

## Undocumented work (by foreigners) and sanctions. The situation in Italy\*

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## 1. Migration: models, policies and Mediterranean affinities.

Whilst the growing scientific interest on national level focusing on the link between migration and labour law<sup>276</sup> has not yet fully matured, it provides a starting point for the discussion contained in this paper. This specialist scientific interest is consolidating, even in situations where flows of people searching for work started earlier as a result of the post-colonial development of the dynamics of flows of people looking for work.<sup>277</sup> Various research papers indicate that the models of migratory flows do not follow stable and predefined contours. This is due amongst other things to developments in forms of transportation, resulting in a mixing between migration out of a classic colonial background and economic migration towards selected and predefined destinations, as well as movements of refugees who – in the wake of the Syrian crisis – will have a profound influence on the future destiny of the European Union's Schengen Agreement (which will be heavily conditioned by the impending *Brexit* of the United Kingdom, the capital of which - London - has been branded as “*super-diverse*” precisely on account of the heterogeneous nature of its population).<sup>278</sup> This research also discusses issues common to countries from the Mediterranean area (including in particular Italy and Spain), which may be summarised in a few lines digesting the consolidated experience of emigration,<sup>279</sup> which has emerged during recent times and has involved the difficult management of significant immigration flows (emerging in Italy around the end of the 1970s and the start of the 1980s following the economic boom), with high levels of *undocumented immigrants*. This is a fact which confirms, for political scientists, at least an evident discrepancy between political projects (and rules) concerning access by non-EU citizens and the current needs of the societies under consideration.<sup>280</sup> Although the arrangements for regularisation may change (individual and collective for respectively Spain and Italy), the overall sense of the project remains, which is unequivocally recognised within the academic literature.<sup>281</sup> Regularisation offers tangible proof of policy failures.

There is a further structural element which needs to be considered in the introduction, namely that immigration policies take for granted (in the sense of being conditioned by) the more or less

<sup>276</sup> Out of the most recent monographs published, see W. CHIAROMONTE, *Lavoro e diritti sociali degli stranieri. Il governo delle migrazioni economiche in Italia e in Europa*, 2013, Turin, Giappichelli; A. MONTANARI, *Stranieri extracomunitari e lavoro*, 2010, Padua, Cedam. See L. CALAFÀ, *Migrazione economica e contratto di lavoro degli stranieri*, 2012, Bologna, Il Mulino.

<sup>277</sup> C. COSTELLO, M. FREEDLAND, *Migrants at Work and the Division of Labour Law*, in C. COSTELLO, M. FREEDLAND (eds), *Migrants at Work. Immigration and Vulnerability in Labour Law*, 2014, Oxford, Oxford University Press, a volume which addresses – in a systematic manner – questions relating to the impact of immigration law on labour law, revealing the divisive nature of the former (in terms of both existing and new differences). The proposal – formulated within a multilevel logic of respecting the fundamental human rights of workers – of taking account of all forms of labour exploitation is of great interest.

<sup>278</sup> M. BORKERT, R. PENNINX, *Policymaking in the field of migration and integration in Europe: An introduction*, in G. Zincone, R. Pennix, M. Borkert, *Migration Policy Making in Europe. The Dynamics of Actors and Contexts in Past e Present*, 2011, Amsterdam, Amsterdam University Press, in particular from p. 8; see also, for flows into Eastern Europe, B. GLORIUS, I. GRABOWSKA-LUSINSKA, A. KUVIK, *Mobility in Transition Migration Patterns after EU Enlargement*, 2013 Amsterdam, Amsterdam University Press.

<sup>279</sup> Article 35 of the Italian Constitution protects work by Italians abroad.

<sup>280</sup> C. BOSWELL, *The Politics of Irregular Migration*, in L. Azoulai, K. de Vries (eds) *EU Migration Law: Legal Complexities and Political Rationales*, 2014, Oxford, Oxford University Press, p. 41.

