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Regulation of the Access of Undocumented Migrants to Social Protection

Exploring the Boundaries of Solidarity

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7.1 INTRODUCTION: UNDOCUMENTED MIGRANTS, ORGANISED SOLIDARITY, AND FACTORS OF INCLUSION

The evolution from nationality to residence as factor for inclusion in systems of social protection has shaped undocumented immigrants into an exclusionary category, with the view to bring social law in line with goals of immigration control. However, undocumented immigrants have access to social protection in certain circumstances.

Systems of social protection are generally construed as the expression of the concept of solidarity or as governed by a principle of solidarity considered as a core value of democratic states, with constitutional relevance (Becker 2007: 1). However, solidarity is an elusive, difficult and poly-semantic concept (Supiot 2015). In this chapter, I refer to solidarity above all as state-organised, compulsory redistribution of resources related to the notion of welfare state, sometimes also referred to as 'coerced collective action' (Kolers 2012), or to use Durkheim's concept, an imposed form of organic solidarity. This form of redistribution is regulated by a legal concept of solidarity, among other principles. But from a political point of view, it must base its legitimacy on the understanding of solidarity by those who are part of it (van der Veen et al. 2012).

But this also poses the question of the boundaries of solidarity. Who can be part of that system of solidarity? In exploring that question, this chapter uses the notions of exclusive and inclusive solidarity as loosely based on the work of Hannah Arendt. She defines exclusive solidarity as a shared experience of oppression leading to interdependence and a shared understanding of the rationale of action and organisation. And inclusive solidarity is present where the experience of oppression is not shared but where action and organisation arise from the 'judgment that certain factual conditions involved in the situation of a ... group of persons constitute an affront to the dignity of humankind' (Reschaur 1992: 728).

https://doi.org/10.1017/9781009170260.007 Published online by Cambridge University Press

For practical reasons, this chapter translates those concepts into a form that would structure the analysis around its objective. Therefore, inclusive solidarity would refer to organised solidarity that goes further than the boundaries of the group of solidarity defined around the concept of citizenship and legal residence. Redistribution of resources to cover social risks within that group of solidarity would be referred to as exclusive solidarity, involving a communitarian understanding of solidarity (Misic 2018: 271). Even if those translations do not contain the same meaning as in their use by Arendt as dynamics of solidarity, it is contended that the concepts of exclusive and inclusive solidarity have those logics at their core, even if some aspects of solidarity within the community of nationals and immigrants with authorised residence are funded on the logic of inclusive solidarity, and some aspects of the access of undocumented immigrants to organised social protection find their explanation in logics of exclusive solidarity. This would show the inherent lack of coincidence between the logics of immigration law and social protection law.

As even in the EU the subject still pertains to the core competences of the Member States (excepting within the sphere of the right to free movement), and in the presence of only very timid specific international standards on the matter (O'Cinneide 2020: 58), the chapter analyses four cases pertaining to the Continental Welfare State group (and its Mediterranean derivative), Germany, The Netherlands, France, and Spain. Their systems of organised solidarity rely on a combination of employment-related social insurance systems and more universalistic complementary systems of protection.

Core to the analysis are the concepts of responsibility, reciprocity, dignity, and vulnerability as factors of inclusion in the circle of solidarity, reflecting different 'dimensions of solidarity' (Supiot 2015), which are also factors of legitimation of the institutionalisation of solidarity in the form of those social protection systems (van Oorschot and Roosma 2015).

Before starting the analysis, and given the extremely complex character of the question, some limitations to the study must be explained. The notions of undocumented worker or undocumented immigrant are complex and represent various realities of precarious statuses of residence in a host country: refused asylum seekers, non-citizens with expired authorisations, immigrants with short-term authorisation without work permits, persons in a situation of transition between authorisations, victims of human trafficking, and so on. The analysis developed here eludes that complexity to a certain extent, as its objective is to focus above all on the regulation of social rights, rather than be a study of the notion of undocumented migrant. This is also the reason why it does not consider the different regulations of the residence and work authorisation policy or the different openings towards regularisation of immigration status, relating to immigration law, even if they are important factors of access to solidarity that allow one to qualify that solidarity around the inclusive–exclusive spectrum.

This is because the purpose of the chapter is to explore the legal boundaries of the systems of social protection as defined by social law, and critically analyse the exclusion of undocumented migrants from those systems, drawing on the different rationales legitimising being on the receiving end of solidarity, other than nationality or legal residence. While the first section focuses on the discussion of exclusion from the point of view of the equality principle, the following sections analyse the system of benefits in case of work-related accidents as a system based on the responsibility of the employer, employment-related insurance as a system based on reciprocity, social assistance as a system guaranteeing dignity as well as evolving around the idea of vulnerability, and, finally, healthcare as having essential links with core fundamental rights.

7.2 EXCLUSIVE SOLIDARITY AS INSTRUMENT OF IMMIGRATION POLICY AND THE PROBLEMATIC FRAMEWORK OF EQUALITY LAW

The French or Dutch cases clearly show that the exclusion of undocumented immigrants from organised systems of solidarity should not be considered as an absolute constant, but rather the culmination of a process accompanying or following the extension of social security systems and gradual substitution of nationality by residence as a criterion of inclusion (Isidro 2016: 106; Kapuy 2011: 271).

Since the Dutch Linkage Act of 1998, Section 10 of the Act on Foreign Nationals (Vreemdelingenwet) provides that a foreigner without authorisation to stay has no right to benefits or advantages conceded by an administrative authority. Exceptions are possible for benefits related to education, necessary medical care, the necessity to protect public health, or legal assistance.

In France, authorised residence as a condition of access to social insurance was generalised by the Act of 24 August 1993 on Control of Immigration and Conditions of Entry, Reception and Stay of Non-Nationals in France, after a process of affirmation by administrative courts and the Conseil Constitutionnel of a principle of equal treatment between nationals and non-nationals in terms of social security (Michelet 2007: 82–83). Since then, section 115–116 of the Social Security Code only allows inclusion of foreign citizens in obligatory social insurance if they are in order with legislation on residence and work of non-nationals. Access to retirement, invalidity, maternity, and sickness benefits became likewise limited. Exclusion of undocumented immigrants from social assistance was culminated in 1998 (Isidro 2016).

