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Lucia Della Torre

State's Discretion and the Challenge of Irregular Migration – the Example of Permanent Regularization Practices in Spain and Switzerland

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Lucia Della Torre
(University of Lucerne)

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nccr – on the move, University of Neuchatel, Faubourg de l'Hôpital 106, 2000 Neuchâtel, Switzerland
Contact for the Working Paper Series: info@nccr-onthemove.ch

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Abstract

In the heated debate around irregular migration, the so-called regularization measures represent one of the main bones of contention – presented by some as the only possible solution to irregular presences and contested by others as rewards for illicit behaviour. Despite their many differences, such measures have a common core – discretion. They are, in fact, gracious concessions of the State to those who, by entering and staying within its borders in breach of its laws, have challenged its sovereignty. The present paper will use an operational definition of discretion to analyse two European regularization mechanisms that, because of their manifest similarities as well as their different empirical outcomes, lend themselves particularly well to comparison: the Swiss "cas de rigueur" procedure and the Spanish "arraigo". The juxtaposition between the two schemes will be used to investigate how the powers of the State decline, through discretion, different answers to the challenge posed to national immigration models by irregular entries and stays.

Keywords

Irregular migration, Regularization Practices, State Discretion, Switzerland, Spain, Comparative Research

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Contacts

lucia.dellatorre@unilu.ch

University of Lucerne, Faculty of Law
Frohburgstrasse 3, Room INS-3
6002 Lucerne

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1. Introduction – The challenge of irregular migration

The size of the foreign population residing in Europe has steadily increased over the past 50 years: in the 1960s, the share of immigrants was approximately 3.5%; by 2013, it had reached a peak of 52.3 million, representing 10.3% of the total population[1]. Whilst these numbers are only of the so-called "regular" migrants, it is safe to assume that the share of irregular presences is not negligible either: according to the Clandestino Project, there were, in 2008, between 1.9 million and 3.8 million third country nationals living within the European borders without the required papers[2]. The European response to the increase of (irregular) immigration to the Member States has been firm, and different normative provisions have been adopted to fight against irregular movements of people across borders[3]. Member States as well have, in the meantime, reinforced their measures of protection of both external and internal borders[4] and toughened the tone of their anti-immigration campaigns and discourses[5]. The reason for such reactions is clear: if migration represents, generally speaking, a "challenge to the Nation State"[6], all the more so can be said about irregular migration: those who enter and take residence within the State in breach of its migration provisions openly defy its control over its borders and its population, with the risk of increasing social discontent and ultimately creating political instability.

1 S. de la Rica, A. Giltz, F. Ortega, *Immigration in Europe: Trends, Policies and Empirical Evidence*, IZA Papers, 2013, p. 8, available on: http://ftp.iza.org/dp7778.pdf

2 European Commission, *Clandestino Project, Final Report,* 2009, p. 12, available at: http://www.gla.ac.uk/media/media_147171_en.pdf

3 "The global approach to migration adopted by the European Union includes, as one of its main aims, the fight against irregular migration […] the Community employs external measures (border management, cooperation with third countries, use of technologies, carrier's sanctions) […] in its fight against irregular migration", European Commission, *Clandestino Project*, p. 14. Amongst the normative measures adopted: Directive 2001/51, so-called "Carriers' Sanctions Directive"; Directive 2002/90/EC, establishing a common definition of the offence of facilitation of unauthorised entry, transit and residence, and Framework Decision 2002/946/JHA, reinforcing the penal framework to prevent this crime by setting out minimum rules sanctions – together known as Facilitators' Package; Council Regulation no. 2007/2004, establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex); Directive 2008/15, so-called "Return Directive".

4 Member States' external border controls have diminished over the past few years due to the creation of the common Schengen space. However, recent events such as the terrorist threat in France and the "refugee crisis" of last summer have pushed some of the Members to reintroduce, or at least to advocate for a reintroduction, of such controls as well. Internal border control takes place within state territory and can be divided into two different subtypes: the first type is aimed at excluding illegally residing or undocumented immigrants from the welfare state's key institutions, such as the formal labour market, social security benefits, public education, the formal housing market, and health care. The second type pertains to all practices aimed at tracing and expelling irregular immigrants who have settled in the state territory. On the concept of "internal borders", see, for instance, D. Vogel, *Migration Control in Germany and the United States*, International Migration Review, 34, 2, 2000 pp. 390-422.

5 According to the *Clandestino Project*, «the discourse on irregular migration is highly politicized […] common European themes addressing the scope of irregular migration include 1) number games, 2) threat and criminalization, 3) marginalization and vulnerability«, p. 114/115.

6 C. Joppke, *Challenge to the Nation-State*, Oxford University Press, Oxford, 1998.

Yet, at the same time, and in parallel, other measures have been taken along the years to "adjust" to the phenomenon of irregular presences within national borders. These measures are sometimes taken very openly but most of the times in the most discrete way possible. And while some scholars have explained this "gap" between the policy goals officially announced and pursued and the final results[7], noting that States are losing control of their sovereignty in the face of migrations and of the challenges they bring with them[8], other interpretations suggest that such gaps between the official narrative and implementation practice may be, if not directly desired, in any case necessary in order to allow the State to pursue purposes that would otherwise be apparently irreconcilable[9].

The economic immigration case can be specifically placed within this context. While some recent studies confirm that from an economic, social and demographic point of view, Europe will continue to need foreign labour[10], the public opinion towards the so-called "economic migrants" (who are often perceived as threatening to the Western way of life and, in general, a source of social and political instability[11]) is increasingly hostile. In the midst of the tension between these two opposing

[7] W. Cornelius, P. Martin, J. Hollifield (eds), *Controlling Immigration*, Stanford University Press, Stanford, 1993. At p. 3: «The gap between the goals of national immigration policy and the actual results of policies in this area (policy outcome) is growing wider in all major industrialized democracies». According to C. Joppke, *Why liberal States Accept unwanted immigration,* World Politics, 1998, 50, pp. 266-293: «The phenomenon of unwanted immigration reflects the gap between restrictionist policy goals and expansionist outcomes».

[8] «For globalists, migration is seen as a case of nation-states losing control. Some scholars have argued that the capacity of States to control unwanted migration is declining, because they have been unable to prevent the settlement of unsolicited migrants such as family members of foreign workers, asylum seekers, and undocumented aliens» V. Guiraudon, G. Lahav, *A reappraisal of the State Sovereignty Debate. The case of migration control*, Comparative Political Studies, 2000, 33, pp. 163-185.

[9] «Recent studies on asylum policy and border control suggest an increasing will on the part of receiving countries to stem unsolicited migration flows» V. Guiraudon, G. Lahav, *A reappraisal of the State Sovereignty Debate,* cit., p. 164. The same authors argue that: «T[he] multifaceted devolution of migration policy has not resulted in states losing control over migration. Rather, it shows the adaptiveness of agencies within the central state apparatus in charge of migration control and their political allies. By sharing competence, states may have ceded exclusive autonomy yet they have done so to meet national policy goals, regaining sovereignty in another sense: capabilities to rule».

[10] I. Martin et al., *Exploring new avenues for legislation for labour migration to the European Union*, Study for the LIBE Committee, September 2015, available at http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536452/IPOL_STU(2015)536452_EN.pdf: «There are signs of an impending demographic crisis in Europe. Beyond political debate, this emerges clearly from the consolidated demographic trends, both in terms of decreasing fertility and in terms of population aging […] This is no doubt one of the key strategic questions for the future of Europe as a whole, its growth and well-being: the growing divergence between the economic force of Europe and its demographic underpinnings. This points clearly to a need for international labour migration in the coming decades», p. 14.

[11] See again the feasibility study for the LIBE committee, p. 58: «Regardless of technical analysis and policy debate on the need for international labour migration to fill the labour and skills gaps in the EU's labour markets, immigration has taken centre stage in the political debate in many European countries. It already features prominently in the political platforms of some political parties, including some mainstream ones (in the UK and France, for instance). This public debate is based largely on (often wrong) perceptions on the number, the profile and the integration of immigrants, rather than on objective facts. Generally, public debate on immigration is dominated by a series of stereotypes which tend to misrepresent the phenomenon and its impact (Fargues 2014). This makes migration policy reform, both at national and EU level, politically

forces, a disconnect originates between official policies, often verbally aggressive and bombastic, conceived to discourage potential arrivals but especially to reassure the public opinion and, on the other hand, solutions that, often concealed, are put in place to allow the system sufficient flexibility to accommodate work energies and forces that are necessary to the country's economy.

Regularization procedures, which have been used extensively – both geographically and chronologically – at least until the economic breakdown of 2008, are one good example of this dichotomy. Over the past 15 years, numerous studies have been carried out at different levels (regional, national and supranational)[12] to investigate, categorize and explain such measures, which, despite all their differences, have the same strong element in common: the need to "fill the gap" between ideal immigration models and the stark reality, made apparent by the presence, within national borders, of irregular migrants.

1.1. Regularization processes

How could such a scope be reached used to be a matter for very heated discussions, the options mainly polarizing around two different possibilities: general normalization measures (also known as regularization programmes, or amnesties) or regularization mechanisms. The former are one-shot measures directed towards large groups of people, whilst the latter work on a rolling, case-by-case basis[13].

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very difficult. The increasing importance of this issue becomes evident in the Spring 2015 Standard Eurobarometer (released 31 July 2015). For the first time, the most frequent issue cited by European citizens as their main concern was immigration (with 38% citing it, against 24% in Autumn 2014), ahead of 27% citing the economic situation, which has been the main concern of European citizens over the last few years, and 24% citing unemployment. Immigration is the most frequently cited concern in 20 Member States, reaching peaks in Malta (65%) and Germany (55%)». As per the different perception towards "refugees" (in the broad sense) and "economic migrants", see Prof T. Hatton's presentation, *Refugees and asylum seekers, the crisis in Europe and the future of policy*, at the IMI (International Migration Institute) 10th year Celebratory Conference, Oxford, UK, 13-15 January 2016.