<sup>281</sup> See more recently, M. BELL, *Irregular Migrants: Beyond the Limits of Solidarity?* in (eds) M. ROSS, Y. BORGMANN-PREBIL, *Promoting Solidarity in the European Union*, 2010, Oxford, Oxford University Press, p. 151; S. CARRERA, *Integration of Immigrants in EU Law and Policy: Challenges to Rule of Law, Exceptions to Inclusion*, L. AZOULAI, K. DE VRIES (eds) *EU Migration Law: Legal Complexities and Political Rationales*, 2014, Oxford, Oxford University Press, p. 149.

widespread presence of an informal economy, which is not always rooted in crime, but is certainly liable to impinge upon the proper functioning of fair competition between undertakings (both large and small, and whether in labour-intensive sectors or not), not to speak of between workers. Issues relating to competition between undertakings and between workers (both documented and undocumented) must be taken into account, at least implicitly, in this report. The proper functioning of competition is radically undermined in various European macro-areas because, where undertakings disregard the rules of reciprocal fairness, competition is structurally distorted. The results arrived at in the recent publication edited by Costello and Freedland, which directly compare the circumstances of local workers (including not only EU citizens but also non-EU citizens with a valid residence permit) with those of other people who are, for whatever reason, undocumented are undoubtedly interesting;<sup>282</sup> the position is however different when the undocumented work is not performed for an undertaking but for an individual or a family, such as by a carer. The segmentation of the labour market for foreign nationals (not limited to undocumented workers) points to the enduring significance of the work of carers, whether for children or the elderly. Within this context, the issue of proper competition must be considered from a different angle, having regard to the extent to which public services are satisfactory, from the national level (such as for example school hours) through to local communities (which are having to manage health services and primary schools with increasing difficulty).

An issue such as that considered in this study touches upon general questions (and general policies: access to borders) from the standpoint of a specialist discipline which deals with labour-related issues (labour markets, contracts and relations). However, it must also consider the interdisciplinary dialogue that has emerged in relation to the same issue (i.e. migration), both with non-legal disciplines (with sociology in particular, although also economic studies concerning demographic growth rates)<sup>283</sup> and also with areas of the law other than labour law, including in particular criminal law.

This dialogue has proved to be necessary due to the need to engage in an objective manner with a fact that is now established: the essential relevance of policies of control<sup>284</sup> and the “choice made by states (including our own), both internationally and within national legal systems, to privilege a ‘*law enforcement approach*’ rather than adopting a ‘*human rights perspective*’, which has the inevitable consequence that ‘*less attention [is paid] to the range of factors that created*

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<sup>282</sup> C. COSTELLO, M. FREEDLAND, *Migrants at Work and the Division of Labour Law*, op. cit. p. 24, who state that - as labour lawyers - it is almost inevitable to conclude that, on considering the divisive impact of immigration law (in general) on labour law (in particular), the preferred choice is under all circumstances to protect workers irrespective of their status as legal migrants. This choice of privileging the interests of labour over the general interests associated with immigration has repercussions on an ethical level (not to speak of the legal level). Workers are certainly protected. But which workers? Are local workers protected against unfair treatment, which may by contrast be imposed on undocumented workers, thereby conditioning the local market, or must migrant workers be protected from disloyal or unfair treatment? When framed in these terms, the question is rendered dependent upon a precondition which is not generally valid throughout all countries: namely the proper conduct of a business. A more reassuring answer may be provided with reference to the issues relating to supervening undocumented status, which will be considered below in section 4.

<sup>283</sup> See the recent study by H. BRÜCKER *The Labor Market Impact of Immigration and its Policy Consequences* MPC Analytical and Synthetic, Note 2012/04.

<sup>284</sup> J. DOOMERNIK, M. JANDL, *Modes of Migration Regulation and Control in Europe*, 2008, Amsterdam, Amsterdam University Press.

or exacerbated workers to the exploitation' and of downgrading the rights of the victim,<sup>285</sup> considering that the subject matter of today's session embraces both domestic and EU approaches to the issue of the mobility of people from a standpoint of so-called *politics of proximity*,<sup>286</sup> both of which must take account of the - undoubtedly neglected - regulatory dimension of the ILO, which will be considered in the concluding part.<sup>287</sup>

## 2. From legal indifference to the law enforcement approach.

A summary of the legal literature on the issue of undocumented foreign nationals reveals, at least until 1998, an overall stance of substantial indifference, if not even the complete lack of any interest; within social sciences – in particular sociology, which has historically paid greater attention to the issue – a variety of different views have been proposed, all of which reject the significance of any legal notion, thereby reflecting a broader political approach, according to which the borders lost through the globalisation of markets are replaced by issues relating to the legal status of migrants, as a symbol of lost sovereignty (also on EU level).<sup>288</sup>