The Spanish case is one of central regulation, but with precepts left open to interpretation. Act 4/2000 of 11 January on the rights and freedoms of foreigners in Spain and their social integration provides that those foreigners with residence in accordance with the legal provisions have the right to develop a professional activity as employee or self-employed person as well as the right to access the social security

system. They also have the right to social assistance and social services in the same conditions as Spanish citizens. Undocumented immigrants could be therefore considered as excluded *a contrario*. However, the Act also provides that non-nationals, whatever their administrative status (including thus undocumented immigrants) have the right to basic social services and benefits. Also, the Act specifies that the absence of authorisation to reside or to work 'shall not be an obstacle for the access to benefits deriving from circumstances provided by international treaties for the protection of workers, or other [benefits] to which [the worker] could have right, whenever they are compatible with his or her situation'. The open wording of the provision seems to be in line with the statement of the Tribunal Supremo in a judgment recognising the right to benefits in case of industrial accident, according to which one cannot ignore 'the progressive evolution towards the social protection of immigrants who provide services as employees without counting with the preceptive authorisations' (González Ortega 2008).[1] However, in a later judgment of 2008 on access to unemployment benefits, the same Court put the brakes on the expansive jurisprudence of lower courts that was being built on that idea.[2] It considered that such an approach would imply the lack of different treatment between authorised and non-authorised residents, a movement that would go against the aim of disincentivising non-authorised immigration. Therefore, a restrictive interpretation was needed, and the Court seemingly limited the 'benefits compatible with the situation of the worker' to the basic social assistance benefits expressly authorised by the Act.[3]

The German case is one based on more complex legislation and a different tiers system. Section 30 of the 1st Book of the Social Code (*Sozialgestezbuch* I, or SGB I) provides that the Social Code, as an expression of the responsibilities of the Social State, applies to all those who have their domicile or habitual residence in Germany (Mimentza Martin 2011: 125). As undocumented immigrants are considered by definition to have a provisional residence, because of the lack of authorisation, they are excluded from said scope (ibid.: 126).[4] However, section 37 SGB I provides that the specific regulation in other books of the Social Code can make exceptions to the principle of section 30, enlarging or reducing said scope. As such, inclusion in obligatory employee social insurance depends on legality of employment (even if in some cases employment can be legal even without authorisation to stay and exceptions are made under the regulation of specific social risks). Inclusion in the system

[1] González Ortega (2008) cites the Judgment of the Tribunal Supremo of 7 October 2003 to ground this assumption.

[2] Judgment of the Tribunal Supremo of 18 March 2008.

[3] Montoya Medina (2009: 863) criticises that interpretation by stating that a systematic and teleological interpretation of the provision and the Act does not permit such a far-reaching limitation, giving rise to the possibility of access to employees' social insurance benefits 'compatible with the workers' situation'.

[4] This would thus include in the scope of application those undocumented workers who have not (yet) been ordered to leave the country.

of social assistance benefits in cash for employable persons (Hartz IV) also depends on habitual residence. But the Act on Asylum's Seekers Benefits, which provides for a system of social assistance calculated and organised differently, also applies to those who are 'obliged to leave the country', and therefore undocumented immigrants (ibid.). This involves thus the existence of a different tiers system, the content of which varies in function of administrative status, but which guarantees, in theory, a minimum of subsistence to all.

The logic of subservience of solidarity to immigration policy is expressed thus under different forms of intensity in function of the case. In a particular case it has been pushed to the extreme through the appearance of what has been called a 'solidarity crime'.[5] Section L622-1 of the French Code for Entry and Residence of Foreigners and the Right of Asylum forbids any person to facilitate or try to facilitate the irregular entry, circulation, or stay of a non-citizen. The interpretation of this vague definition by Criminal Courts ended considering various forms of individual, private help towards undocumented migrants as an offence, and prohibited thus solidarity in its most unorganised version: direct empathy and defining a category of persons not even deserving private help for a supposed common good (Cinalli and De Nuzzo 2018: 295 and 298).

However, in the context of appeal procedures against those judgments, the Conseil Constitutionnel recognised for the first time in an explicit manner the principle of fraternity as constitutional principle, which involves the guarantee of 'the liberty to help others, with a humanitarian goal, without consideration of the regularity of their stay within the national territory'. As a response to the public debate, an amendment was introduced in the law in September 2018 that created immunity from prosecution in case of free help to move within the territory or in providing shelter, except if the help is provided for passing the border. This brought French law more in line with article 1 of Directive 2002/90/EC, which requires financial gain for the assistance to undocumented immigrants to be an offence. Before the entry into force of that law, the Cour de Cassation already annulled judgments in application of the jurisprudence of the Conseil Constitutionnel and ordered the persons to be judged again before the Court of Appeal of Lyon, which absolved them from prosecution in May and October 2020.[6]

However, it is not only in its extreme expressions that the limitation of solidarity as a mechanism at the service of immigration policy has been brought before the

[5] The notion of 'solidarity crime' starts being used in several countries to conceptualise the criminalisation of individuals and organisations helping migrants and refugees. This can happen through direct means, like in the French case, but also through indirect means, like in the case of the prosecution of ship captains helping refugees crossing the Mediterranean in Italy for supposed complicity with immigration mafias (and there are other cases in Switzerland, Belgium, and the USA), contributing to the forming of an imaginary where a fundamental value ends being criminalised.

[6] The Prosecution, however, appealed the judgment of 18 May 2020 so that the case is again pending before the Cour de Cassation.

Courts. In the four analysed cases, the legal configuration of exclusive solidarity systems in function of the necessities of immigration policy has been challenged on the grounds of the equality principle, without, however, any real success.

The Centrale Raad voor Beroep[7] had to decide upon several requests for non-application of the Dutch Linkage Act for being contrary to the equality principle of article 26 of the International Covenant on Civil and Political Rights. The Court found that there was no violation because the purpose of the Act as well as its means were sufficiently justified: the Act contributed to a coherent migration policy that had among its goals that persons who are not authorised to stay would be made to leave. In this context, access to social benefits could give rise to extension of unauthorised stays and the creation of a situation of 'apparent legality' possibly affecting the qualification of the residence.

The French Conseil Constitutionnel approved the 1993 reform by merely and very succinctly stating that it did not violate the principle of equal treatment, because undocumented immigrants were not in a similar situation when compared to nationals or non-nationals with authorisation to reside or work.[8] As such the Conseil did not even proceed to assess if the difference of treatment was adequate to the purpose of the law. This does not seem to be in line with the traditional doctrine on equal treatment principle. It would be difficult to sustain that the adequate character of exclusion from social insurance is sufficiently evident for the Court not to even mention it (Michelet 2007: 84).

Even if there are no judgments of the Spanish Constitutional Court on the specific provisions regulating inclusion in social security, the application of the equality principle between nationals and non-nationals has been configured with the occasion of a 1984 judgment on the compatibility with the right to work of the existence of a work authorisation as condition for valid employment. Starting from the premise that section 14 of the Constitution limits the application of the general principle of equality of treatment to Spanish nationals, it states, however, that the use of nationality as a criterium to limit access to a right is not allowed if this would be prohibited by law or an international treaty, or in case it would affect those fundamental rights that are necessary for the guarantee of human dignity and which the Constitution generally states that they belong to anyone, and not only to Spanish citizens.[9] But the right to work does not belong to that second category.

The more complex character of the legislation in the German case might explain that there does not seem to exist judicialised controversies on the exclusion of undocumented immigrants from the general scope of the Social Code. However, segmentation of social assistance rights in function of the type of residence authorisation (or the absence of authorisation) has been discussed under the

[7] The highest appeal court in matters of social security.
[8] Conseil Constitutionnel, Decision 93-325 DC of 13 August 1993, at 118.
[9] Tribunal Constitucional, judgment 107/1984 of 23 November, legal ground no. 3.

equality principle of section 3 of the German Federal Basic Law. Benefits under the Asylum Seekers' Benefits Act are more limited, can be paid in kind,[10] and are not based on an individualised approach. However, in a Judgment of 13 November 2018, the Bundessozialgericht found that this did not involve a violation of the equal treatment clause of section 3 paragraph 1 of the Federal Constitution. Considering the wider margin of appreciation of the legislator when regulating social benefits linked to the needs of the beneficiaries, the Court found that the justification for the unequal treatment (reducing economic migration and avoiding social benefits from being incentives for the extension of the stay of beneficiaries) was to be considered in adequate proportion to the affectation of the fundamental right. And one of the main reasons for that is that basic needs are guaranteed in all cases. Here thus, the existence of a multiple-tier system guaranteeing basic needs allows to consider as justified the exclusion of access to 'general' social rights in the name of migration policy. Another argument that was used, and reminds of the reasoning of the Dutch courts, is the necessity to avoid factual statuses that might be considered hidden regularisation processes.