[12] Besides the already mentioned Clandestino Project, see, amongst the studies commissioned at a supranational level: Council of Europe Parliamentary Assembly - J. Greenway, *Regularisation programmes for irregular migrants,* 2007, available at: http://www.unhcr.org/4b9fac519.pdf; ICMPD, *Regine – Regularisations in Europe. Final Report,* Vienna, Austria, 2009 available at: http://ec.europa.eu/home-affairs/doc_centre/immigration/docs/studies/regine_report_january_2009_en.pdf. See also, P. De Bruycker, (ed.) *Les regularisations des étrangers illégaux dans l'Union Européenne/Regularisations of illegal immigrants the European Union*, Bruyant, Bruxelles, 2000; A. Levinson, *The Regularisation of Unauthorized Migrants: Literature Survey and Country Case Studies,* Centre on Migration, Policy and Society, Oxford, 2005, available at: https://www.compas.ox.ac.uk/media/ER-2005-Regularisation_Unauthorized_Literature.pdf; D. Papademetriou, D., *The regularization option in managing illegal migration more effectively: a Comparative Perspective*, MPI policy brief, 2005, 4 available at: http://www.migrationpolicy.org/research/regularization-option-managing-illegal-migration-more-effectively-comparative-perspective

[13] «Although there exists a wide range of policies across Member States for granting a regularised status, two broad and fairly distinct procedures can be identified for this purpose. For these, we employ the terminology of "programmes" and "mechanisms" - the former indicating a time-limited procedure (frequently, but not necessarily, involving a large number of applicants) and the latter indicating a more

The criteria on which the regularization is carried out are an important element for distinguishing amongst different regularisation processes. In this sense, a separation can be drawn between the so-called *fait accompli* measures and the protection measures. *Fait accompli* procedures «aim to recognise the presence of those persons who have been illegally in the country since a certain date […] the criteria used to decide who should be regularised during these processes are largely of a geographic (presence in the country at a given moment rather than over a certain period of time) and economic nature»[14]. In the case of protection measures, the focus is rather on the risk the person may run into if removed from the host country. Such risk can be caused either by the situation the person would find upon returning to his country of origin or by the amount of difficulty and stress it would cause the claimant to be separated from the situation he is living in when his application is considered. Elements such as the extent of family or societal ties or the state of the applicant's health can, in this case, come into account. *Fait accompli* measures tend to be associated with one-shot collective measures, because the criteria that have to be taken into consideration are, as anticipated, somewhat clearer and more objective[15].

Over the past few years, however, the popularity of general regularization programs – already bitterly contested by some European Member States – has faded significantly. The impact such programs can have on the EU area as a whole[16] and the general attitude towards the increase of migration fluxes and economic stagnation have cause general amnesties to all but disappear from European Governments' political agendas[17]. Permanent and individual regularization mechanisms,

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open-ended policy that typically involves individual application and, in most cases, a smaller number of applicants», ICMPD, *Regine*, cit., p. 6.

[14] J. Apap, P. De Bruycker, C. Schmitter, *Regularisations of Illegal Aliens in the European Union. Summary Report of a Comparative Study*, European Journal of Migration and Law, 2, 2000, pp. 263 - 308.

[15] This has not prevented some States, however, from carrying out one-shot collective measures based mostly on humanitarian or protection considerations. See, for instance: «Regularizing on humanitarian grounds (Belgium, Denmark, Finland, Luxembourg, the Netherlands, Sweden) – The main common characteristic of this group of countries is that regularisation is granted primarily on humanitarian grounds; overall, regularisation is closely connected with the asylum system and, in particular, with subsidiary and temporary protection. Other than Finland, all countries in this group have had small to medium-scale regularisation programmes in the last decade, and all but the Netherlands have mechanisms», ICMPD, *Regine*, cit., p. 40.

[16] In this sense, see, for instance: C. Finotelli, J. Arango, *Regularisation of unauthorised immigrants in Italy and Spain: determinants and effects,* Documents d'Anàlisi Geogràfica, 57, 3, 2011, pp. 495-515: «Some European countries clearly withdrew from regularisations in other Member States. After the 2002 Italian regularisation, representatives of certain Members States attempted to exclude regularised immigrants from the categories encompassed by the European directive on long-term residents from third countries. Furthermore, in 2005, both the German and Dutch governments sharply criticised the decision by the Spanish government to carry out a mass regularisation of irregular immigrants. The same government was also blamed for not having informed its fellow EU Member States about the process in an adequate time frame. In particular, German and Dutch criticism was fuelled by a widespread fear that regularised immigrants in Spain would invade other EU Member States, attracted by their generous welfare systems».

[17] At a European level, a shift is clear from the quite "open" position represented by the Council of Europe (CoE) Assembly, Regularisation programmes for irregular migrants, Doc 11350, 6 July 2007, available at: http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc07/edoc11350.htm, according to which Member States should «avoid having large numbers of persons living in an irregular situation in their countries. If it is not possible to return them, member states should consider the option of

on the other hand, have not disappeared. Far from it, they can be found scattered in many European States, even if under different shapes and forms and with different characteristics. However, they mostly share one important common feature: rolling basis individual regularization mechanisms «leave a fairly large margin for discretion in the hands of the appropriate authority»[18]. This comes, first of all, from the very structure of such measures. Unlike regularization procedures, which generally address a broad population and are therefore more thoroughly monitored, case-by-case regularizations are implemented through an individual interaction between the applicant and the administrative authority that has to apply the appropriate normative framework, which can sometimes lead to a weaker protection of the claimant's position. Secondly, while general amnesties tend to be based on quite objective requirements, regularization mechanisms rely upon more-flexible criteria, which can be more or less specific, more or less official, more or less changeable.

Despite all their differences, regularization mechanisms seem to share a common core element: discretion. It is here that one's investigation into regularization mechanisms may seem to have come to a stop: etymologically, in fact, discretion is a judgement, one that pertains exclusively to the decision maker, and it is, consequently, personal, individual and unique and thus impossible to compare. For that reason, when it comes to the discretion of different powers of the State (the public administration, for instance, or the judiciary), such uniqueness may seem to prevent any further comparison between one way of implementing these programs and another. Yet, it is also possible to approach the problem from another angle, using discretion not as an obstacle preventing further investigation but rather as a compass to investigate how, in the folders of official immigration regimes, different answers to irregular migration can be shaped by different interactions amongst a State's powers.

2. Discretion as compass

«Legal philosophers have been most concerned with clarifying the concept of discretion and exploring its relationship with rules and the extent to which rules authorize discretionary behaviour»[19]. In such research, discretion has often been seen as the very opposite of rules, as the blank space left when rules are taken away. This has in turn facilitated the perception of discretion as the de-negation of rules and of what is generally associated with them: equality of treatment, foreseeability of results, protection in Court, and so forth. In this sense, many legal writings advocate for a significant restriction of discretionary powers, both at the judicial and the

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regularising their situation» to the much stricter one of the European Commission that, in 2008, argued that «indiscriminate large-scale mass regularisations of immigrants in an illegal situation do not constitute a lasting and effective tool for migration management and should be prevented», *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Common Immigration Policy for Europe; Principles, actions, and tools*, Com (2008) 394/4 p. 11.

[18] J. Apap, P. De Bruycker, C. Schmitter, *Regularisation of Illegal Aliens in the European Union*, cit., p. 267.

[19] K. Hawkins, *The uses of legal discretion: Perspectives from Law and Social Science*, in K. Hawkins (ed.), The uses of discretion, Clarendon Press, Oxford, 1992, p. 13.

administration level: «proponents of the extravagant version of the rule of law seek to eliminate as much discretion as possible from the legal sphere. Beyond this, they urge the need to bring such discretion, as it is reluctantly determined to be necessary within the legal umbrella, by regulating it by means of general rules and standards and by subjecting its exercise to legal scrutiny»[20].

However, it has been demonstrated, on the one hand, that discretion is much less flexible and broad than what is generally imagined by legal scholars. As social sciences studies testify, the amount of sociological, anthropological and psychological constraints that impend upon single decision makers are so many, so varied and so powerful as to influence and re-shape the very idea of discretion as unlimited and (often) arbitrary, quite ironically bringing again the notion of "rules" within the very concept of "discretion"[21]. On the other hand, it has been accepted that «discretion is a central and inevitable part of the legal order. It is central to law because contemporary legal systems have come increasingly to rely on express grants of authority to legal and administrative officials to attain broad legislative purposes. It is inevitable because the translation of rule into action, the process by which abstraction becomes actuality, involves people in interpretation and choice»[22].

One of the legal scholars who has dedicated the most attention to discretion is Dennis Galligan, who, trying to overcome the traditional diffidence of the legal scholars for discretion on the one hand and to bring the contribution of the social sciences within the analysis on the other, has suggested that «discretionary power is based around […] two variables: the scope for assessment and judgment left open to the decision-maker by the terms of his authority, and the surrounding attitudes of officials as to how the issues arising are to be resolved»[23]. The first element of the definition, the decision maker's own margin of manoeuvre, is further broken down according to the three main elements that can constitute a bureaucratic decision, namely, the finding of fact, the settling of the standards, and the application of the standards to the facts. It is found, in this respect, that «discretion is more central [where] judgments and assessments have to be made *as to the standards themselves which explain and justify a decision*»[24]. Within such conceptual space, however, different "degrees" of discretion can occur: «at the one extreme, standards may be drawn with such clarity and precision that whatever element of judgment is involved would hardly be considered to amount to discretion, while in other cases, the standards may be so open in meaning and require such a substantial exercise of assessment and judgment as to make them discretionary in a very real sense»[25]. Discretion, according to this categorization, is particularly strong when it allows the official to

[20] L. Carlile QC, S. Macdonald, *The Criminalisation of Terrorist's On Line Preparatory Acts*, in T.M. Chen, L. Jarvis, S. Macdonald (eds.), Cyberterrorism, Springer, London, 2014, pp. 155 - 173.

[21] «Finally, it is mistaken to assume that there is a neat dichotomy between rules and discretion. In fact, the distinction is heavily implicated in the interpretation and application of rules, and rules enter the exercise of discretion», L. Carlile QC, S. Macdonald, *The Criminalisation of Terrorist's On Line Preparatory Acts,* cit., p. 168.

[22] K. Hawkins, *The uses of legal discretion*, cit., p. 12.

[23] D. J. Gallighan, *Discretionary Powers*, Oxford University Press, Oxford, 1990, p. 23.

[24] D.J. Gallighan, *Discretionary Powers*, cit., p. 9.

[25] D. J. Gallighan, *Discretionary Powers*, cit., p. 9.

decide the specific *outcome* of a bureaucratic procedure, because, in this case, it yields a final decision, i.e., a decision that impacts not just the sole sphere of the official's range of action but also someone else's specific position and interests[26].

The second element, on the other hand, relates to the "institutional arrangements", i.e., the attitudes officials have towards the exercise of power[27]. What is relevant in this second aspect is, first of all, the way the individual official perceives his own power and his own function. Here, considerations regarding «the internal point of view of the officials themselves and, thus, the way in which they perceive their task» are in order. Such an evaluation[28], however, needs to be coupled with a consideration of «the relationship between sets of institutions, especially between the superior courts and other institutions, where the former have the authority to scrutinize the decisions of the latter»[29]. Therefore, if the two components of this operational definition of discretion are brought together, it follows that the broader the normative standards and the more retained the judicial scrutiny, the larger the official's margin of manoeuvre will be.