It has already been noted elsewhere that Italy has a parallel labour market for foreign nationals in general, which has its own somewhat cumbersome rules (general and special systems of access, flows, residence contract for employment) and is inspired by its own values (such as the safety of the general public: see the report by Prof. Lunardon).<sup>289</sup>

Interest in this issue from the specifically labour law perspective was certainly late in developing, being related to the emergence of EU law in this area, and has been closely conditioned by the development of criminal law vis-à-vis undocumented work by foreign nationals and intersects with the phase of initial influence of EU law on national law, thanks to the consolidation of the common EU policy grounded in Title V TFEU dedicated to *Freedom, security and justice*. EU policies in this area may be classified as proximity policies in the sense that such policies, the level of implementation of which on national level is under scrutiny, result from a unanimous common

<sup>285</sup> N. BOSCHIERO, *Lo sfruttamento economico dei lavoratori migranti: vecchie o nuove forme di schiavitù nell'era della «private economy»*, in *Diritti umani e diritto internazionale* 2010, 4, p. 363. The author also adds in her lucid and rich study that destination states are keen to avoid administrative and financial responsibility which the protection for victims entails, "in spite of the growing dependence of their economies precisely on work performed by those segments of the population that prove to be the most vulnerable", as is demonstrated by the central role performed by the private economy "which strives to respond in the most profitable way possible to the needs of individuals and people who are increasingly reluctant to perform so-called '3D' jobs (*difficult, dirty and dangerous*)".

<sup>286</sup> L. CALAFÀ, *Migrazione economica e contratto di lavoro degli stranieri*, op. cit., p. 9.

<sup>287</sup> Reference is made in particular to the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* adopted by the General Assembly by Resolution 45/158 of 18 December 1990, which has not been ratified by any EU Member State. As far as Italy is concerned, the various positions expressed by the National Council for the Economy and Labour, the national coordination body for policies for the social integration of foreign nationals in 2001 following the outcome to the Durban Conference ([www.cnel.it](http://www.cnel.it)) should be compared, with reference to the interpretations provided by independent associations, in particular F. VASSALLO PALEOLOGO, *Brevi note di sintesi sulla ratifica della Convenzione ONU del 1990 sui diritti dei lavoratori migranti e delle loro famiglie*, in [www.asgi.it](http://www.asgi.it).

<sup>288</sup> F. PASTORE, *Migrazioni internazionali e ordinamento giuridico*, in *Storia d'Italia*, vol. 30, Turin, Einaudi, 1998, p. 1090; per una sintesi recente delle teorie sociologiche, M. AMBROSINI, *Immigrazione irregolare e welfare invisibile. Il lavoro di cura attraverso le frontiere*, 2013, Bologna, Il Mulino, from page 9.

<sup>289</sup> This paper takes as read the entire discussion regarding the lack of (structural) efficacy of immigration policies that are founded on the bureaucratisation of procedures governing entry and stay for the purposes of employment in Italy, which refer to an equally difficult disciplinary relationship, such as that with administrative law, considering the jurisdiction of the administrative courts over all matters relating to residence permits.

position adopted by the Member States within the Council (as is demonstrated by the rules incorporated into the Lisbon Treaty departing from the best intentions expressed only a few years before 11 September 2001 at the Tampere Council in October 1999).

One of the most tangible results has been the conversion to security issues during those years, which occurred without distinction on both EU and national level, resulting in the transformation of the process proposed by the important contribution to migration issues in 1998 (and which has been used as the title to this section), which was originally framed as *from legal indifference to minimum protection* under Italian Law no. 40 of 1998 (before the Bossi-Fini Law of 2002)<sup>290</sup> but subsequently became – after passing through a variety of legislative acts aimed at criminalising status as an undocumented foreign national – *from legal indifference to the law enforcement approach* in Directive 2009/52/EU.

This is not the appropriate forum in order to trace out the evolution of supranational policies on undocumented foreign nationals.<sup>291</sup> However, this paper will provide an introduction to the overall domestic policy insofar as strictly of interest to labour law. Indeed, the legal question of undocumented foreign nationals certainly did not emerge during the transposition phase for the 2012 directive. The transposition of the directive enables the various problems associated with the issue of undocumented labour to be crystallised with a certain degree of systematicity. The directive will be used within this paper as a framework for interpreting the phenomenon of undocumented labour with the aim of drawing up a complete list, insofar as this is possible, of the legal problems which labour law, as a sectoral discipline, should engage with in relation to the concept of the undocumented worker.