A look at the jurisprudence of the European Court of Human Rights (ECtHR) also shows the limitations of the non-discrimination framework in challenging restrictive legislation in the international sphere. However, it allows for the addition of new elements to the debate.

The European Convention on Human Rights has, according to its article 1, the vocation of applying to 'all persons' under the jurisdiction of the ratifying parties, including undocumented immigrants (Da Lomba 2014), and the ECtHR has forbidden unequal treatment between nationals and non-nationals in the access to social security rights in the absence of sufficient justification.[11] However, in *Ponomaryovi* v. *Bulgaria* (judgment of 28 November 2011), the Court considered that 'a State may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programmes, public benefits and healthcare – by short-term and illegal immigrants, who, as a rule, do not contribute to their funding. It may also, in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory.' In the case at hand, the Court found a violation of article 14 taken in conjunction with article 2 of Protocol no. 1 (right to education), considering the circumstances of the case, which excluded the application of 'any consideration related to the need to stem or reverse the flow of illegal immigration' or that it could not be said that the applicant tried to abuse the Bulgarian education system. The Court seems thus to connect on the one hand the right of access to public benefits to the level of contribution to the system, and on the other does not rule out the objectives of immigration policy or the limitation of abuse of the system as possible justification of unequal treatment on grounds of the

[10] Even if in general beneficiaries are given cash benefits, except in Bavaria.

[11] ECtHR, judgment of 16 September 1996, *Gaygusuz* v. *Austria*, and subsequent jurisprudence; for a critical appraisal of the significance of the judgment, see Dembour (2012).

immigration status. The Court confirmed in *Bah* v. *United Kingdom* that limiting 'access of certain categories of aliens to resource-hungry' public services could be justified, where it considered that excluding access of a mother and her son to social housing and housing assistance because the residence authorisation of her son was delivered on the condition that he would have no recourse to public funds, pursued the legitimate aim of allocating a scarce resource fairly between different categories of claimants.[12] The means were also considered to be proportionate to the aim given the specific circumstances of the case, because there would have been an obligation of the municipal authority to intervene if the threat of homelessness had materialised, even if temporarily.

Those decisions show the lack of effectiveness of the equality framework in advancing inclusive solidarity in the field. But this lack of effectiveness could not be said to be due to an intrinsic problem with the principle of equality, or the weakness of possible justifications against exclusion versus those in favour. What the analysis reveals is the general unwillingness of Courts to proceed to a weighted analysis of the different countervailing arguments, taking subjective legislative assumption generally for granted. On the other hand, they do not seem to go as far as ruling out immigration status as a possible ground for discrimination. As such, there is a formal adherence to the right of undocumented migrants to equality, but in practice, the margin of appreciation given to the Member State or the legislative power 'dilutes the impact of this formal universalism', without forgetting the weaker protection generally given to social fundamental rights (O'Cinneide 2020: 58).[13]

However, the underdevelopment of that area of human rights law does not mean that there can be no evolution towards more universalism (ibid.: 64). When focusing on social protection, one element to be considered is the internal logic of the regulation of access to those systems. In addition to treating that aspect, the following sections also show that there are cases where exclusionary systems are not as tightly closed as one would assume.

7.3 THE CASE OF INDUSTRIAL ACCIDENTS: INCLUSIVE SOLIDARITY AND EMPLOYERS' RESPONSIBILITIES

In all the cases of the analysis, whatever the restrictive character of their social insurance system towards undocumented workers, exceptions are made for benefits related to industrial accidents.

[12] The Court also considered that, while immigration status is to be considered an aspect of personal status for the purpose of article 14, despite being granted by law, the element of choice as to the status is important to determine the scope of the margin of appreciation to be accorded to the state. It reminded that the applicant was not a refugee, and could thus return to her country of origin, and chose to have her son join her in the United Kingdom.

[13] This also confirms to some extent the observation of Dembour (2012), according to whom there is a refusal to address the liberal contradiction between universalism of rights and particularism in access to resources.

The Dutch case is one where inclusive solidarity in the matter is technically explained by the classification of the question as part of the realm of labour law, rather than social security. Pursuant to article 629 of the 7th Book of the Dutch Civil Code on the regulation of the employment contract, in case of incapacity to work due to illness (including accident, industrial accidents and professional diseases), pregnancy or childbirth, the employer has the obligation to pay the employee 70 per cent of the salary during a maximum period of 104 weeks.[14] As employment contracts celebrated with a worker without authorisation to work or stay are considered valid as to their effects, independently of the responsibility of the workers for the situation, the system of wage continuation applies also to undocumented workers (Kapuy 2011: 513). Here thus, it is the formal qualification of the coverage of a social risk as a right under labour law (as opposed to a social security right) for which the employer is solely responsible, which serves as system of extension of solidarity.[15]

In the other cases, the link with the employment contract is more tenuous, even if material or formal connections are clearly present. The definition of industrial accident by section L-411-2 of the French Social Security Code applies to 'all employees or person providing work, wherever and under which title ever'. This has been traditionally interpreted as including undocumented workers under the principle that 'no distinction has to be made when the law does not make any'.[16] The origin of the definition of professional disease in the Labour Code and its treatment under the same Book of the Social Security Code also involves inclusion of undocumented workers under its scope.

Obligatory inclusion in the Unfallenversicherung (German Insurance in case of Industrial Accidents, SGB VII) depends only on the material characteristics of being employed, without consideration to the declared or undeclared character of the work, or the residence status. In this line, the law explicitly provides for the payment of benefits also when the habitual residence is in another country (Mimentza Martin 2011: 174). The insurance institutions can, however, recover the costs of their intervention towards the employer in case of absence of declaration and payment of contributions.[17]

[14] In case of permanent incapacity to work, however, most undocumented workers will not be covered as they will not be considered as employees under the Sickness Benefits Act and the Work and Income According to Labour Capacity Act (Kapuy 2011: 518).

[15] In case of permanent incapacity due to industrial accident, there is also an obligation under labour law to compensate the worker for the loss of salaries. Permanent incapacitation in case of illness or non-industrial accident is covered under the Social Security Law, involving exclusion of undocumented non-citizens. However, the *Besluit aanspraken bij beroepsziekten van niet op grond van de WAO of de Wet WIA verzekerden* provides for an exception in case of certain professional diseases, even if payment of benefits is made dependent on the proof of establishment in another country.

[16] Cour de Cassation, judgment of 4 May 2016, Case 15-12.237.

[17] §110 SGB VII.