The proposed definition of discretion relies on the ideas of "progression" and dynamism. On the one hand, it thus avoids the dichotomy, often present within the legal thinking, between rules and their absence, allowing one to see that discretion is actually present and operating within the rules themselves. What can vary is its intensity, which in turn depends on the structure of the norm and on the use made of it by the decision maker[30]. On the other hand, such definition clarifies how discretion cannot be conceived as something completely autonomous and auto-referential but rather as something dynamic, depending on the interaction with the different powers of the State, the judicial in particular. The two main elements this interpretation of discretion takes into account are,

[26] «[Discretion in its clearest and most central sense occurs in respect of Z, where the official is required to do, or to refrain from doing, some action, or where there are various ways of performing a task, and in deciding how or whether to act, the official has to determine for himself the reasons and therefore the standards which are to guide his decision. Discretion in this sense occurs in an unlimited variety of situations, such as whether to grant bail or parole; whether to make a welfare payment and, if so, how much; selecting a site for a new road; or excluding a piece of evidence. The reason[s] for thinking of those situations as discretionary in its real, strong or central sense [is that] the discretionary decision pertains to a final action (to grant bail) rather than being merely one step or element in the course of a decision (what does XY mean)?», D.J. Gallighan, *Discretionary Powers*, cit., p. 9.

[27] D.J. Gallighan, *Discretionary Powers,* cit., p. 12.

[28] To which we will not dedicate further attention, as it brings in considerations pertaining more to the social sciences and their studies of decision makers and decision processes.

[29] D. J. Gallighan, *Discretionary Powers*, cit., p. 13.

[30] «We can now see how these two variables interact; the first suggests that discretion is a function of the absence or relative absence of binding standards, while the second suggests that the attitudes of officials will be an important consideration in classifying powers, or elements of powers, as discretionary. In other words an analysis of the context in which decisions are made will reveal the extent to which there are elements of choice and assessment in creating, ranking, or interpreting standards; discretion in one sense refers to those elements of choice. However, in order to assess the real as well as the legal significance of these elements, or to make distinctions between them, the officials' attitudes towards them must be taken into account. It is only when there is a significant freedom of choice in the officials, and when that choice is recognized and respected by the courts or other authoritative body, that we may talk of a reasonably discrete notion of discretionary power», P.J. Gallighan, *Discretionary Powers*, cit., p. 14.

on the one hand, the structure of the norm and the decision maker's perception of it, and, on the other, the response of the judiciary power to its enactment by the administration. By focusing on these clearly distinguishable components, it is possible to take into account all the different actors that participate in the development and enactment of a regularization mechanism. It thus represents a good operational compass to be used in the investigation of the complex relationship that exists between a State's immigration normative framework and its practical implementation at the hands of the Public Administration and the judiciary.

3. Presentation of the cases

As anticipated, rolling or permanent regularization mechanisms have, over the years, become part, more or less overtly, of many European States' practices and policies towards irregular migration. However, given the absence of any specific guidance at a European level on how to proceed in such matters, States are left with total freedom as to whether, how and when to enact any kind of regularization practice, which in turn leads to many differences between the various models used at a national level. A broad overview of the mechanisms in place in the western part of the EU space nonetheless allows one to spot two cases that, despite the very different backgrounds and contexts of the countries enacting them, share a significant common features: reference is made to the Swiss mechanism of "*cas de rigueur"* (hardship case), on the one hand and to the Spanish mechanism of the "*arraigo"* (rootedness) on the other.

At a formal level, similarities are first of all given by the fact that both measures are prescribed in national laws, the Swiss Law on Foreigners, in effect since 1st January 2008, and the Spanish General Law on Foreigners, n. 4/2000. This trait sets the two cases apart from many of their European counterparts. In France, for instance, there exists a policy of permanent regularisation for economic migrants, but this is carried out mostly at the level of administrative circulars, or memoranda[31]. Secondly, both measures grant significant power and influence to the local authorities, who have the first (and often most important) say on the application presented by the

[31] The circular of 28 November 2012, the so-called Circulaire Valls, replaced the growing contradictory body of administrative memoranda and other documents related to the exceptional admission of third country nationals based on art. L 313-11 co 9, L313-14 and L313.15 CESEDA (Code de l'entrée et du séjour des étrangers et du droit d'asile). The Circular in force addresses both regularization through work and regularization for reasons of family and private life. As per the latter, 4 categories are specifically considered: a) parents of children at school; b) spouses of regularly residing third country nationals; c) minors reaching the age of 18; and d) admission on humanitarian grounds. As per regularization through work: a) third country nationals who are subject to bilateral agreements and seasonal workers are exempted; b) at least five years of stay in France; c) evidence of 8 months employment throughout the past 24 months or 30 months employment over the last five years; d) pledge to recruit or draft contract has to be provided; and e) the employer has to provide remuneration comparable to the salary of nationals. The use of circulaires in the practice related to the regularization of Sans-Papiers, the broad administrative discretion enjoyed by the local authorities who have to address the application, and the very limited judicial overview of the procedure have all been criticized by legal scholars and by the associations assisting irregular migrants. See, for instance: Gisti, La circulaire Valls du 28 novembre 2012 – analyse et mode d'emploi, accessible at http://www.gisti.org/spip.php?article3062

irregular migrant[32]. Thirdly, whilst other countries such as the United Kingdom require an extremely long previous stay in the country in order for the regularization request to be submitted (20 years), the Spanish mechanism is much less strict, and the Swiss one is much less specific than that.

Interesting similarities can also be spotted at a more substantial level, i.e., with reference to the requirements to be complied with when applying for regularization. As anticipated, permanent and individual regularisation mechanisms tend to be based more on protection than on economic/temporal considerations. In this sense, at least taking their legal denomination into account, both the Spanish case and the Swiss case would seem to fit this very broad categorization: the Spanish mechanism is "Leave to remain for exceptional circumstances"[33], and the Swiss one is "[leave to remain for] cases of exceptional gravity". In both cases, there is an emphasis on the personal situation of the migrant and, coherently with the categorization recalled above, both schemes place a significant weight on the connections and links between the irregular migrant and the hosting society. Yet, at the same time, both cases seem to slightly drift away from this initial configuration in at least two ways. First of all, both specifically avoid targeting people coming from the asylum system: in the Swiss case, the exclusivity of the venue of art. 30 co I, lett b), which aims at (even if not only) Sans-Papiers[34], has been stated on multiple occasions. People who have entered the asylum system have other venues to try, and pursue a regularization of their position[35]. In Spain, a simple survey of the necessary requirements for the application confirms that the mechanism is open to any irregular migrant, irrespective of previous claims for international protection. In both cases, on the other hand, the possession of a job (or at least the prospect thereof) is an important element of evaluation, as well as the amount of time that has already been spent in the country. These requirements seem to bring both processes closer to "fait accompli" regularizations, tools that are generally used to deal with economic migration.

A closer look at both mechanisms should now allow us to investigate how far these similarities really go.

3.1 Switzerland: Background

[32] According to A. Sabater, A. Domingo, *A New Immigration Regularization Policy: the settlement Program in Spain,* International Migration Review, 46, I, 2012, pp. 191-216, «[the "*arraigo"* procedure] decentralized Government's strategy toward immigration from central to regional and local-level administrations, thus giving more emphasis on proximity in the policy decision-making process», p. 215.

[33] *Residencia temporal por circunstancias excepcionales por arraigo.*

[34] The provision of art. 30, co. I lett. B obviously relates to the so-called "Sans-Papiers", but not only. Other categories of people who can benefit from a permit of "exceptional circumstances" are listed in artt. from 29 to 30a of the Ordinance and include: foreigner children of Swiss citizens who cannot rely on family reunion provisions; former Swiss nationals who have been released from Swiss citizenship; and young Sans-Papiers who want to complete a professional apprenticeship.

[35] TAF, B 2009/189, as quoted in D. Efionay-Mäder, *Visage des Sans-Papiers*, cit., p. 85.

Whilst immigration to the country had already started during the XIX century, it was especially at the end of WW2 that the country started to be an important recipient of labour migration, mostly coming from the Southern part of Europe. There were, at the beginning at least, no quotas as such. Workers, on the other hand, were only supposed to stay for a fixed period of time and then to return to their home countries (so-called *Rotationsprinzip*). As noted by scholars, the intervention of the State was minimal at the beginning, but it had to be increased from the 1960s due to a slow-down in economic growth and a rise in xenophobia amongst Swiss nationals. Quotas were introduced in the 1970s, and they have been part of the Swiss migration policy since then, although with different specificities[36].

The first Sans-Papiers actually came from the *saisonnier* system: those who had overstayed their permit for work without returning to their country of origin or those who had remained after losing their job, and so forth. Another important cause for the rise in the number of Sans-Papiers was the families of the seasonal workers, who, in principle, were not allowed to join them but had done so anyway. To this group of people others were added along the years (mostly people coming from South America and from the Balkan area), and the number rose. Still, the problem of the Sans-Papiers only became apparent at the beginning of the year 2000, when, following the events that had already taken place in France, some irregular migrants and the associations supporting them started to occupy public spaces (mostly churches) to advocate for a solution to their situation, specifically asking for a regularization of their position[37].

The only legal instrument available to Sans-Papiers to try to regularize their status at the time was art. 13, lett. f of the previous Ordinance of 6 October 1986 - Limiting the number of foreigners. Such a provision, however, was conceived only for specific case-by-case situations of "extreme gravity" and had always been interpreted very strictly by the Federal Court. Requests were raised by associations and by some parties for a general amnesty, but the Swiss Government refused (and has always refused since then) any possibility of such a programme taking place[38]. Instead, an administrative memorandum (the so-called *circulaire* Metzler) was passed in 2001, its main goal being to clarify what "personal cases of extreme gravity" should stand for. The memorandum was conceived to allow a more flexible interpretation of the personal circumstances of the claimant,

36 E. Piguet, *Quotas d'Immigration: L'experience Suisse*, available at: http://www2.unine.ch/repository/default/content/sites/sfm/files/shared/pub/o/o_03.pdf. See also, M. Caroni,T. Grasdorf-Meyer, L. Ott, N. Scheiber, *Migrationsrecht*, Stämpfli Verlag, Bern, 2014, p. 19 ss.; ICMPD, *Regine,* cit., p. 37.

