the attitude of the law makers towards any party failing to comply with immigration law. It is also clear that, in common with the Migrant Workers Convention,¹⁴¹ there are no provisions in the 2004 Act for identifying or for the protection of the rights of undocumented migrants.

The International Protection Act 2015 is focused entirely on the ‘applicant’ openly and explicitly seeking recognition of their ‘status’ as eligible for international protection. They are indeed migrants, but from their first arrival, they are intent on becoming documented and on complying with the state authorities requirements. The subjects of this dissertation are intent on quite the opposite: to avoid insofar as possible any contact with the state authorities. Where, as is frequently the case, an ‘applicant’ is considered and refused this ‘status’ by the state authorities, it may be the case that they become a form of undocumented migrant, however, this situation is outside the scope of this research.

3.8.2 The Irish Supreme Court Decision of *Younis* Case

The recent Supreme Court decision in the *Younis* case¹⁴² appears at first glance to be both relevant to and strongly supportive of the undocumented migrant in Ireland. The case, originally to Rights Commissioner, involved a claim by Mr. Younis against his employer, a restaurant owner Amjad Hussein regarding work pay and conditions. The Rights Commissioner ruled in favour of the plaintiff. The Labour Court refused to overturn this decision on judicial review (no appeal was made within the required period). On appeal, the High Court ruled in the favour of the defendant on the basis that any employment contract in this case was tainted by illegality. The Supreme Court

¹⁴⁰ *ibid*, s 13(1)

¹⁴¹ *ibid* (n 78)

¹⁴² *Amjad Hussein v The Labour Court* [2015] IESC 58. This was a Supreme Court Decision of Murray J, Hardiman J and MacMenamin J of 25 June 2015, by Order Mohammad Younis as Notice Party/Appellant.
<<http://courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/67b523d012e20c6280257e6f0053fabf?OpenDocument>> accessed 20 July 2016

overturned the High Court decision on the basis that the High Court was not charged with deciding any matters of fact.

However, the Supreme Court judgment in *Younis* case is quite clear in refusing to enter into an examination of the legality of the employment of Mr. Younis, nor the impact of this legality, or otherwise, on the rights available to him. The High Court had, albeit outside their required brief, considered that the absence of a valid permit to work in the state, for at least most of the period of employment, meant that the employee was not entitled to redress under law. In any case, perhaps disappointingly, paragraph 37 of the Supreme Court judgement, in reference to the findings of the Rights Commissioner, which are the only valid findings of fact in this case, refers to an absence of any valid judgement that any work had been performed without a valid work permit. Therefore, this case is of limited relevance to the interpretation of law for undocumented migrant workers in Ireland.

It is only in paragraph 54 and 55 of the *Younis* judgment that the Supreme Court's decision gives some insight into how they might judge the facts of a case involving the rights of an employee where the contract of employment was tainted in some way by illegality. The Supreme Court recommends that the principle of proportionality should be applied in considering the restriction of rights due to illegality, based on the level or extent of that illegality. A distinction is made by the Supreme Court between very different levels of severity of illegality, from one near extreme of an agreement to rob, to the other, of an 'inherently lawful relationship of employer and employee'.¹⁴³ The Supreme Court makes reference to a contract to rob, for example, where the 'work' would certainly be inherently wrong, and one might consider that payment in the form of illicit drugs, for example, would also be inherently wrong. However, it is unclear whether the 'inherently legal relationship' the Supreme Court refers to depended on the Rights Commissioner's decision, that there may have been or probably was a valid work permit, or whether the Supreme Court is referring to a higher principle of fairness, justice and natural order in the exchange of work for pay, where neither the work itself nor the pay are by their nature wrong.

The difficulty, the author identifies in the *Younis* case, is that all of the ruling of the Supreme Court is based on findings of the Rights Commissioner's judgment, which

¹⁴³ *ibid* (n 142) 54-55

held, with apparently good grounds, that an employer-employee relationship existed in legal terms. Since the Supreme Court was not asked to, and therefore did not, consider the merits of this decision, this means that the reference to applying the principle of proportionality must be taken in that context. In referring to the principle of proportionality, it could be argued that the Supreme Court was referring to relatively minor aspects of illegality as being open to consideration using the principle of proportionality, so as not to dismiss out of hand the right of the employee to avail of the employment protection rights and other legal rights.