The Spanish Tribunal Supremo, in its judgment of 9 June 2003, based its favourable interpretation of existing norms (ILO Convention 19 on Equality of Treatment (Accident Compensation) and Order of 1966 on the extension of the scope of social security) on the idea that 'a worker cannot be deprived of an element of protection which in our system of labour relations always has been inherent to the employment contract'. Therefore, the principle of automaticity of benefits and presumed registration with the social security system in case of industrial accidents should apply, even in case of nullity of the employment contract. As explained hereunder, those principles involve payment of benefits by the social security administration also in case of undeclared work, and repetition of the benefits from the employer by the administration.

Benefits in case of industrial accidents are thus an important exception to the exclusion of undocumented workers from social protection. This could be explained by the close historical links this form of worker protection has with the contract of employment. In the analysed cases, absence of work and/or residence authorisation does not invalidate the contract, or if it does, the effectiveness of most rights the employee has under the contract is not affected. Moreover, rooted in the traditional concept of objective liability of the employer for industrial accidents, the cost of that social insurance is generally fully borne by the employer, and it is less the community of nationals and authorised residents that bears the costs of redistribution. This is also expressed by the right to repetition that the state has towards employers whose undocumented workers are to be covered by state benefits. One could therefore discuss whether this system of social protection is to be grounded on principles at the basis of organised solidarity, or rather pertains to the scope of responsibility and liability from one contracting party to the other, even if the mechanisms of application of that private liability have been collectivised.

7.4 EMPLOYMENT-BASED SOCIAL INSURANCE SYSTEMS: EXCLUSIVE SOLIDARITY DESPITE RECIPROCITY

Undocumented workers are generally excluded from employment-based social insurance, whether as part of the general exclusion like in the Dutch[18] and French cases,[19] or through a more complex configuration in the German and

[18] As a complement to the Linkage Act, the different acts regulating the branches of employment-based social insurance (Health Care Act – Ziektewet, Unemployment Act – Werkloosheidswet, Work and Income according to Labour Capacity Act – Wet Wia – and the Work and Care Act – WAZO) all provide for the explicit exclusion of undocumented workers from the notion of employee under their application. Also, without authorised residence, non-nationals who are receiving benefits would see their right suspended, suspensions that would be lifted in case of a new authorisation or once residence has been established abroad in the EU/EEA or in a country with which a bilateral agreement has been concluded (Kapuy 2011: 482–483).

[19] Up to 2017, section L161-8 of the Social Security Code provided that in case of loss of conditions to be covered by a regime of social insurance (which the Council of State extended to the loss

Spanish cases. However, if undocumented workers are excluded from benefits, social contributions generally remain due by the employer for the period of unauthorised employment. The connection of those contributions with the principle of reciprocity as an important element at the basis of (and legitimisation of) redistribution of resources through solidarity allows us to question the coherence of the exclusion.

The German case is one of generally explicit exclusion from the right to perceive benefits. Undocumented workers are also excluded from unemployment benefits, due to their impossibility to be able to enter the labour market, one of the main conditions of the benefit. And considering healthcare, sickness benefits, and support in case of care needs, the inclusion of undocumented immigrants within the special healthcare and social assistance benefits of the Benefits for Asylum Seekers Act involves their exclusion from those social insurances.

As seen above, the Spanish case is one where access to social insurance benefits seems not to be necessarily prohibited to undocumented workers. However, a general condition for the access to benefits in the case of the occurrence of a social risk is that the worker be registered with the social security system, an administrative act that can only take place upon the communication by the employer of the hiring of the worker, which involves the communication of the authorisation to work in the case of non-nationals. However, in case of undeclared work, section 166.4 of the Basic Social Security Act provides that, with respect to benefits in case of unemployment, industrial accident, and healthcare benefits in case of maternity, common accident or common illness, workers will be presumed being registered by law if they fulfil the other conditions to receive those benefits. And because the payment of contributions is a responsibility that pertains to the employer, the lack thereof cannot be opposed to the worker by the social security administration. This construction has been extended to undocumented workers in the case of industrial accidents, as seen above, but the Tribunal Supremo refused to extend it to unemployment benefits. Claims to other benefits have not been brought before courts.

On the other hand, despite the exclusion from the reception of benefits, all cases provide for the obligation of the employer to pay the social contributions related to the period of (most probably) undeclared employment, based on the responsibility for the employer for their payment,[20] except in the case of The Netherlands,[21] were

of authorisation to work/reside), the right to sickness, maternity, invalidity, and benefits in case of decease would be maintained during a period determined by decree (one year in 1998). However, the provision was amended in 2017 and now excludes expressly undocumented workers from its application.

[20] France: section 115-6 Social Security Code. In Germany, this obligation is generally submitted to a prescription period of thirty years (Tangemann and Grote 2017).

[21] With some exceptions for the employer and in the case of social insurance not related to employment, like the basic pension insurance (Kapuy 2011: 490).

payment of an amount equivalent to unpaid contribution is legally conceptualised as a fine.

As seen above, the Spanish Tribunal Supremo has put the question of the obligation of payment of social contributions despite the unauthorised character of the employment in the middle of its legal reasoning for the recognition of some categories of social insurance benefits to undocumented workers.

The payment of contributions can be connected to the insurance logic behind earnings-substituting benefits. But it is also closely connected to the idea of reciprocity or the interdependency logic behind those forms of organised solidarity. Social contributions can be considered as a tax on the salary with the objective to finance specifically the benefits paid to the other members of the group of solidarity (in the future or at the time of payment) and involve therefore 'membership elements' (Spiegel et al. 2015: 11). Therefore, their payment is the fulfilment of the primary condition of reciprocity to be able to be part of the system.

In the four analysed cases, it is the employer who bears the responsibility to pay social contributions to the administration, both those that are detracted from the workers' salary in a legal sense and those the employer has the obligation to pay, and which are part of the salary as labour cost. And in case of irregular employment the employer will bear liability for the lack of payment. But it is important to conceptualise that liability as not related to the obligation of the employer to contribute to the system, but to the employer being the instrument through which contributions are collected, because the employer is the party to the employment contract with the most means. And because the liability of the employer in case of non-payment of contributions is thus a practical means guaranteeing that contributions will be recovered, the absence of their payment during the employment relationship should not exclude the fact that the undocumented worker contributed to the system through his or her employment, and as such fulfilled, at least to a certain extent, the condition of reciprocity at the basis of his or her membership of the community of solidarity.[22]

Under that perspective, the obligation to pay contributions in case of employment of undocumented workers is not to be construed as a penalty on the employer (or at least not exclusively), but as materialisation of the contribution of the worker to the social security system in parallel with his or her contribution to society and/or the economy through his or her activity. It could thus justify their right to access to benefits under the idea of reciprocity as legitimisation of social insurance systems. From that perspective, in those cases where undocumented workers would have

[22] The open clause of section 36.5 of the Spanish Act on Foreigners, granting access to benefits 'compatible' with the situation of the undocumented migrant should thus be read in this light.

worked sufficiently to build up rights to social benefits, the justification for excluding undocumented migrants from social protection brought forward by the EctHR under *Ponomaryovi* v. *Bulgaria* should not stand.[23]

7.5 SOCIAL ASSISTANCE AND OTHER FORMS OF PROTECTION OF THE RISK OF POVERTY: DIGNITY AND VULNERABILITY AS FACTORS OF INCLUSIVE SOLIDARITY

Legal discussion around access of undocumented migrants to social assistance and other subsidiary systems concerns less the principle of equality (except maybe in the German case, to a certain extent, as discussed in Section 7.2) than the existence of a positive obligation of the state to maintain the dignity of all those who find themselves on its territory, with special emphasis on the most vulnerable.