37 Federal Commission for Migration - D. Efionay-Mäder, S. Schönenberger, I. Steiner, V*isage des Sans-Papiers en Suisse*, 2010, available at: https://www.ekm.admin.ch/dam/data/ekm/dokumentation/materialien/mat_sanspap_f.pdf, p. 40.

38 «Jusqu'à présent, en Suisse, l'ensemble des efforts mis en œuvre en faveur de régularisations collectives ont échoué face à la volonté politique de la Confédération» D. Efionay-Mäder, *Visage des Sans-Papiers*, cit., p. 47.

giving weight to the passing of time and, therefore, to the length of the foreigner's presence within the country, providing more room for possible case-by-case regularization procedures[39]

This point (the amount of time spent in the country) was, on the other hand, at the centre of the debate that, in the Autumn of 2005, saw the Swiss Parliament in the process of amending the previous law on immigration to replace it with the new and currently valid one. A specific proposal was presented to allow the possibility of raising a claim for "*cas de rigueur*" after having spent 4 years in the country[40], but the proposal was bitterly contested and did not pass in the end[41]. The present provision, which, as anticipated, is found in art. 30 lett b of the Federal Act, only states that: «Derogations from the admission requirements (Art. 18-29) are permitted in order to […] b. take account of serious cases of personal hardship or important public interests».

3.2. Art 30 para 1, lett b) LStr and its Procedure

The content of the normative provision is further specified by an administrative memorandum, the OASA (Ordinance on admission, residence and economic activity), which states (at art. 31) the criteria that should be taken into account when assessing the claim for a cas d'urgence. The provision is backed by an FOM (Federal Office for Migration) Directive, which has the goal of bringing some uniformity to the interpretation of the requirements listed in the Ordinance[42].

39 «La principale réaction officielle à la mobilisation prit la forme d'une circulaire que les offices fédéraux compétents adressèrent aux cantons en décembre 2001 et dans laquelle on récapitulait les critères de la jurisprudence en matière de cas de rigueur. Elle précisait les circonstances dans lesquelles le séjour irrégulier d'une personne pouvait être légalisé en raison d'un cas individuel d'une extrême gravité. Cette «circulaire Metzler» dressait une sorte d'état des lieux de la jurisprudence du Tribunal fédéral et de la Commission de recours en matière d'asile relative à la reconnaissance des cas de rigueur d'une extrême gravité» D. Efionay-Mäder, S. Schönenberger, I. Steiner, *Visage des Sans-Papiers*, cit., p. 40.

40 See for example, from the Parliamentary debates: «L'article 30 alinéa 1bis tel qu'il nous est soumis représente une toute petite avancée afin d'améliorer la situation de certains sans-papiers. Je vous invite à bien relire son libellé. Il dit tout simplement que, pour ceux qui sont en Suisse depuis plus de quatre ans, "les demandes .... seront examinées de manière approfondie": cela signifie que cette disposition donne droit uniquement à un examen des dossiers "compte tenu de l'intégration, de la situation familiale et de l'exigibilité d'un retour dans leur pays d'origine". Je vous invite vraiment pour une fois à faire une toute petite avancée, un tout petit compromis », U. Leuenberger, *Intervention at the National Assembly*, 28 September 2005, Bulletin officiel de l'Assemblée fédérale, available at: https://www.parlament.ch/en/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=9389

41 See for instance, C. Blocher, *Intervention at the National Assembly*, 28 September 2005, Bulletin officiel de l'Assemblée fédérale, cit: «Es tut mir Leid, Ihnen das sagen zu müssen, Frau Menétrey: Wir dürfen keine illegal arbeitenden Leute zulassen. Dieser Kanton hat sie zugelassen, er hat sie sogar abgerechnet. Sie sind also "illegal legal", und jetzt weiß man nicht mehr, was man mit ihnen machen soll.»

42 The most recent version of 6th January 2016, n. 5.6.4. is available at: https://www.sem.admin.ch/dam/data/sem/rechtsgrundlagen/weisungen/auslaender/weisungen-aug-f.pdf For the "*cas de rigueur"* procedure, see p. 223 ss.

According to the actual normative framework, a Sans-Papiers willing to apply for regularization will need to show good integration in the country and respect for the Swiss legal order[43]. Furthermore, the claimant family and economic conditions will be evaluated: in respect to the former, special attention will be paid to the situation of the claimant's children; in respect to the latter, the claimant's ability and will to work will also be the object of scrutiny[44]. Crucially, given the history of the provisions related to the "*cas de rigueur*", the fifth element to be taken into account is that related to the length of the migrants' presence in Switzerland. The administrative guidelines clearly state that neither «the law, nor the jurisprudence of the Federal Tribunal explicitly foresee a minimum or a maximum length of stay [or the claim to be considered or to succeed]». Nevertheless, possibly taking into account other normative references that are present in the Federal Act (art. 84 al 5) and in the Law on Asylum (art. 14. co 2), the same guidelines state that «a presence of 5 years in Switzerland should be considered as a relevant indicator». The sixth and the seventh elements relate to the state of health of the migrant and to his possibility to reintegrate in his country of origin[45].

43 Regarding the element of "integration", it has been noted by the scholars that despite the fact that in principle it should be used to clarify and better define the meaning of the expression of art. 30 para. 1, lett b, it is in itself a rather vague concept. In an attempt to sharpen it, the Directive invites the interpreters to also make reference to art. 4 of the VintA (Ordinance on the integration of Foreigners), which lists the requirements to be taken into account when assessing the integration of the foreigner, namely: respect of the legal order and of the Constitutional values of the country, knowledge of one of the national languages, knowledge of the Swiss lifestyle and the will to participate in the economic life, or obtain some professional training. See: Federal Office for Migration, p. 223, and M. Spescha, *Migrationsrecht Kommentar*, Zurich, 2015, p. 203. Regarding the element related to the "respect of the Swiss legal order", on the other hand, the claimant must obviously show that he has never breached legal provisions significantly or repeatedly – and, according to the directives of the Federal Office for Migration, reference is made in this case not only to criminal provisions, but also to private/public civil law provisions, such as the duty to pay taxes. On the other hand, minor violations or very old ones should not, in principle, have a major impact on the evaluation of the migrant's dossier. See R. Petry, *La situation juridique des migrants sans statut legal*, Schulthess, Geneve, 2013, p. 293, and M. Spescha, *Migrationsrecht Kommentar,* cit. p. 204.

44 See M. Spescha, *Migrationsrecht Kommentar,* cit., p. 204. As per the economic situation of the claimant, to put it in the words of the Directive «the perspectives of a job are essential [for the positive outcome of the evaluation]». Despite the fact that, according to the Directive « according to art. 31 co 5 of the Ordonnance, the age, state of health or possible interdictions to work have to be taken into account when assessing whether the claimant has not been able to exercise a job or other professional activity», the scholars note that the interpretation of this article is extremely strict, especially on the part of the jurisprudence: «le fait, pour un étranger, de toucher des prestation d'assistance ne joue généralement pas en sa faveur. Il en va également pour les personnes au bénéfice de l'aide d'urgence. Cela est discutable sous l'angle du droit fondamental que consacre l'art. 12 Cst, car l'exercice d'un droit constitutionnel ne devrait pas avoir pour conséquence de pénaliser la personne concernée dans d'autres domaines». See R. Petry, *La situation juridique des Sans-Papiers en Suisse,* cit., p. 294.

45 Again, the Directive tries to clarify these requirements better by specifying for the first one that «chronic or serious illnesses that may affect the foreigner or a member of his family and for which there is no adequate treatment in the country of origin will have to be taken into account when assessing the individual case». Regarding the possibility to reintegrate in the country of origin, the Directive states that the following should be considered when assessing the individual claim for regularization: «age of the person concerned at his entry in Switzerland; knowledge of the customs and language of the country of origin;

The migrant who would like to avail himself of the provisions contained in art. 30 lett. b of the Federal Act should address his request to the local migration authority, which gives a first consideration to the dossier and decides whether to pass it on to the central administrative authority on migration (State Secretariat for Migration). It is important to highlight here that because art. 30 para 1, lett b) was redacted as a "may" and not as a "shall" clause, there is no right for the migrant to being granted the permit – the concession of it depends solely on the discretionary evaluation of the administrative authority. The decision of the central authority on the dossier is free and does not necessarily have to take into account the evaluations of the local authority. On the other hand, statistics show that once the dossier has made it to the second step of the bureaucratic structure, the rate of approval is quite high – in other words, the Federal Office tends to rely on the evaluations made by the Cantons and to stand by their decisions[46].

The decision of the local authority not to pass the dossier on to the Federal office can be appealed before the cantonal tribunals according to the provisions of the cantonal law. The decision of the Federal Office can be appealed to the Federal Administrative Tribunal[47]. The procedure clearly develops through a path that takes into account the specific structure of the Swiss administration, first allowing the local authorities to have their say on the claim and then passing the dossier on to the central level.

3.3 Spain: Background

Notoriously, Spain became an immigration country almost overnight. The number of foreigners regularly living in Spain went from 198.042 in 1981 to 801.329 in 1999 to an astonishing 3.730.610 in 2006, representing 8.5% of the overall population[48]. The Foreigners Law (*Ley de extranjeria*), dating back to 1985, was no longer apt to deal with such a mounting phenomenon: the law,

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possible health problems; family and social connections in the country of origin; schooling, training and job opportunities in the country of origin; housing conditions in the country of origin».