Having examined the *Younis* judgment, the question remains unanswered then, as to what would be the Supreme Courts' view of an undocumented migrant seeking remedy in a situation where no legal relationship of employer-employee is deemed to exist. Interestingly then, the importance of this recent decision of the Supreme Court to the direction of jurisprudence in Ireland, lies as much in what remains unsaid as in what is said.

The author has determined that there are, as seen in recent Irish cases, layers of illegality suffered by the undocumented migrant worker, so that all the discussions through the Courts, on inclusion, with or without explanation, appear essentially moot, since the undocumented migrant appears always to be one step too many away from an inclusion that actually counts.

Chapter 4: Examination of Proposed Recommendations and Conclusion

4.1 Introduction

The objective of this Chapter is to review recommendations by academics, legislators and jurisprudence, to seek some basis for addressing the rights of the undocumented migrant. It addresses the complex interplay between the rights of migrants on the one hand, and citizenship as part of the increasing emphasis in the modern world on sovereignty, on the other.

The Chapter includes a discussion on how the unchallenged emphasis on sovereignty of territories and the status of borders effectively excludes the undocumented migrant from even the most apparently relevant international Conventions. It includes also consideration of the conundrum of how the law can be used to address issues of illegality without undermining its own authority.

The question of amnesty, or allowing the undocumented migrant to become documented, is identified as peripheral to this dissertation, in which the concern is to find a way to allow true recognition of the rights of the undocumented migrants as persons before the law without necessarily first achieving regularised or documented status.

The author will present a conclusion and final remarks as to how the law may best develop in this area and the contribution to knowledge derived from the research.

4.2 Recommendations under The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families 1990

The question posed by this dissertation, has at its heart, another question: whether people will ever truly accept outsiders within their territory, so that they do not have to hide. All other concerns of the universality of rights, of sovereignty, of proportionality of judgements, policies and measures, are ultimately secondary to the legal status we assign to people, and in the modern world, it appears that this status is very much dependent on one's documented permission to enter, reside and work in a territory. According to DAuvergne,

For extra-legal migrants seeking legal protection or redress from harms, the status of 'illegal' has become almost insurmountable. This will eventually prove to be one of the most important tests of the global spread of human rights.¹⁴⁴

In addition, in an increasingly globalised world, with increasingly tightly controlled borders, is the undocumented migrant condemned to remain invisible?

Perhaps the most illuminating example of this is in the details and qualifications of the Migrant Workers Convention.¹⁴⁵ While the Convention requires state parties to 'undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind,'¹⁴⁶ the Convention is also strongly supportive of the rights of nations to exert control over their borders. The implications of these are clear: irrespective of all the other rights enumerated in the Convention, as DAuvergne remarks, 'there is no right to cross borders to seek work.'¹⁴⁷

The Convention applies 'to all migrant workers [...] without distinction' throughout the 'entire migration process', and specifies that the convention applies 'to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.'¹⁴⁸ As DAuvergne notes, undocumented or irregular migration status is omitted from this list of criteria for distinction.¹⁴⁹

4.3 The Universality of Human Rights and the promotion of a notion of Citizenship based on residence rather than Nationality

What this highlights is that the border, as a concept and as a physical and legal reality, is increasingly unchallenged in the modern world. Anyone within territory borders, without documented permission, is inevitably in a vulnerable position. The most clearly directed international convention on the matter of migrant rights, pointedly excludes them from consideration and indeed, reinforces the exclusionary factor of sovereignty

¹⁴⁴ DAuvergne (n 93) 19

¹⁴⁵ *ibid* (n 89)

¹⁴⁶ *ibid* (n 89) Art. 7

¹⁴⁷ DAuvergne (n 93) 24

¹⁴⁸ *ibid* (n 89) Art. 1

¹⁴⁹ *ibid* (n 82) 22

and immigration control. It is not within the scope of this dissertation to examine the rights of countries to establish and protect borders; they are accepted as a fact, and consequently, so too is the status of the undocumented migrant. Therefore, this dissertation does not align with the view proposed by Katrougalos, that the path to ensuring, at the legal level, the universality of human rights and the equality of treatment of nationals and non-nationals, would be through the promotion of a notion of citizenship based on residence rather than nationality. Katrougalos argues that:

This does not imply the abandonment of national sovereignty or relinquishment of the right to control national borders. These are two distinct things: One is the State policy regarding immigration and the control of frontiers, which is mainly a political matter. Another is the protection of the fundamental rights of persons being (legally or illegally, is irrelevant) in the State. For instance, it is difficult to object that even an illegal foreigner still has a right to life (one cannot, for instance, kill him without being punished) or to property, regarding his personal things, etc. The nature of social rights, such as the right to health or the right to education is not legally different from this or the aforementioned traditional ones, at least in legal orders in which these rights enjoy constitutional recognition.¹⁵⁰