In France, the introduction in 1993 of the authorisations of residence and/or work as condition for access to social benefits also extended to social assistance. Exceptions were made for social assistance benefits for children (extended by jurisprudence to other forms of social aid for children, like school meals); social assistance in case of admission in a shelter for social reinsertion (victims of violence, toxicomania, ex-convicts, and so on); and some social assistance benefits for elderly people (linked with a duration of residence requirement). The Conseil Constitutionnel did not see any infringement of the right, enshrined in the Preamble to the Constitution, 'of any human being to obtain means for an acceptable existence from the community when, for reason of age, physical or mental state, or economic situation he or she is incapable to work'. According to the Conseil, it pertains to the legislative and executive powers to determine the modalities of exercise of that right. And the law restricting access to social assistance provided for the possibility to derogate from the principle of authorised residence by governmental decision. The Conseil recognised this element of proportionality as sufficient not to have to review the law.[24] It is, however, important to point out that the possibility for the government to provide for 'inclusive' exceptions has never been exercised, reinforcing the purely theoretical character of the proportionality test in this case.

Social assistance is also a domain where the open character of definitions in the Spanish case leaves important questions unresolved. Act 4/2000 provides that any non-national, independently of his or her administrative status, has the right to basic social services and benefits. Those concepts are, however, not further defined. Moreover, except for the so-called non-contributory benefits of the social security

[23] It is also important to consider that if undocumented workers do not formally contribute to the social security system, it is because the immigration regulation does not allow them to, despite providing effective work and (even modestly) contributing to the economy or providing valuable services to the community.

[24] Decision 93-325 DC of 13 August 1993, paras 125–127.

systems and the newly implemented Vital Minimum Income, to which undocumented immigrants have no access, social assistance is regulated at the regional level. But regional legislations do not necessarily define benefits or services under categories that would refer to the term 'basic'. The lack of clarity involves a certain leeway for regional laws to remain confusing on the subject and exclude undocumented immigrants for those schemes.

The explicit exclusion of undocumented immigrants to social assistance in the case of The Netherlands gave rise to several challenges based on international law. The Centrale Raad van Beroep recognised in 2010 that in certain circumstances, exclusion from social assistance benefits could violate Art. 8 of the ECHR (right to respect for private and family life, home, and correspondence). In the case at hand, it was recognised that an undocumented migrant with serious health problems that could not be remedied without shelter had a right to the latter in application of the positive obligation of the state to guarantee a person's dignity. However, so as not to 'contradict the migration policy of the government', this does not necessarily mean that those persons have access to social benefits in application of the general social assistance act (WWB, now Participation Act). It first must be ascertained if the positive obligation under Art. 8 ECHR can be assumed by the administration competent for immigration (which provides some benefits or services to some categories of immigrants, like victims of human trafficking or refugees).[25]

The question of exclusion of social assistance to undocumented migrants in The Netherlands was brought to the attention of the European Committee of Social Rights (ECSR) through a collective complaint brought by the Confederation of European Churches for violation of the European Social Charter for the lack of emergency assistance and shelter given to adult undocumented immigrants.

In its decision of 1 July 2014,[26] the ECSR reminded its decision in *FIDH* v. *France*, where it considered that, even though the first paragraph of the Appendix to the ESC apparently limits its scope to foreign nationals of contracting parties when they are residing or working lawfully in the concerned state, the limitation of the scope by the Appendix must be interpreted restrictively to preserve the essence of the rights of the Charter, and would not apply when rights are at stake that have to be considered a prerequisite of human dignity, a fundamental value or the core of positive European human rights law.[27] The ECSR also reminded that already in its 2009 Conclusions it found The Netherlands being in breach with

[25] Centrale Raad van Beroep, judgment of 19 April 2010.

[26] ECSR, Decision on the Merits of 1 July 2014, complaint number 90/2013.

[27] ECSR, Decision on the merits of 3 November 2004, complaint number 14/2003 (*International Federation of Human Rights Leagues* v. *France*). In the case at hand, the ECSR did not find a violation of article 13 of the Charter, as the French system of State Medical Aid (commented hereafter) provided a form of medical assistance to undocumented migrants, even if with imprecise concepts and difficulties of implementation. It found, however, a situation of non-conformity with article 17 as the same conclusions could not be attained when children, to which the UN Convention on the Rights of the Child applies, are concerned.

article 13-4 (right to social and medical assistance to nationals of other Parties to the Charter) and 31-2 (right to housing) of the ESC – because 'it has not been established that all persons without resources, whether or not legally present in The Netherlands, have a legally recognised right to the satisfaction of basic human material need (food, clothing, shelter) in situations of emergency'.[28] Moreover, the Committee considered that emergency assistance 'cannot be made conditional upon the willingness of the persons concerned to cooperate in the organisation of their own expulsion', decoupling thus the limited right to access to solidarity from its submission to immigration policy.

In a judgment of 26 November 2015, the Centrale Raad van Beroep followed only partially the decision of the ECSR. It acknowledged that Art. 3 and Art. 8 of the ECHR could impose, in specific circumstances, the obligation on a state to provide minimal assistance to undocumented immigrants, and that emergency assistance in the form of food and shelter should thus be given. However, it considered that this possibility already existed in the form of the existing shelters for asylum seekers. In the case at hand, the claimant had been offered continued shelter by the Immigration Administration once his authorisation had expired, but on the condition that he would cooperate to his return to his country of origin. The municipality had refused to give assistance under social assistance laws because of the existence of the latter alternative. The Court found that the obligation to cooperate to his return did not invalidate the legitimacy of that alternative (contrary to the position of the ECSR on the obligation to cooperate),[29] for which the refusal of the municipality was in accordance with the law.[30] In a judgment delivered on the same day,[31] the administrative section of the Council of State considered that the cooperation of an undocumented immigrant with his or her return as a condition for providing emergency shelter and assistance did not violate the obligation of the state under the ECHR,[32] provided that exceptions could be made in particular circumstances.[33]

[28] In a Recommendation of 19 January 2000, the Committee of Ministers of the Council of Europe adopted a Recommendation already on 19 January 2000 where it stated that the right to basic material needs 'should be open to all citizens and foreigners, whatever the latter's position under national rules on the status of foreigners'.

[29] The Court stated that the European Social Charter did not have direct applicability and that the decision of the ECSR, while authoritative, did not bind national courts.

[30] Subsequently, the applicant brought a complaint before the ECtHR, which in its Decision of 5 July 2016 (*Hunde* v. *The Netherlands*) acknowledged the decision of the ECSR, but refused to consider that the violation of the ECS in the case would automatically involve a violation of article 3 of the ECHR, and declared the application manifestly ill-founded, refusing to compare the situation to that in *M.S.S.* v. *Belgium and Greece*.