46 «Au vu des statistiques et des précisions fournies par les spécialistes, on constate toutefois qu'une grande majorité des demandes formulées par les cantons sont acceptées par le SEM», M. Morlok, A. Oswald, H. Meier, D. Efionay-Mäder, D. Ruedin, D. Balder, P. Wanner, *Les Sans-Papiers en Suisse,* Bale, Switzerland, 2015, available at: https://www.sem.admin.ch/dam/data/sem/internationales/illegale-migration/sans_papiers/ber-sanspapiers-2015-f.pdf, p. 57

47 Art. 99 Federal Act, Art. 85 OASA, point no. 1.3.2. of the Directive. See also R. Petry, *La situation juridique des Sans-Papiers en Suisse*, cit., p. 290: «toute demande d'autorisation fondée sur cette disposition est d'abord adressée au service de migration cantonal qui se détermine à titre préalable sur l'octroi d'une autorisation. En cas d'avis favorable, il transmet le dossier à l'Office fédéral des migrations pour approbation. L'ODM examine librement la demande et n'est pas lie par la position de l'autorité cantonale. La décision de l'autorité cantonale de soumettre un cas de rigueur à l´ ODM peut faire l'objet d'un recours selon le droit cantonal. La décision de l'ODM peut, quant à elle, être contestée devant le Tribunal Administratif Fédéral qui statue alors en dernière instance, tout recours au Tribunal fédéral étant en principe exclu en matière de dérogation aux conditions d'admission »

48 J. Gonzalez-Calvet, E*l arraigo como instrumento de Regularizacion Individual y permanente del trabajador inmigrante indocumentado en el reglamento de extranjeria aprobado por el RD 2393/04, de 30 diciembre*, Revista de Derecho Social, 37, 2007, pp. 105 - 138

conceived at a time when Spain was mostly a country of emigration, considered immigration from extra-European countries as a temporary phenomenon, reducing the possibilities for third country nationals to settle within the national borders[49]. The problem of the integration of such migrants was not even contemplated: generally speaking, the very indeterminate character of many juridical concepts laid the basis for a wide discretion on the part of the public administration, which tended to interpret them in a very restrictive manner. As an answer, different left-wing Government carried out various amnesties. As other Southern European States, therefore, Spain went through the rapid changes of the 1990s with an old legislation backed up by contingency measures such as broad regularization programs[50].

To overcome the constant state of emergency that seemed to characterize the legislative answer to the constant immigration fluxes to the country, the new Ley Organica, no. 4/00 of 11th January 2000 was passed. This, despite the very many changes that were enacted through time[51], remains the core of the Spanish normative framework in the field of migration management.

This law endorses the traditional scheme of labour migration that was already present in the previous law of 1985, coupled with the establishment of an annual immigration ceiling. In principle, therefore, and leaving aside cases related to family reunion or to the asylum/international protection systems, migrants can regularly enter Spain only with an official confirmation that a job offer has been made to them. Entry is, in any other case, irregular, which leads to irregularity of the permanence within the country[52]. According to art. 31.3, however, «the administration can grant an

49 «As for regulation of entry and residence, the LOE (and the follow-up post 1986 regulation) introduced the requirements of an entry visa as well as residence and work permits. This meant that the entry of foreigners was now subject to regulation while their access to the labour market was conditioned by the country's economic circumstances. Furthermore, the situation of foreigners in Spain was restricted by short-residence permits and non-recognition of the right to family reunification», B. Garces - Mascarenas, *Labour Migration in Malaysia and Spain. Markets, Citizenship and Rights*, IMSCOE Research, Amsterdam University Press, 2012, p. 118

50 On the migratory situation of Spain, and on its frequent use of amnesties, see, for instance: Clandestino Project, Final Report. Spain, p. 74 ss; J. Arango, *Exceptional in Europe? Spain's experience with immigration and integration*, Washington DC, Migration Policy Institute, 2013; J. Arango, *Becoming a country of immigration at the end of the twentieth century: the case of Spain*, in R. King, G. Lazaridis and C. Tsardanidis (eds), Eldorado or Fortress? Migration in Southern Europe, Palgrave, London, 2000; M. Baldwin-Edwards, *The Emerging European immigration Regime: Some Reflections on implications for southern europe, Journal of Common Market Studies,* 35, 4, 1997, pp. 497-519; C. Finotelli, J. Arango, *Regularisation of unauthorised immigrants in Italy and Spain: determinants and effects*, Documents d'Analisi Geografica, 57, 3, 2001, pp. 495-515; N. Ribas Mateos, *How can we understand immigration in Southern Europe?* Journal of Ethnic and Migration Studies, 30, 6, 2004, pp. 1045-1063

51 «A finales de los noventa, abogaban por la necesidad de adecuar la obsoleta legislación de extranjería de 1985 a las nuevas realidades delos movimientos migratorios que se producían en Europa y, ya se intuían, en nuestro país», J. Gonzalez Calvet, *La regularizacion individual,* cit., p. 106. The Law underwent, as known, many modifications, amongst which the ones introduced by Law no.8/00 and Law 14/03 need to be remembered. Furthermore, the further regulatory provisions were in time also introduced: RD 846/01 and RD 2392/04, which is known for having paved the way for the last, massive amnesty carried out in the country, in 2005. The most recent RD, which also details the procedure of the "*arraigo"*, is RD no. 557/2011, to which we will dedicate most of our attention.

52 See for instance Garces-Mascarenas, *Labour Migration in Malaysia and Spain,* cit., p. 125 ss.

authorisation for leave to remain in case of rootedness». This provision lays the basis for the "*arraigo"* regularization mechanism. It nevertheless took some time before the mechanism could be implemented: the Regulation detailing the requirements and procedures to be followed in order to apply for such a permit was only passed in 2001 and was subsequently modified. The most recent version of it is the Royal Decree no. 557/2011 which, in art. 124, details the content, scope and application of the provisions related to the "*arraigo"*.

3.4. Art. 124 RELOEX and its procedure

According to the normative provisions there are three different types of "*arraigo*": *laboral, social and familiar* – ie for reasons of work, for reasons of social rootedness and for family reasons. It is unanimously held that the most common is the one for reasons of social rootedness, which is therefore the one we are going to focus our investigation on[53].

The Sans-Papiers that would like to apply for a regularization on the basis of social rootedness need to have a clear criminal record not only in Spain, but also in their country of origin, as well as in any other country they may have resided into before going to Spain. Furthermore, they need to have a job, which has to be proven by way of a contract that, at the time of the submission of the request, should be for at least one year. Further, family life will be taken into account and here two possibilities open up for the migrant: either he shows that he has family ties with other people regularly residing in Spain (or with Spanish citizens), or he can submit a "certificate of rootedness".

53 The "*arraigo laboral"* was created with the idea of fighting against the labor exploitation of irregular migrants. The requirements to access this extraordinary administrative solutions are the following: 1) first of all, it is required a temporary stay of at least two years in the country; 2) secondly, it is required to show the existence of labor relationships of no less than 6 months. As proof the migrant needs to either provide a judicial decision that recognizes the labour relationship, or an administrative decision of the Work Inspectors that confirm that the migrant was being made to work in an irregular position. In other words, in order to be able to access to such a procedure, the migrant needs to first denounce his or her employer and (possibly) to also win the case against him. This solution explains possibly why the rate of application of such a provision (and its rate of success) is extremely low: «Entre 2006 y 2014, se solicitaron en España 12.406 autorizaciones de residencia temporal por este procedimiento, de las que 7.307 se concedieron. En términos relativos representa un 59% de las solicitadas, pero a estos datos donde un 41% no obtuvieron resultado, peor aún resulta intrascendente si la cifra porcentual la comparamos con el total de autorizaciones de arraigo (suma de arraigo laboral, social y familiar) es del 1,65% sobre las 747.685 solicitudes presentadas en ese período y del 1,54% del total de las 473.161 autorizaciones concedidas» J.M. Cerezo Mariscal, *La gestion de los Procesos de la Irregularidad estructural y sobrevenida en Espana. Analisis maquetado del arraigo*, Revista de Derecho UNED, 17, 2005, pp. 657 – 684; J.C. Calvet, *El cas de riguer como Instrumento de Regularizacion Individual,* cit. According to the Spanish practitioners that we were able to contact, «Irregular migrants hesitate a lot before starting such a practice, because they prefer to have the opportunity to keep on working and to be able to provide for their families. Furthermore, they are afraid to become known to the authorities through this procedure because they fear they could be sanctioned for their irregular position, and for having worked in the black economy». The "*arraigo"* for family reasons can be acceded by two different categories of migrants: a) those are parents to Spanish children and b) those who are children to Spanish parents, and it represents 7.6% of the authorizations granted between 2006 and 2014. See J.M. Cerezo Mariscal, *La gestion de los Procesos*, cit., p. 680.

Such a certificate is produced by the local authorities which, in drafting it, will have to take into account the economic means of the migrant, his family situation, his efforts towards integration and the amount of time he has spent in the town to which he is now applying for regularization. The minimum amount of time that the migrant must have spent in the country before submitting the application is 3 years.

As far as the procedure is concerned, the claimant will have to submit his request to the local authority, which will evaluate the request and, in case of a positive outcome, will grant a permit for a year. In case of negative decision, on the other hand, the claimant will have the opportunity to address the Tribunal.

3.5. Outcomes

Despite the significant similarities, the scholars' evaluations regarding the two schemes differ greatly, ranging from a substantial appreciation within the Spanish doctrine[54] to a more careful and critical approach in the Swiss one[55].

Such different attitudes can possibly be explained also by the very different outcomes of these programs. In Spain, the regularization mechanism of the "*arraigo"* has been in use since the year 2006 and it has overall allowed for the regularization of 473.161 Sans-Papiers – of these, more than 259.000 have been regularized in the last 4 years, 35.060 in 2015 alone[56]. In Switzerland, for the year 2014 we have the number of 294[57] - 318 for the year 2015. If this can partially be attributed to the sheer numeric difference existing between the irregular foreign population of Spain and Switzerland, it is not enough, alone, to account for the disparity in the amount of people that benefit

54 Of a «favorable assessment of the Settlement Program to date» speak A. Sabater, A. Domingo, *A New Immigraiton Regularization Policy,* cit., p. 214. See also: A. Domingo, A., Sabater, X., Franch, An Assessment of the New Legislation on Migration Control in Spain: from amnesties to Regular avenues for legal migration, 2010, available at: http://paa2010.princeton.edu/papers/101175. More cautious, but not negative, the conclusions of M. Baldwin-Edwards, *Regularisations and Employment in Spain*, cit.

55 R. Petry, *La situations juridique des migrants sans statut légal*, cit., p 300 ss; D. Efionay-Mäder, S. Schönenberger, I. Steiner, *Visage des Sans-Papiers en Suisse,* cit., p. 78 ; M. Spescha, *Migrationsrecht Kommentar*, cit., p. 210 ; P. Uebersax, & oths (eds), *Ausländerrecht – Eine umfassende Darstellung der Rechtsstellung von Ausländerinnen und Ausländern in der Schweiz – von A(syl) bis Z(ivilrecht)*, HelbingLichtenhahn, Basel, 2009, pp. 373-415

56 Data available on http://extranjeros.empleo.gob.es/es/Estadisticas/. The decline of the recent years has been explained by scholars that suggest that a significant factor to take into account should be the economic crisis, and also the fact that large numbers of people had already been regularized in the first years of the use of the measure.