4.4 Amnesty and Granting of Citizenship to all long-term residents of Europe

With respect, the mistake in this reasoning by Katrougalos is to confuse punishment for serious crimes, and the availability of real options to the undocumented migrant where their rights are being denied to them. The reality is that being murdered leaves no scope for redress, only punishment, and through death, the question of the legality of the migrants presence is ended. If someone robs an undocumented migrant of their property, are they really in a position to object to the authorities? To assign citizenship based on residence would require too great a shift in the policies of practically all developed countries in regard to what citizenship is. As DAuvergne remarks, ‘...[M]igration law is emerging as the centre of sovereignty. New citizenship laws, forged as part of the global crackdown on illegal migration, shows this transition clearly.’¹⁵¹ In effect, granting citizenship to all long-term residents of Europe would amount to a massive amnesty; however, an amnesty does not change the law and the treatment of the next wave of undocumented migrants, and therefore, does not address the question of how those who remain or are yet to become undocumented migrants are to be truly recognised as persons before the law.

¹⁵⁰ George Katrougalos (n 94)

¹⁵¹ DAuvergne (n 93) 6

It may well be, as DAuvergne argues, that the law is not the correct tool with which to address problems caused by illegality. DAuvergne refers to ‘the difficulties of using law to alleviate illegality. The law is a necessary site for constructing illegality, but is much less apt for remedying it.’¹⁵² If rights are to be the basis for, and protected by, the law, then it may be too much to expect that the law should also provide effective protections for those whose status is contrary to the law, without the law subverting its own authority and purpose.

4.5 International Law and *Jus Cogens*

The Vienna Convention on the Law of Treaties 1969 recognised the sovereignty of individual States, and therefore that the law regarding immigration should remain a matter of national law. The result is that national law will invariably treat the undocumented migrant as an offender against the laws protecting those nation’s sovereign borders. In order to overcome the fundamental legal problem at national law level, of protecting the legal rights of those whose presence in the territory is contrary to national law, then it may be that the matter must be elevated to the level of International Law, in such a way as not to undermine state sovereignty. There is an interesting example of a possible means of bridging this gap in the concept of *jus cogens*,¹⁵³ or a peremptory norm, as a fundamental principle of international law that is accepted by the international community of states as a norm from which no derogation is permitted. In a very relevant case to this thesis, Bianchi states:

[T]he Inter-American Court of Human Rights provided an Advisory Opinion on Juridical Condition of and rights of undocumented migrants. The opinion issued at the request of Mexico, aimed at ascertaining whether undocumented workers are entitled to fundamental workplace rights. The Court unanimously found that the principle of non-discrimination, equality before the law, and equal protection before the law *qua* peremptory norms impose on all states respect for workers’ human rights once an employment relationship is established, regardless of the fact that workers are undocumented.¹⁵⁴

Bianchi was sceptical of the legal basis for this judgement and believed that reference to *jus cogens* in this case may have been intended as a route to reaching out to the United States, not a party to the Inter-American Convention on Human Rights. However, the

¹⁵² *ibid* 27

¹⁵³ T Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge University Press 2015) 86

¹⁵⁴ Andrea Bianchi, ‘Human Right and the Magic of Jus Cogens,’ EJIL (2006) Vol. 19 no. 3, 491-508

norm of *jus cogens* appears to present a possible basis for addressing what appear to be otherwise seemingly unsolvable legal problems, such as that of the legal position of the legally undocumented migrant. If the right of everyone to be recognised as a person before the law could be established as *jus cogens*, or a peremptory norm, then courts may be allowed greater authority to set to one side matters of illegality of residence, of work permit status and of contract, so as to give judgments to protect the rights of the undocumented migrant.

4.6 The application of Principle of Proportionality and Unjust Enrichment

There are other areas where national law may very well be used to good effect in protecting the rights of the undocumented migrant, through making illegal, and subject to greater penalties, actions that most contribute to injustices against the undocumented migrant.

By applying the principle of proportionality to the extent of illegality due of the undocumented status of the migrant, and the principle of unjust enrichment, the law could be better used to reduce those conditions that lead to undocumented migration in the first place, and greatly reduce the motivation of those employers who profit from it. If the evils of undocumented migration are to be prevented, then perhaps the only route is through preventing undocumented migration in the first place.