### 3. Undocumented work and the market of the invisible.

Also the *Fifth Annual Report on Migrants in the labour market in Italy* published in 2016 by the Italian Ministry for Employment confirms that the broad array of statistical observation covers only the segment of the foreign population that is properly registered with municipal authorities. In other words, the Ongoing Documentation of the Labour Force (Rilevazione Continua sulle Forze Lavoro, RCFL) of the Italian Statistics Institute (ISTAT) does not cover individuals who are present unlawfully or those who, whilst being lawfully present, are not resident in Italy. It is no longer possible to infer from that report how many people it was not possible to hire as a result of the provision for inadequate capacity under the migration flows decrees and/or other technical problems emerging in relation to the signature of a residence contract for employment. This means that it is not at present possible to repeat the attempt previously made elsewhere to measure the impact on the rate of undocumented work of the procedures applicable in Italy, namely the

<sup>290</sup> F. PASTORE, *Migrazioni internazionali e ordinamento giuridico*,

<sup>291</sup> See again L. CALAFÀ, *Migrazione economica e contratto di lavoro degli stranieri*, op. cit., from page 11; see more recently S. CARRERA, L. DEN HERTOG, *Whose Mare? Rule of law challenges in the field of european border surveillance in the Mediterranean*, Ceps Paper in Liberty and Security, no. 79, Jan. 2015, in [www.ceps.eu](http://www.ceps.eu); R. CHOLEWINSKI, *Labour Migration, Temporariness and Rights*, in CARRERA S., GUILD E., EISELE K., *Rethinking the Attractiveness of Eu Labour Immigration Policies, Comparative Perspectives on the Eu, the US, Canada and Beyond*, Ceps, Brussels, 2014; M. KHANEC, *Labour Market Needs and Migration Policy Options: Towards More Dynamic labour Markets*, in CARRERA S., GUILD E., EISELE K., *Rethinking the Attractiveness of Eu Labour Immigration Policies, Comparative Perspectives on the Eu, the US, Canada and Beyond*, Ceps, Brussels, 2014.

hypothesis that there is a reciprocal influence between the level of undocumented foreign nationals (and workers) and the rules governing access procedures in Italy on the basis of the presumption (which has been maintained over time, even though it is clearly misguided) that non-EU nationals applying for hose employment are not – at the time the request is made – present in Italy.<sup>292</sup> It is obvious that they are, but that they pretend not to be. They will remain invisible until a new procedure for regularisation is approved.<sup>293</sup> As was noted in the 2013 statistical file dedicated to immigration, “the structural recourse to an exceptional instrument” is a “reflection of a migratory policy that is focused more on ex post regularisation than on a prudent management of migratory flows”, even though the European Union’s aversion to procedures for regularising undocumented foreign workers was acknowledged in the European Pact on Immigration and Asylum (approved by the Council of Europe on 16 October 2008) and has become an integral part of Directive no. 2009/52/EU, specifically in recital 15.

In addition to being non-quantifiable (despite the various efforts of the ISTAT),<sup>294</sup> undocumented foreign nationals are also not easy to qualify under law (including labour law).

Directive 2009/52 on sanctions against employers who employ undocumented workers does not define undocumented work, which it considers to be a matter for each individual Member State: it rather seeks to isolate, distinguishing from undocumented work as a general category, work that is performed by an undocumented foreign national, and to focus on the employer to be sanctioned. In this way it fails to pay any attention to undocumented work in general except where it is performed by an undocumented foreign national who – as an undocumented foreign national as such – need simply be expelled according to a clear procedure, which however disregards the full range of complexity of the phenomenon of migration.<sup>295</sup>

The relativity of the concept of undocumented immigrant is a given fact: it changes depending upon the reference legislative context, and in fact breaks down entirely when considered from a multi-level perspective with reference to different geographical areas.<sup>296</sup> It is important to

<sup>292</sup> There is a lack of migration flows decrees that are “open” to any non-EU national given that in the most recent years of the economic and financial crisis such decrees have been adopted in response to international agreements reached only with certain specific foreign states.

<sup>293</sup> Seven procedures have been approved since 1986 in Italy, or eight if the period under consideration is extended to 1982 (the year in which the circulars of the Ministry for Employment no. 14194/IR/A and no. 15106/IR/A were adopted, respectively on 2 March and 9 September), during which five thousand applications for the regularisation of employee workers have been accepted. The most recent regularisation dates back to 2012 and was approved within the context of the transposition of Directive 2009/52.