57 M. Morlok, A. Oswald, H. Meier, D. Efionay-Mäder, D. Ruedin, D. Balder, P. Wanner, *Les Sans-Papiers en Suisse*, cit., p. 59. Statistics for each year are available at: https://www.sem.admin.ch/sem/fr/home/publiservice/statistik/asylstatistik/haertefaelle.html . Furthermore, it has to be kept in mind that, as noted in note no. 34, not all those who can access the procedure of art. 30, co. I, lett b) are, strictly speaking, Sans-Papiers: some can be also foreigner children of Swiss citizens who cannot rely on family reunion provisions, former Swiss nationals who have been released from Swiss citizenship, or young Sans-Papiers who want to complete a professional apprenticeship.

from the application of such measures. Estimates are made particularly difficult by the very nature of the investigated subject (irregular migrants are difficult to count) and by the fact that there are no recent Spanish studies dedicated to the topic. If, though, we take into account the latest estimate of the irregular population in Spain (485.000 in 2010, according to Caritas) and the number of regularizations via "*arraigo"* carried out that year (65.623) we see that 13% of the irregular population was able to benefit from the procedure. For the same year, 2010, when the number of irregular migrants in Switzerland was considered to be around 90.000, the number of regularizations carried out was of 150, therefore less than 1% was able to benefit from the mechanism[58]. Furthermore, whilst in Switzerland there is a significant discrepancy in the use of the measure according to the different Cantons[59], such differences seem to be less important in Spain: if the application of the "*cas de rigueur*" mechanism is therefore quite patchy, the "*arraigo"*s one seems to be much more uniform[60].

Such differences are difficult to explain at first sight: if the two procedures are considered globally, in fact, the differences are not so great (either substantially or procedurally) as to justify a discrepancy so wide in the real impact of the processes or in their evaluation by scholars. Something else besides the numbers and scholars' evaluations, however, sets the two mechanisms quite significantly apart from one another despite their many common features – and this is their history and background. The Swiss "*cas de rigueur*" procedure was mostly transferred from the old Ordinance of 1986 into the new one of 2005 without much change, and the proposals made to partially modify its features, notably by further specifying some of the listed requirements (i.e.,

58 0.16% to be exact. It needs to be mentioned that according to the most recent Swiss study on Sans-Papiers, their number is more around 76.000 unities. Even taking that number into account, indicatively, also for the year 2010, the percentage of success remains very low, around, 0.19%.

59 Demographic explanations could be at the basis of the mentioned discrepancy in the use of the regularization mechanism amongst cantons: as noted by the researches that have dealt with the issue, some regions of Switzerland simply have a higher percentage of migration (and therefore also of irregular migration) than others. See for example: «L'analyse des coefficients de corrélation montre que les caractéristiques suivantes influent considérablement sur le nombre de sans-papiers : degré d'urbanisation, part des étrangers et attitude favorable face à la migration lors des votations, produit intérieur brut par habitant dans le canton. A noter qu'un coefficient de corrélation élevé n'implique pas nécessairement un lien de cause à effet entre deux facteurs (proportion de sans-papiers et caractéristique étudiée), la corrélation pouvant être influencée par un troisième facteur. Des interdépendances peuvent par ailleurs s'observer entre plusieurs caractéristiques. On note ainsi dans les cantons urbains des salaires plus élevés (et donc plus de places de travail dans les ménages privés), une plus grande proportion d'étrangers et une attitude plus favorable face à la migration» M. Morlok, A. Oswald, H. Meier, D. Efionay-Mäder, D. Ruedin, D. Balder, P. Wanner, *Les Sans-Papiers en Suisse, cit., p.* 26. Such an explanation, though, is not enough to clarify why such rich and populous cantons as the ones of Zurich or of Bale – Ville only account for 1 application for regularization each, in the year 2014.

60 There are obviously differences between the different Spanish regions for what concerns the use of such a measure: the Region of Catalunya (mainly the city of Barcelona) and the Autonomy of Madrid count alone for 15.838 of the applications for the year 2015 – other regions, such as Aragon, Canaria, Murcia, account for roughly 1.100 requests each, others do not reach 1000 (Castilla La Mancha, Baleares, Galicia) and some are below 500 (Navarra, Asturias, Cantabrias). Still, the differences can be reasonably linked to the differences in the economies of the different regions and, most importantly, all the regions make use of such measures, even the tiniest and most remote ones. In the Swiss case, on the other hand, of the 12 out of 26 Cantons that accepted to take part into the survey on the situation of the Sans-Papiers in Switzerland, almost half of them (5) had never made use of the measure of art. 30 FNA during the year 2014.

time), were turned down. The Spanish "*arraigo"*, however, comes from a much more dynamic and unexpected source, which we will now address in further detail.

4. The origins of the *"arraigo"* procedure

As anticipated, international immigration caught Spain somewhat by surprise. It was only in 2004, long after a steady increase in the number of foreign arrivals and stays had begun to be acknowledged by the public and the media, that politicians set out to amend the out-dated 1985 law and to provide the country with a more modern legislative framework for the discipline of migratory fluxes.

Despite the apparent immobility, something had already begun to change in the daily practice of the organs charged with the management of the migration phenomenon. In particular, already in the late 1990s, the Courts had begun to articulate a practice aimed at protecting the foreign recipients of an expulsion procedure, attributing certain importance to the ties such persons might have created during their stay in Spain[61]. This position was, in turn, inspired by a wider judicial approach that had first been suggested in the fields of civil and labour law, with particular reference to the issue of the validity of employment contracts: such a position was oriented to attribute weight and importance to the presence of foreigners within the national territory regardless of its "regularity"[62]. In other words, regardless of the legitimacy of their stay, it was found that foreigners had a right to the protection of the positions and ties they had been able to create whilst in the country. This was the case for an employment contract that was, in principle, void for lack of adequate migratory status, and it was the case for an expulsion order pronounced without taking into account the links created by the migrant in the meantime. In creating such a case law, the Spanish Courts plunged into reality and derived from there the criteria that should have been taken into account at the time of deciding whether an expulsion order could be executed or not. These criteria included, for example, the alien's family life, inclusion in the social network, time spent in the country and, of course, his integration in the economic fabric. This orientation made it up all the ladders of the

61 «Aunque el arraigo no fue expresamente regulado en la legislación de extranjería de 1995 ni en los reglamentos de ejecución dictados por el Gobierno, es decir, ni en el RD 1119/1986, de 26 de mayo, ni en el RD 155/1996, de 2 de febrero, esta institución del derecho de extranjería emergió, como una construcción jurisprudencial […] bastante antes que la nueva normativa del año 2000. El arraigo fue invocado en estas sentencias ante supuestos de suspensión cautelar de la efectividad de la orden de expulsión del extranjero indocumentado mientras esta última no alcanzara firmeza», J. Gonzalez Calvet, *El Arraigo*, cit., p. 116

62 C. Pico Lorenzo, *Nuestra erratica normativa sobre Extranjeria. Especial referencia a las regularisaciones y el arraigo*, Jueces para la Democracia. Informacion y Debate, 43, 2002, p. 71: « el arraigo como elemento relevante para no abocar a una situación de ilegalidad al extranjero que pretende integrarse en territorio español, también ha sido tenido en cuenta por la doctrina judicial para valorar el cambio de circunstancias en los permisos de trabajo, atemperando las normas y modulando la poca flexibilidad normativa para obtener un permiso de trabajo por cuenta propia para la explotación de pequeños negocios proviniendo del disfrute anterior de un permiso de trabajo por cuenta ajena»

Spanish judicial order until it was acknowledged by the Supreme Court[63], and, finally, by the Legislator of 2004.

Far from being a legislative tool created *ex nihilo*, then, the "*arraigo"* comes from the bottom up. The Spanish Lawmaker of 2000, therefore, did nothing but adopt a solution that had already been elaborated on and tested in the field by judicial practice and adapt it within the normative framework of the new legislative provisions related to the management of the migration fluxes. We will see now that, coupled with the operational definition of discretion we referred to above, the historical origins of the institute can provide clearer reasons for the broader application of the "*arraigo"* compared to the Swiss mechanism of the "*cas de rigueur*".

5. Putting the litmus test of discretion to use

The first element of our operational definition is the autonomy of evaluation and action left to the single decision maker by the very structure of the norm. We can now see that in the Spanish case, the structure of the criteria that need to be applied in case of "*arraigo"* comes from the practice through a "bottom up" approach. The instructions contained within the Spanish provision of the "*arraigo"* therefore take into account the judicial experience that was already in place before the institute was officially created.

Two important aspects follow from this historical background. First, the criteria used are hermeneutically clear, meaning that, although flexible, they are structured to apply with some precision to the different cases that have to be solved, as they have already been tested in the field. Secondly, the criteria are teleologically clear. In other words, they have been created and constructed with the specific goal of protecting, provided that some basic requirements are met, the situation of irregular persons and of allowing them a way out of the precarious status they normally live in. Therefore, as we have seen, these criteria mainly revolve around parameters such as work, family life and social ties, because jurisprudence can, upon these elements, reasonably ascertain whether the time irregularly spent in the country had somehow been "well spent".

63 M. Luisa Trinidad Garcia, M. Martin, *Una forma nueva de ordenar la inmigracion a Espana*, Nova Lex, Valladolid, 2005. «frente a la discrecionalidad administrativa para valorar los medios acreditativos del arraigo, la jurisprudencia había tomado en consideración varios elementos indiciarios para declarar su existencia, tales como haber tenido hijos en España (STSJ Valencia de 26–6–02, Ar. 2002/270109); haber convivido y/o contraído matrimonio con ciudadano español o extranjero regularizado (SSTSJ Madrid de 3–5–01, Ar. 2001/202226, Cataluña de 2–4–01, Ar. 2001/223317); haber estado en posesión con anterioridad de los permisos de residencia y de trabajo (SSTSJ Valencia de 3–5–02, Ar. 2002/269110 y de 24–1–02) o, finalmente, haber cursado estudios en España con aprovechamiento (SSTSJ Canarias de 23–3–01, Baleares de 13–3–01 y Cataluña de 1–2–01)». See also, J. Gonzalez Calvet, *El arraigo*, cit., p. 117

The hermeneutical and teleological clarity of the elements listed in art. 124 RELOEX has, consistent with our operational definition of discretion, had an impact on the work of the administrators who need to apply the provision: more clarity means less ambivalence and thus less margin of manoeuvre for the single administration to apply the norm in a different, unexpected and perhaps too restrictive way. This, for instance, can help explain why, despite all the economic and geographical differences that can be found amongst the different Spanish regions, the application of the "*arraigo"* mechanism is much less patchy than in Switzerland[64].