4.7 The ‘Full Protection Approach’ and Class or Representative Action Rights-Based Claim

As noted by Dewhurst, a key requirement to achieve a ‘full protection approach’ is to allow some separation between the undocumented migrant in their status as plaintiffs on the one hand, and as ‘illegals’ on the other, so that the threat of deportation or other penalty does not immediately arise when they seek remedy. She notes how a ‘full protection approach’ can effectively be achieved by means of class or representative actions, in particular in the decision of the *Plyler v Doe* case¹⁵⁵ referred to in Chapter 3, in which Mexican school children were represented anonymously in challenging a state law in Texas denying funding for irregularly resident children. Dewhurst identifies the most important outcome of this decision, from a human rights perspective, in that the

¹⁵⁵ *Plyler v Doe* 457 US 202, 102 SC 2382 (1982)

irregular immigrants in this case were protected from the consequences of detection while being able to make a rights-based claim in the courts. Since, as Dewhurst notes ‘class actions are not a feature of the Irish judicial system’, alternative means of achieving the same end are required in Ireland.¹⁵⁶

Dewhurst further proposes that similar benefits could be achieved through a representative action taken by a non-governmental organisation or other relevant organisation on behalf of the irregular immigrant community, subject to the rules of *locus standi*. She highlights two precedents set in the cases of *Irish Penal Reform Trust and Others v The Governor of Mountjoy Prison and Others*,¹⁵⁷ and *Digital Rights Ireland Ltd v Minister for Communications and Others*.¹⁵⁸ The decision of the Court in the Irish Penal Reform Trust case, was that the rule of *locus standi* was ‘subject to expansion, exception or qualification when the justice of the case so requires’ and that the rules could be relaxed ‘where those prejudiced may not be in a position to adequately assert their constitutional rights.’¹⁵⁹

4.8 Conclusion

The conclusion of this dissertation is that there are no quick or easy answers to the plight of the undocumented migrant. The author is therefore not in a position to make firm recommendations but rather, concludes that there are paths open to nation States, collectively through international agreements, to take greater active responsibility, focusing on the principles against unjust enrichment by those in the position of greatest power. This involves a rejection of the belief that undocumented immigration is inevitable and so the State authority must focus on pursuing the migrant person, as described by Shapiro, ‘States can’t regulate immigration, but they can regulate illegal immigrants.’¹⁶⁰ The State can take steps to remove in large part the benefit to employers using undocumented migrant labour. It appears to the author that the best approach to achieve this is to ensure full protection of the rights of undocumented migrants, so that employers know that they are at all times liable to pay the national minimum wage, and

¹⁵⁶ Elaine Dewhurst (n 3) 126

¹⁵⁷ *Irish Penal Reform Trust Limited & Ors v Governor of Mountjoy Prison & Ors* [2005] IEHC 305

¹⁵⁸ *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources* (C-293/12) ECJ (2014) 238

¹⁵⁹ Dewhurst (n 3) 126

¹⁶⁰ Ilya Shapiro, ‘Remarks at the 2012 Charleston Law Review and Riley Institute Law and Society Symposium,’ *Immigr. & Nat'lity L. Rev.* 217 (2012) 33

are subject to penalties and recompense for failures to protect migrant rights. The establishment of a true 'full protection' regime, may not be as costly a burden as might first appear, and may indeed greatly strengthen the hand of the States in stemming the flow of undocumented migrants into the State, if that is in fact what the State wishes.

In the course of the research carried out and conclusion reached, the author of this dissertation has learned that the situation of the undocumented migrant is tremendously complex and nuanced. One's initial reaction is to conclude, that the undocumented migrant has the ever available option of returning to their nation State to escape any problems or mistreatment in a foreign territory. However, such an argument is to ignore entirely the very natural and powerful impulse in mankind to migrate to other lands to seek opportunity, and does not reflect the reality of the particular, unspoken, undocumented arrangement between ambivalent receiving States, economies and populations, and eager, hardworking and discrete migrants. As time passes, and children are born, undocumented, but in the land of their birth nonetheless, the stakes get much higher to achieve a workable balance; there are no easy solutions. The author has found intriguing prospects for a basis on which to uphold the rights of undocumented migrants in the concept of *jus cogens* and in particular, the model of 'full protection' through allowing *locus standi* of representative groups in Court proceedings to defend the rights of undocumented migrants.

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