[31] And referred to by the Centrale Raad van Beroep, which shows the judicial cooperation between both Courts on the case.

[32] It also denied direct applicability of the ESC.

[33] It is important to point out that the concerned shelter facilities involve limitation of freedom of movement of their inhabitants, an element that reduces the incentives of undocumented migrants to claim emergency assistance, and that has not been discussed, neither by the ECSR nor by national jurisprudence.

After those decisions governmental negotiations have been slowly going on to develop a 'Bed, Bath and Bread' policy, which for the moment has included the pilot project 'Landelijke Vreemdelingenvoorziening', an agreement between the government and municipalities to develop the first shelters for undocumented immigrants. More than 40 per cent of the persons welcomed in those institutions ended receiving authorisations of residence after a certain time, despite not having authorised residence when they claimed the right to shelter and food (Mack et al. 2020). This shows again the complexity of the categorisation of undocumented immigrants as well as the lack of immutable character of their status, reinforcing the argument for more generous perspectives on their right to access solidarity systems.

The German case is also of particular interest, since the Federal Constitutional Court recognised for everyone the fundamental right to a benefit guaranteeing the minimum of existence arising out of the social state principle and the right to dignity in its 'Hartz IV' judgment of 2010. The object of the constitutional challenge was the system of social assistance benefits for employable persons (ALG II), discussed in Section 7.2.[34] The question soon arose if such right would also apply to foreigners without resources, including undocumented migrants. With its judgment of 2012 the Court declared the fundamental right to a minimum of existence applicable to all non-citizens falling under the scope of the Benefits for Asylum Seekers Act and that the level of benefits provided at that time involved a manifest violation of the right. The Court explicitly stated that

> Migration policy considerations to keep the benefits for asylum seekers and refugees low to avoid incentives for migratory movements due to a possible comparative high level of benefits, cannot justify a lowering of those benefits below the physical and socio-cultural subsistence level from the outset … The human dignity guaranteed in Section 1, Paragraph 1 of the Basic Law cannot be relativized for reasons of migration policy.[35]

According to some authors, section 1a of the Asylum Seekers' Benefits Act, which reduces the range of benefits guaranteeing the minimum of existence to undocumented migrants who act to impede their return to their home country to cover only food, housing and personal hygiene (excluding clothing, consumer goods and other daily needs), could be considered as violating the fundamental right (Kanalan 2018), reflecting the position of the ECSR on the unconditionality of social assistance for undocumented migrants.

[34] Concerning access of undocumented migrants to social assistance in Germany, next to the benefits of the Asylum Seekers' Act, it is also important to point out that, pursuant to section 2 of the Act, after an uninterrupted stay of eighteen months that would not have been influenced by a behaviour constituting an abuse of right, benefits will be paid in application of the XIIth Book of the Social Code (social assistance for non-employable persons). This means that a more 'generous', individualised approach, with benefits in cash, would be applied in cases of long-term stay in 'precarious' authorisation circumstances.

[35] Bundesverfassungsgericht, judgment of 18 July 2012 (1 BvL 10/10), para. 95.

When analysing social assistance or non-employment-related systems of social protection, it is more difficult to integrate the logic of contribution as expression of the idea of reciprocity to argue for inclusive solidarity, even if the logic of reciprocity is invading the logic of social assistance through its 'workfarisation' or its increasing conditionality (de le Court 2016; Hoop 2014). This does not mean that the rationale behind social assistance cannot relate to the idea of solidarity. In this case, the jurisprudence of the German Federal Constitutional Court on the right to a minimum existence is a strong example of legal recognition of the link between the human right and the fundamental value of dignity and the right of access to organised solidarity with only potential residual conditions of reciprocity for undocumented immigrants.

Another element that is present in those decisions making exceptions to the exclusion of undocumented workers is the vulnerability of the specific persons affected,[36] or the conceptualisation of undocumented migrants as a particularly vulnerable group (Krause 2008). The same idea is also expressed by the Inter-American Court of Human Rights in its advisory opinion oc-18/03 of 17 September 2003 on the Legal Condition and Rights of Undocumented Migrants. It has been the main argument for the ECSR to extend application of the European Social Charter to persons 'unlawfully present' on the territory of a contracting party, despite the wording of paragraph 1 of the Appendix. It also surrounds the justification of a more generous regime for children of undocumented migrants, under the influence of the UN Convention for the Rights of the Child.[37] This is an element of much relevance when considering the point of view of solidarity (Reshaur 1992: 728). One cannot deny that undocumented migrants are to be categorised as a particularly vulnerable group, and that this vulnerability is greatly increased by the lack of access to social rights on the one hand, and the difficulties to access them in those cases where they have a right in principle. One of the aspects of the latter problem is that contact with social protection institutions involves visibility and the consequent increase of chances to be expelled or be notified of the obligation to leave the country, above all given the obligation of those institutions to communicate irregularities to the immigration administration. To the extent such obligations can be conceptualised as covert obligations for undocumented migrants to cooperate with their return, they should be considered as highly suspicious under the right to housing or social assistance, as developed under the European Social Charter. This should also be considered when analysing data protection rights of undocumented migrants.

[36] Centrale Raad van Beroep, judgment of 19 April 2010, case 09-1082 WMO.

[37] See for example European Committee of Social Rights, *DIH* v. *The Netherlands*, 20 October 2009, and the subsequent decision of 21 September 2012 of the Hoge Raad der Nederlanden (highest cassation court in civil, criminal and tax matters).

7.6 HEALTHCARE: DIGNITY AND PUBLIC INTEREST AGAINST AUSTERITY

The case of healthcare seems to have been a more fertile terrain for inclusive solidarity, even if sometimes only circumscribed to emergency healthcare. Here the concept of dignity can be found to be a justification, however mixed with the necessity to protect the health of the public in general. On the other hand, the reasons accepted by jurisprudence to justify restrictions to access seem to focus more on the costs of healthcare, rather than the necessity to guarantee a 'coherent' immigration policy.

The Spanish case might be considered as an exception within the scope of this chapter. Section 3 of Act 16/2003 on the cohesion and quality of the National Health System provides explicitly that undocumented immigrants have the right to healthcare in the same conditions as Spanish citizens. This has, however, not always been the case. In 2012, the right to healthcare for undocumented workers had been restricted to urgent healthcare in case of serious illness or accident and assistance in case of pregnancy before or after childbirth, as well as healthcare for minors. The Tribunal Constitucional considered that these restrictions did not violate the constitutional duty to develop a healthcare system and to guarantee fundamental rights of foreigners where their dignity is affected.[38] By permitting access to healthcare in situations of emergency, the Act guaranteed interventions in those cases more closely connected with the right to health and the right to life, 'taking into account the objective of the law which is the preservation of the public health system taking into account the possibilities of the system in a moment of intense economic complication, respecting the proportionality principle as well as its international obligations'.[39]

In any case, the situation was reversed by the newly formed socialist government by urgent Decree-Law 7/2018 of 27 July, appealing, according to its preamble, to the special vulnerability of undocumented immigrants and the fact that international law recognises the right to health without discrimination based on the authorised character of the residence.

In the three other cases, special systems of access to healthcare for undocumented migrants have been created, with various degrees of generosity.