But it is the second element of the operational definition proposed – namely, the dynamical relationship between the administrative power exercising discretion, on the one hand, and the control exerted on it by the Courts, on the other – that helps provide further explanation for the quite wide application of the procedure in Spain. Possibly as a consequence of the very important role played in the historic origins of the institute, jurisprudence still has a significant influence on the practical implementation of the provisions by the administration. In other words, tribunals play a very active role in monitoring the execution of the institute. In this way, administrative discretion is disciplined and, where needed, challenged, which in turn makes it so that claimants feel less unsafe when they decide to submit their application and that disparities of treatment are avoided throughout the country, granting some uniformity in the application of the provisions[65].

64 One of the lawyers we talked to said: «The institute of the arraigo social, i.e. the possibility of becoming regularized for reasons that testify a significant attachment to Spain, is well disciplined in the latest Foreigners' Regulation, therefore there is less room for manoeuvre for the Administration». Another one, mentioning in particular the practice taking place in the Andalucia Region, also said: «it is so clear that, once they [i.e. the irregular migrants] comply with the requirements, they should be given status, that this [the staus] is provisionally granted to them during the pending of the judicial proceedings». This does not mean, of course, that there are no difficulties. See for instance M. Baldwin-Edwards, *Regularisations and Employment in Spain. REGANE Assessment Report*. ICMPD, Vienna, 2014, available at: http://research.icmpd.org/fileadmin/Research-Website/Project_material/REGANE/REGANE_Assessment_Spain_Final_Sentout.pdf, according to whom «there are tensions between the central state and local governments, including some reports of different implementations of the policy», p. 11.

65 Two examples can be mentioned in this respect. At a regional level, reference can be made to the issues raised by some administrations with reference to the *arraigo social.* The administrative practice had introduced, amongst the requirements tat the foreigner had to comply with in order to submit an arraigo application, that the job offer he had came from an enterprise/an entrepreneur that had enough money to follow up on his business plan/project: this way, clearly, making it more difficult for the applicant to qualify for regularization. This line of practice was though intercepted and stopped by the jurisprudence, (Tribunal Superior de Justicia de Andalucia, the highest Administrative Authority in the Region) back in 2008, and the reasoning behind it has now become constant practice. See for instance: Decision no. 1318/2014, Tribunal Superior de Justicia, Sala de lo Contencioso Administrativo, Secciòn Cuarta, Rollo 178/2013. At a national level, it is possible to refer to the decision of Supreme Tribunal (Section 3 – Administrative litigation) of 12th March 2013. Amongst other things, the decision quashed a provision contained in co. IV of art. 128 of the RELOEX. More specifically, the addressed provision stated that the PA could convene the claimant for a personal interview. According to the Tribunal the provision had to be expunged because in violation with the principle of the primacy of the law. In other words, the fact that the Administration, by way of a regulatory provision, had decided to insert in the RELOEX an obligation for the migrant (of going to the interview, if summoned) that was not part of any legislative provision, or of any Parliamentary delegation to the Public administration, was an abuse of power. This has also been confirmed by one of the lawyers we talked to,

Considering the application of the same operational definition of discretion to the Swiss case, and starting again from the structure of the norm, it seems that the requirements listed in art. 31 of the OASA are, from a hermeneutic perspective, broader than those of its Spanish counterpart. The immediate reference here, of course, is that the Spanish legislation has decided to specify the amount of time after which the migrant (does not have the right to, but nonetheless) can hope for regularization. On the other hand, no mention of any specific amount of time is made by the Swiss provision, and the directives also refrain from taking any part in this aspect. However, the hermeneutic difference goes further than this. Whilst in the Swiss case, there is no specific reference as to what should be considered "integration", the Spanish model finds a way to it, asking the local authorities to provide a certificate that can testify, taking different parameters into account[66], of the efforts made by the foreigner to become part of the hosting society.

It is also possible that the hermeneutic broadness of the Swiss mechanism can be ascribed to an even deeper teleological one. While the Spanish case, as anticipated, only mentions work, family and social ties as elements that need to be taken into account (apart from the obvious lack of criminal records) to grant regularization, the Swiss catalogue is more varied: besides professional activity and family, it also mentions the health of the migrant and the possibility for him to return to his country of origin. By placing evaluations related to the migrant's "lifestyle" side by side with other evaluations, rather than those related to his need of "protection", the Swiss provision brings together considerations that generally lie at the basis of *fait accompli* regularizations (time and work) with assessments generally related to a more humanitarian approach. In turn, as also shown by jurisprudence, this originates some kind of ambiguity in the goals pursued through regularizations ex art.30, lett b), which seem to oscillate between the protection of vulnerable situations, on the one hand, and the reward of a balanced and productive lifestyle, on the other.

As anticipated, according to the reading that the Tribunal gives to the normative provisions, only very exceptional cases should succeed under art. 30 lett b. It is not enough for the foreigner to comply with (at least some of the) requirements listed in art. 31 OASA, it is also necessary that his situation be one of "personal distress": «this means that his [the migrant's] conditions of life and existence, compared to the ones applicable to the average foreigner, have to be put in question in a special manner, i.e., applying to him the normal conditions on the admission of foreigners would have serious consequences for him. When considering an application for regularization it is important to take into account all the circumstances of the specific case […] the fact that the

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according to whom: «in the field of "arraigo", I don't think that the role played by Administrative Discretion is too big. The requirements appear in a very clear form in the normative framework, and the administration cannot make things up, because at the end there are good mechanisms of control».

66 See above. It has to be mentioned here that, according to some scholars, the attendance of such courses, the way such attendance is evaluated by the local authorities and so forth may very easily turn into mechanisms of control of the migrant, which, in turn, can lead to further discretion in the Administration's decisions. See for instance, M. Perez, D. Leraul, *El Arraigo en Espana. De figura exceptional a instrumento de Gobernanza de las migraciones*, available at: https://www.academia.edu/1928486/El_arraigo_en_Espan_a._De_figura_excepcional_a_instrumento_de_gobernanza

foreigner has spent quite a long time in Switzerland, that he is well integrated from a social and professional point of view and that his behavior has always been irreproachable is not enough to create a case of exceptional gravity: it is also necessary that the foreigner's relationship with Switzerland is so close that one could not ask of him to go and live in any other country, particularly his country of origin» [67].

At the same time, scholars have noted that «professional qualifications play a crucial role [in the evaluation of an application for regularization]». According to a study published in 2014, «the general explanation provided to explain the refusal of a regularization request is that the socio-professional integration of the claimants is not exceptional, and that they don't have acquired knowledges or qualifications so specific that they would not be able to put them at use in their own country, or that they don't have a remarkable professional situation in Switzerland»[68]. The role jurisprudence gives to economic integration and professional success is thus very significant, although it may blur the lines amongst the real, the perceived and the supposed scope of the mechanism. In other words, if the regularization mechanism is there to protect people who have a special attachment to Switzerland such that it would be impossible for them to leave the country, then it is not particularly necessary to ask very high professional qualifications of them. Doing so, on the other hand, seems to suggest that other goals are pursued with the use of this instrument, particularly rewarding notably successful migration stories. Here, the emphasis is placed on the professional qualifications and advancement reached by the migrant[69].

The judicial responses to the administration's margin of manoeuvre in the application of standards is also very different in the Swiss compared to the Spanish case. This, first of all, is because the Federal Administrative Tribunal operates on the basis of significant self-restraint in the interpretation of the regulatory provision and, therefore, in the interaction with the local authorities

67 «Cela signifie que ses conditions de vie et d'existence, comparées à celles applicables à la moyenne des étrangers, doivent être mises en cause de manière accrue. Autrement dit, le refus de soustraire l'intéressé aux conditions d'admission doit engendrer pour lui de graves conséquences […] Lors de l'appréciation du cas d'extrême gravite, il y a lieu de tenir compte de l'ensemble des circonstances du cas particulier. La reconnaissance d'un tel cas n'implique pas forcement que la présence de l'étranger en suisse constitue l'unique moyen pour échapper à une situation de détresse. D'un autre côté , le fait que l'étranger ait séjourné en Suisse pendant une assez longue période, qu'il s'y soit bien intégré socialement et professionnellement et que son comportement n'ait pas fait l'objet de plaintes ne suffit pas, à lui seul, à constituer un cas d'extrême gravité : il faut encore que sa relation avec la Suisse soit si étroite qu'on ne puisse exiger qu'il aille vivre dan un autre pays, notamment dans son pays d'origine» ATAF 2007/16; ATAF 2007/45; TAF C-3263/20091.

68 R. Petry, *La situation juridique des Sans-Papiers en Suisse*, cit., p. 297 ss: «L' argument généralement invoque à l'appui du refus d'admettre un cas de rigueur est que l'intégration socio-professionnelle des intéressés «ne revêt aucun caractère exceptionnel qu'ils n'ont pas acquis de connaissances ou de qualifications particulières qu'ils ne pourraient pas mettre à profit dans leur pays, ou encore qu'ils n'ont pas fait preuve d' une évolution professionnelle remarquable en Suisse».

69 «Or, ces exigences en matière de qualification pénalisent lourdement les Sans-Papiers qui, par définition, ne sont souvent pas en mesure d'acquérir des qualifications professionnelles hors du commun. Une telle exigence ne tient donc pas compte de la situation spécifique des étrangers sans titre de séjour, et rend illusoire toute perspective de régularisation, notamment pour les personnes seules ne pouvant pas invoquer des motifs d'ordre familial», R. Petry, *La situation juridique des Sans-Papiers en Suisse,* cit., p. 298

who actively put them in place[70]. Furthermore, it is because the interaction provided seems unable to avoid the same teleological ambiguity that, as seen, also characterizes the structure of the norm. As a result, discretion at an administrative level remains very high in Switzerland and is given both by the structure of the normative provisions applied and by the lack of precise guidance at a judicial level. This explains the discrepancies in the local practice noted by multiple studies and that is so significant that experts have compared the outcome of a regularization procedure to a "lottery". It also explains the limited recourse to the measure due to the claimant's fear of making himself known to the authorities, not trusting he can count on a good outcome.

The operational definition of discretion presented at the beginning of the paper proved useful to structure the analysis of the regularization mechanisms present in Spain and in Switzerland. Coupled with an analysis of the very peculiar historical origin of the Spanish tool of the "*arraigo"*, it also enabled an in-depth evaluation of the peculiarities of the two systems, zooming in on the very focus of them both, namely, administrative and judicial bodies' reciprocal margins of manoeuvre. The question now is whether this same compass could also be used to provide more general reflections on the functions and scope of such models.

6. What gaps tell us

The comparison between the Spanish and the Swiss regularization mechanisms seems to lead to the conclusion that the latter "does not work". Besides the fact that its application is too patchy and its impact too little, its structure appears not to be tailored to address the population it should really target, namely, Sans-Papiers who have been living in the country for years, who have raised families and who have worked what are, most of the time, very menial jobs[71].

Given that, as shown throughout the paper, at the core of the mechanism is the discretion of statual apparatuses, it is possible to categorize the various suggestions made along the years to improve the system based on which of the two sides of the "margin of manoeuvre" coin they are approached.

On the one hand, the efforts of scholars, associations and some parliamentary forces have focused on the structure of the norm, with particular emphasis on the importance of giving more weight to the amount of time spent in the country by the irregular migrant[72]. Other options that could reduce administrative discretion in favour of the applicant by better sharpening the election requirements include a re-assessment of the hierarchy of the criteria listed in art. 31 of the OASA and suggestions

70 For a recent overview of the practice of the Federal Tribunal on the issue, see R. Diethelm, *La régularisation des Sans-Papiers a l'aune de l'art. 30 al 1 let. B Letr*, in G. Sauthier, M.S. Nguyen, Actualité' du droit des étrangers. Jurisprudence et analyses, Stämpfli Editions, Berne, 2016, pp 1- 28.

71 R. Diethelm, *La régularisation des Sans-Papiers a l'aune de l'art. 30 al 1 let. B Letr,* cit., p. 25.

72 See, for instance, the Parliamentary debate of 2005. See also R. Petry, *La situation juridique des Sans-Papiers en Suisse,* cit., p. 300 ss., and, more recently, R. Diethelm, *La régularisation des Sans-Papiers à la une de l'art. 30 al 1 let. B Letr,* cit., p. 27.

for "earned regularization systems", which, being based on points, would be «more respectful of the proportionality principle»[73].

Very little room for change seems to exist on the other side of the coin, namely for what concerns the interchanges between the administrative and judicial branches, given the very restrained role traditionally played by Swiss jurisprudence in this field. At the same time, the Federal Commission of Migration's 2011 proposal to invert the order of the procedure – namely allowing claimants to submit their application first before the Central Federal Office and then to the single local authority – can be placed along the lines of changing (or at least increasing) the dynamics and exchanges between different authoritative organs[74].

All these suggestions have at their core the same idea: "channelling" administrative discretion, either by changing the structure of the norm or by increasing the procedural interactions, so as to increase the impact of the mechanism of art. 31 OASA, reducing at the same time the patchiness of its application. The bottom line is, as stated, that «there is no point in having a corrective measure, if it is based on unrealistic expectations»[75].

It is here, however, that the comparison with the Spanish model can prove to be (not only of descriptive but also) of euristic interest. By inserting the "*arraigo"* that had been created by judicial praxis within an official, normative provision, the Spanish legislator has taken the step of recognizing the existence of the gap that such mechanism had been intended to fill, namely, the gap between the "ideal" of the old Spain as an emigration country and the reality of the increasing foreign presence inside the national borders. To adopt such a suggestion, coming from bottom-up, meant stabilizing a procedure that originally had the sole scope of adjusting the ideal of the general immigration provisions with the reality of Sans-Papiers' existence, thus keeping this gap as small as possible. This dynamic shows that administrative discretion, judicial interaction, and regulatory guidelines do not exist in the void. In order for them to function, to develop and to propose new solutions, there must be the political will to recognize the existence of *a gap* between imagined and optimized migration regimes, on the one hand, and the concrete facts of irregular presence within the State's borders[76], on the other.

73 Again, R. Petry, *La situation juridique des Sans-Papiers en Suisse*, cit., p. 302.

74 See the Proposal of the Federal Commission for Migration, available at: https://www.ekm.admin.ch/dam/data/ekm/dokumentation/empfehlungen/empf_sanspapiers.pdf . Another example in the same sense of increasing the exchanges and debates at a procedural level before a decision on the case is made by the Canton is the creation of Consultative commissions for the hardship cases that have been established in some cantons (see, for instance, the decision – in French – that establishes such a Commission in the Canton of Valais: https://legvs.vs.ch/sites/legvs/FR/20/law/142_250/pdf/ARC).

75 R. Petry, *La situation juridique des Sans-Papiers en Suisse*, cit. p. 299

76 On the importance, when dealing with irregular immigration, of taking notice of the existence of an inevitable gap between ideas and reality, see, very recently, M. Caroni, Die rechtliche Stellung der Sans-Papiers verbessern, in C. Abbt (Hg.), J. Rochel (Hg.), Migrations Land Schweiz. 15 Vorschlage fur die Zukunft, Hier und Jetzt, 2016, pp 103-116.

The question, therefore, is whether Switzerland wants this gap to be closed as well. The answer seems to be negative. A partial indication in this sense can be derived from Art. 23 Lstr[77], according to which migration from extra-European countries is no longer allowed except in cases of exceptional professionals: therefore, «while until the end of 2007 also the Namibian elephant tamer and the Vietnamese rice farmer could come to Switzerland to take up employment provided the quota and other conditions were respected [….] today only the American top manager can enter»[78]. As noted by scholars, this provision has further closed the country's borders to entries from abroad, making the "ideal" of its migratory regime almost utopian.

The same attitude seems also to be behind the structure of art. 30, para 1, lett b) Lstr and of art 31 OASA, as shown by the parliamentary debates that accompanied the approval of the norm. During the discussions, it was made clear that art. 30, co. I, lett b) should not become a *Blankoscheck,* a blank check: what had to be avoided at all cost was to give the Sans-Papiers the impression that, by "persisting" (i.e., by staying for a certain amount of time) they would end up regularizing their position[79]. This is why, ultimately, the proposal of allowing the Sans-Papier to present an application for "*cas de rigueur*" after four years was not passed, as anticipated above. Very different is the attitude in the Spanish Parliamentary debates, where room is given to the already existing practice on the foreigner's "arraigo" and on the importance of favouring the "emersion" of those living and working irregularly in the country[80]. The adherence to an "ideal" migration regime

77 And from the initiatives "Against mass immigration", approved by the Swiss people on a national level in February 2014, and "Ours first" at the local (Canton Ticino) level, which was approved at the end of September 2016.

78 M. Caroni, *Die rechtliche Stellung der Sans-Papiers verbessern*, cit. p. 104-105. See also M. Caroni and oths, *Migrationsrecht 3,* Stampfli, Bern, 2014, in particular pp. 433 ss.

79 For instance, Lustenberger Ruedi, *Intervention at the National Assembly*, 28 September 2005, Bulletin officiel de l'Assemblée fédérale, 2005, p. 1228: «Es geht hier also um die rechtsstaatliche Durchsetzung oder um eine sogenannte Amnestie. Ich hätte ja noch Verständnis, wenn der Text dieses Artikels etwas anders formuliert und das eine einmalige Amnestie wäre, wenn es heißen würde: für solche, die bei Inkrafttreten dieses Gesetzes seit vier Jahren in der Schweiz sind. Aber mit der Formulierung, wie sie jetzt gewählt wurde, geben Sie einen Blankoscheck, bis dieses Gesetz in zehn oder zwanzig Jahren wieder geändert wird, und Sie schaffen einen Anreiz, dass die "sans-papiers" mindestens vier Jahre hier bleiben, also ausharren; und wenn sie dann vier Jahre ausgeharrt haben, haben sie das Recht auf eine vertiefte Prüfung ihres Falles». See also the intervention of C. Blocher: «Jeder hat versucht, diese vierjährige Klausel zu erfüllen, denn nachher gab es ein Anrecht, hier zu bleiben. Denn "vertiefte Prüfung" heißt natürlich, wie das jetzt auch Herr Donzé ehrlich ausgeführt hat, dass es eine Anerkennung gibt. Wenn sie das auf die illegal Anwesenden ausdehnen, heißt das: Jemand muss vier Jahre illegal in der Schweiz sein, dann wird sein Fall näher geprüft, und dann wird er anerkannt».

80 See for instance the intervention of Campuzano-Canadès, during the parliamentary debate related to the amendments of Law No. 4/00, available at: http://www.congreso.es/portal/page/portal/Congreso/PopUpCGI?CMD=VERLST&BASE=puw7&DOCS=1-1&QUERY=%28CDP200011240044.CODI.%29#(P%C3%A1gina2133) : «En segundo lugar, y en relación a los mecanismos de gestión de la inmigración irregular, nosotros entendemos que la aceptación que se producirá con la intervención del Grupo Popular sobre la asunción de la incorporación del principio de arraigo como mecanismo para afrontar las situaciones de irregularidad, nos parece una buena solución. Damos valor de ley a lo que ha sido una práctica de la Administración española desde el año 1997, a través de la comisión ad hoc, para prever la incorporación al marco de la normalidad administrativa a personas que conviven entre nosotros sin papeles».

also seems to be behind the repeated refusals to consider or implement the yet many suggestions for change or improvements of the legal framework related to Sans-Papiers laid on the table over the past years. The administrative and judicial practices analysed in the paper do nothing but reflect, in the peculiar way made possible by the flexible nature of discretion, this underlying political attitude, which, in sum, refuses to take the "gap" between ideal migration models and reality into account.

From this perspective, then, questions about the efficacy and impact of the "*cas de rigueur*" mechanism lose relevance because it ceases to be a regularization measure, showing itself as a mere symbol, a Graal, of a possible and yet often unreachable way out of irregularity. What can rather be said is that Switzerland does not currently have a true regularization mechanism. Bringing the reflection a bit further, what can be inferred from the history of the provision of art. 30, co. I, lett b) and from its daily implementation is that, at the moment, Switzerland does not want a regularization mechanism at all. The ultimate reason for this may be derived from the parliamentary debates that accompanied the approval of the norm: the will to make political considerations prevail over economic and pragmatic factors, thus making administrative and judicial practices almost impermeable to the inputs coming from reality.

It could be argued, however, whether, from a human rights and economic perspective, it would not be better for the Swiss State to take note of the gap, which its stand on migration is further widening, between the ideal model of a purely highly skilled and wealthy immigration and the stark reality of 76.000 people already living without papers in its borders. In this sense, the Spanish case could work as an example that keeping channels of communication open between praxis and politics can provide for fitting, appropriate and proportionate solutions that, without giving in to demagogic claims of general amnesties or open borders, can allow for the gaps between reality and dream to become smaller. This is, in the end, what every politician should aim for[81].

[81] «Politik ist die Kunst des Moglichen» - «Politics is the art of the possible [and, according to some versions] Politics is the art of the next best» is one of Otto Von Bismarck's famous statements, in *Fürst Bismarck: neue Tischgespräche und Interviews*, Vol. 1, p. 248.