While since 1998, the absence of residence authorisation does not allow undocumented non-nationals to be included in Health Care Insurance under the Dutch Health Care Insurance Act (Zorgverzekeringswet), section 10 of the Dutch Act on Foreign Nationals provides an exception to the 'linkage principle' in case of

[38] Tribunal Constitutional, judgment 140/2016 of 21 July, legal ground no. 10.

[39] It is interesting to observe that the Court also cites the jurisprudence of the CJUE commenting on the 'need to protect the finances of the host Member State' when assessing the right of residence of non-economically active EU citizens for access to social benefits (Case C-308/14, 14 June 2016).

necessary medical care or for the protection of public health. The term 'necessary healthcare' is quite broadly defined under section 122a of the Health Insurance Act as care, covered by the Act (or the Long-term Care Act), which the provider (e.g., doctor, hospital) considers to be necessary (with the possibility for the government to exclude some interventions). However, even in those cases, costs are to be borne by the patient. But the Centraal Administratie Kantoor (CAK) covers 80 per cent of the costs of the intervention when those cannot be recovered from the patient (100 per cent for intervention related to pregnancy and childbirth). This means, however, that 20 per cent of the costs remain for the account of the undocumented immigrant, generally to be paid by way of payment plans (Hendriks and Toebes 2015). It has been detected however, that financial considerations might influence the interpretation by healthcare providers of the notion of necessary medical care, excluding access altogether to avoid the risk of non-payment (Hendriks and Toebes 2015; Nationale Ombudsman 2013; Commissie Medische Zorg voor (Dreigend) Uitgeprocedeerde Asielzoekers en Illegale Vreemdelingen 2007).

The different tier system of the German case is also present for healthcare. Undocumented migrants have access to healthcare under the conditions of the Benefits for Asylum Seekers Act. As such, they are not obliged to have healthcare insurance, like the rest of the population. Section 4 of the Benefits for Asylum Seekers Act provides for healthcare and medication, including dental care, necessary for recovery, improvement, or alleviation of 'acute illnesses or painful conditions' or for pregnant women, before and after childbirth. It is also important to point out that in case of admission to a hospital for urgent reasons, migrants are covered by the continued prohibition of disclosure of their personal data. Therefore, the general obligation of any administration providing social benefits to communicate situations of unauthorised residence to the immigration administration under section 87 of the Act on Residence (Aufenthaltsgesetz), does not apply.

The French case is known for having a specific healthcare system for undocumented immigrants, who are explicitly excluded from general social healthcare insurance. The system of State Medical Aid (Aide Médicale de l'État) is regulated by Section L251-1 of the Code for Social Action and Families. It provides an important range of healthcare benefits to those undocumented migrants with resources below a certain level, for a period of one year from the application. The Conseil Constitutionnel, in its already mentioned 1993 decision, considered that exclusion form general healthcare did not violate the right of all to the protection of their health contained in the Preamble to the Constitution, as the latter was guaranteed by the existence of this alternative system of access to healthcare.

The access to State Medical Aid has been further restricted in 2003 (introduction of a waiting period of three months of prior residence, except urgent medical aid) and 2019 (prior residence must have been unauthorised; application cannot be filed through social services anymore; possibility to subject non-urgent interventions to a waiting period of nine months). Both reforms were adopted in annual budgetary

laws in the name of the fight against abuses and the need to control costs. On the other hand, the 2019 reform was adopted in a context where almost half of the undocumented immigrants who need healthcare are not covered by the AME or by health insurance (Jusot et al. 2019) and was met with harsh criticism from a great number of healthcare organisations.[40] However, both reforms were unsuccessfully challenged before the Conseil Constitutionnel.

In the first case, the Conseil repeated its 1993 position on the existence of alternatives in case of urgent need to find no violation of the right of all to protection of their health. However, it assumed (without expressly stating it) that the restriction, introduced in a law regulating budgetary matters, was sufficiently connected to the objective of the law (financial considerations related to the necessity to curb costs),[41] accepting as such without reservation a legislative assumption of a highly subjective character (Michelet 2007: 85). In the second case, the Conseil Constitutionnel considered that the measures involved a conciliation between the right to health and the constitutional requirement of a good use of public money and the need to combat fraud in matters of social protection, which was not manifestly disproportionate.[42]

In those countries where the two-tier systems of healthcare (or the limitation to emergency healthcare) have been subjected to legal review, under the right to health, the restrictions were declared justified based on the combination of the arguments of cost control (or fighting abuse) and the existence itself of a two-tier system providing for a last-resource intervention.

However, those arguments (or at least the acceptance, without reservation, of those legislative assumptions under the proportionality principle) are highly questionable. No consideration was given by the concerned Courts to the fact that restricting access could contribute to possible degradation of the health of undocumented immigrants, which goes against elementary principles of public health. Moreover, the costs of treatment once medical interventions become urgent are higher than at the initial stages of an illness (Michelet 2007: 85).[43]

This can be illustrated by the dissenting opinion to the judgment of the Spanish Tribunal Constitucional on the matter, which saw no sufficient connection between the limitation of healthcare to a situation of emergency and the goal of the measure (preserving financial sustainability of the system). Excluding persons who in general are part of a particularly vulnerable collective and have more difficulties to pay private healthcare will inevitably lead to their need to receive

[40] Presse release of 31 October 2019, www.aides.org/communique/le-gouvernement-sapprete-degrader-la-sante-des-personnes-etrangeres-le-cri-dalarme-des.

[41] Conseil Constitutionnel, Decision 2003-488 DC of 29 December 2003, paras 18–20.

[42] Conseil Constitutionnel, Decision 2019-796 DC of 27 December 2019.

[43] A parallel reasoning can be found in the dissenting opinion to the 2016 decision of the Spanish Constitutional Court on the restriction of access to free public healthcare, mentioned just before.

(free) urgent public healthcare when their situation has degraded. In that light, the sole declaration of the legislator of the adverse effect of free public healthcare for undocumented immigrants on the sustainability of the system, without more concrete elements, cannot be accepted as sufficient justification,[44] above all because the 2012 modification is to be considered as a regressive measure in the meaning of the International Covenant on Economic, Cultural and Social Rights.

Finally, it should be mentioned that the availability of generalised access to free public healthcare has been used as a reason by the Spanish authorities not to proceed to a campaign of regularisation of undocumented migrants during the COVID crisis, contrary to what happened in Portugal and Italy,[45] where lack of access to healthcare (and the consequences for the spread of COVID) was the main reason behind those campaigns.[46] However, the Spanish experience shows that not only the access of vulnerable immigrants (undocumented or no) to healthcare is a condition for better control of the spread of the pandemic, but other elements of social protection, like the right to health at work or the right to housing, are important in that respect.

7.7 INSCRIBING SOLIDARITY WITH UNDOCUMENTED IMMIGRANTS: RECIPROCITY, DIGNITY AND VULNERABILITY AS BUILDING BLOCKS FOR INCLUSION

During the development of the post-war welfare state, residence has slowly taken the place of nationality as the element of definition of the community within which solidarity as redistribution of resources is organised (Isidro 2016: 106). This could be said as a movement in line with an idea of inclusive solidarity and centred around the extension of the principle of equal treatment between nationals and non-nationals, which, in the field of access to social security under the perspective of human rights law seems to have been affirmed in 1996 by the judgment of the ECtHR in *Gaygusuz* v. *Austria*. Therefore, one could say that social aspects of citizenship have been extended altogether with civil and political rights to non-citizens (lawfully) present in the territory. Social security rights that are strongly based on reciprocity as a source of solidarity, generally through social contributions, have been fully extended. According to Oosterlynck et al. (2015) this corresponds to the idea of organic solidarity. Some restrictions remain in terms of access to

[44] Interestingly, the dissenting opinion also reinforced its argument by stating that the 2012 modification was to be considered as a regressive measure in the meaning of the International Covenant on Economic, Cultural and Social Rights, and should thus have been subjected to closer scrutiny.

[45] In the latter case, regularisation was also driven to the necessity of declared work in essential sectors.

[46] Declaration of the Minister of Social Security and Immigration of 19 May 2020 before the Senate.

solidarity systems, like social assistance, which show fewer tangible elements of reciprocity. There, minimum length of residence is a criterion generally used, whether inscribed in social assistance laws or through conditioning the authorisation of residence to the prohibition to resort to it.

From a negative perspective, the latter restrictions are supposed to combat welfare tourism.[47] But from a positive perspective, they can be considered as translating the need to strengthen the links with the host community before accessing solidarity, reinforcing belonging to that community, reminding the idea of shared norms and values as a source of solidarity (Oosterlynck et al. 2015: 6) as well as building interdependency.[48] However, in most of the analysed cases, this move towards extending solidarity to foreign residents has been accompanied by the introduction of the category of authorised residence (or authorised work) as a new definition of the personal boundaries of solidarity within a national territory. A parallel can be found with what happened to the social protection rights of non-working EU citizens. While in the *Grzelczyk* case the CJUE granted access to social benefits decoupling social rights for EU citizens from the notion of authorised residence,[49] this initial jurisprudence has been restricted with the 'unreasonable burden test' and the 'real link/integration formula' (Thym 2015: 17) moving back towards a more communitarian approach to solidarity with other EU citizens (Schwiertz and Schwenken 2020).

However, this chapter shows that despite the principle that access to social solidarity systems is conditional on the obtention of a residence or work permit, and despite the general movement towards the orientation of social protection towards a tool at the service of immigration policy, exceptions remained or were built in at later stages, through political intervention or upon intervention of (international) courts. And important arguments behind those extensions are related to the different generally admitted rationales behind the construction of communities of solidarity.

The idea of reciprocity lies at the heart of legal debates around the extension of contribution-based social insurance towards undocumented workers, as shown in Section 7.4. The discussion of the right to social assistance and right to healthcare in Sections 7.5 and 7.6 has shown the potential of the principle of dignity, or the concept of protection of fundamental rights essential for the dignity of the person, to promote inclusive solidarity and challenge legally national restrictive policies.

The principle of dignity is also linked to the special vulnerability of undocumented migrants, as the latter intensifies the positive obligation of states for the

[47] Whether they are necessary or not for that purpose is another question.

[48] This is also the rationale developed by the CJUE to grant access of economically inactive EU citizens in host Member States to social benefits, even if the initial concept of 'close links with the Member State of residence' has been turned into practice into a mere condition of length of residence.

[49] Case C-184/99.

guarantee of the former. Adopting the point of view of vulnerability would also give us an additional justification for the inclusion of undocumented workers in insurance against industrial accidents. There is undoubtedly a higher susceptibility for migrant workers suffering industrial accidents, whatever the complex reasons behind that phenomenon. And vulnerability of employees as the weak party to the contract is also a justification behind maintenance of employment rights in case of employment of migrants without administrative authorisation.[50] It is also the vulnerability of Malian undocumented workers that led a French labour court to declare that those workers were victims of 'systemic discrimination' within which abusive acts of the employer were inscribed, the latter taking advantage of the lack of alternatives the workers had to provide for their basic needs. In the case at hand, the workers were not only discriminated against because of their race and/or nationality, but also because of their immigration status, which through its consequences reinforced the other forms of discrimination.[51]

This line of thought brings us also to the importance of intersectionality when speaking of the right to equal treatment of undocumented migrants in precarious administrative situations (Stasiulis et al. 2020). Recent studies show that the conditions for the delivery of authorisation to stay and/or work (and segmentation between categories of immigrants in general) create hierarchies among migrants based on gender, race/ethnicity, nationality, religion and class, rather than meritocratic factors in line with the objectives of immigration policy (Ellerman 2020).

Inscribing solidarity within the definition of the borders of organised solidarity systems highlights the vulnerability of undocumented immigrants, the contradictions between their exclusion from social protection systems and the logic of membership of those same systems, as well as the multiple discriminations to which undocumented migrants are subjected. All those elements would support the requirement of a higher level of scrutiny on the part of the Courts under the equality framework (Da Lomba 2014). As pointed out by some authors, when one considers the disputable character of the justifications put forward by the legislative power in the construction of exclusive solidarity systems, one cannot but wonder at the lightness with which Courts reviewing that legislation take those highly subjective reasonings for granted (Isidro 2016; Michelet 2007). In a context where there seems to be a gap between scientific findings and policy making (Carrera and Merlino 2009) the real extent of the contribution of social benefits or inclusion in social insurance to those situations is widely discussed and far from being obvious. It has been argued that social protection is a minor factor in the choice of country to

[50] Generally, in combination with the fact that legislation conceptualises the obligation of work authorisation for a valid employment contract as directed at the employer rather than the worker, see, for The Netherlands, Conclusions of the Advocate General to the judgment of 27 March 1981 of the Hoge Raad der Nederlanden, nr. 11698 (El Araichi/Roemo); for France, see Doroy (1996); for Germany, see Becker-Schaffner (1977).

[51] Conseil de Prud'hommes de Paris, 17 December 2019, no. RG F 17/10051.

which immigrate, while the level of employment and the presence of a diaspora capable of bringing an informal network of assistance are much more important (Giulietti and Kahanec 2013). Moreover, the supposed pressure of immigration on social expenses is far from being proved (Chojnicki and Ragot 2016) and the effects on the labour market are too complex to lead to a downward pressure on salaries or an increase in unemployment (Ortega and Peri 2009).

In this context, it is also important to consider that immigration seems not to be a strong determining factor explaining loss of support for a redistributive Welfare State (Brady and Finnigan 2014; Mau and Burkhardt 2009) and its potential to undermine the foundation of solidarity should be downplayed, weakening the case for exclusive solidarity.

Reciprocity, dignity and vulnerability are important elements explaining and legitimising solidarity. They are also connected to higher standards in terms of fundamental rights, in a context where symbolic and emotional aspects acquire great importance in the political debates on the subject. Alesino et al. (2019) for example find that 'when it comes to immigration, salience and narratives shape people's views more deeply than hard facts'. Inscribing solidarity within the equality framework and the positive obligations of the state to guarantee dignity for all would thus without doubt create possibilities for a reappraisal by courts and other legal actors of the liberal contradiction between universalism of rights and particularism in access to resources, shifting the balance towards universalism and inclusive solidarity.

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