<sup>294</sup> ISTAT file on Foreign Nationals 2011, *Misurare l’immigrazione e la presenza straniera: una sfida continua per la statistica ufficiale*, in [www.istat.it/it/files/2011/02/Dossier\\_Istat\\_stranieri.pdf](http://www.istat.it/it/files/2011/02/Dossier_Istat_stranieri.pdf).

<sup>295</sup> In general terms, it may be stated that this is a Directive that has the sole purpose of discouraging undocumented labour as a *pull factor* for migratory flows by imposing sanctions on employers (recitals 2 and 36) and not of discouraging undocumented labour in general. Its scope as defined in Article 1 includes the employment (prohibited) of illegally staying third-country nationals in order to fight illegal immigration, a measure which is only complementary to “measures to counter undeclared work and exploitation” (recital 33). Article 2(1)(c) clarifies in the *Definitions* that: “illegally staying third-country national means a third-country national present on the territory of a Member State, who does not fulfil, or no longer fulfils, the conditions for stay or residence in that Member State”; letter (d) adds that “illegal employment means the employment of an illegally staying third-country national”.

<sup>296</sup> M. AMBROSINI, *Immigrazione irregolare e welfare invisibile*, op. cit.; E. DEWHURST, *The Right of Irregular Immigrants to Back Pay: The Spectrum of Protection in International, Regional and National Legal Systems*, in C. COSTELLO, M. FREEDLAND (eds), *Migrants at Work. Immigration and Vulnerability in Labour Law*, 2014, Oxford, Oxford University Press, p. 216.

reiterate a brief note of caution here, which has already been sounded elsewhere,<sup>297</sup> also in the context of the famous citation used at the start of the first Italian monograph in this area.<sup>298</sup> If “language is legislation”, this paper has avoided the usage of the term illegal immigrant, even where this is imposed by the criminal law, rather choosing – on both national and EU level – to use the term foreign national as synonymous with a non-EU national: both terms are used indiscriminately, also because there should no longer be any “foreign nationals” within the European Union but only “European citizens” (in spite of the difficulties arising with the Schengen Agreement).

There is an even more complex relationship between undocumented non-EU nationals and undocumented employment, the confluence of which is a characteristic feature of the situation in Italy, which makes it even more complicated to justify the regulatory choice made within Directive 2009/52. Thanks to an evident process of avoiding the problem, the Directive does not at any point use the term “worker”, almost as if EU lawmakers were attempting to impose the notion of a migrant who simply needs to be removed if he or she is undocumented, notwithstanding the regulatory context within which it operates (employment), sanctioning employers who hire undocumented foreign nationals. On national level it is thus necessary to draw a distinction between status (as a lawful or unlawful resident) and employment contract (which, at least for the first contract of employment, is still the residence contract for employment governed by the Consolidated Text of Legislation on Immigration, which has still not yet been repealed).

In order to promote understanding of the issue, it has been chosen in this paper to distinguish between original undocumented status and supervening undocumented status for non-EU nationals. With regard to the former, this paper will consider the issue of sanctions for the employment of non-EU nationals who do not hold a valid residence permit; with regard to the latter (namely persons who were lawfully resident at the time they were hired but subsequently lose that status), it will engage with the issues most closely related to the proper functioning of the principle of equal treatment, focusing on several recent interesting court rulings.

#### 4. Original undocumented status and sanctions under Italian law.

With regard to the complex sanctions strategy under national law, at the time Directive 2009/52 was transposed in August 2012 criminal sanctions were already in place for employers and illegal entry and stay by a foreign national was already a criminal offence. The legislation was limited to reinforcing – by amending the individual provisions contained in the Consolidated Text of Legislation on Immigration – the criminal sanctions laid down by Article 22, the provisions of which were affected by most of the amendments adopted in August 2012.<sup>299</sup>

<sup>297</sup> L. CALAFÀ, *Migrazione economica e contratto di lavoro degli stranieri*, op. cit.

<sup>298</sup> A. VISCOMI, *Immigrati extracomunitari e lavoro subordinato*, 1991, Napoli, Esi, p. 8 citing R. Barthes.

<sup>299</sup> The seriousness of the offence provided for under Article 22(12) has been increased yet further, having previously been enhanced by Decree-Law no. 92 of 23 May 2008, converted into Law no. 125 of 24 May 2008, with the result that, according to the more careful commentators, the changes appeared to be “irrational” and “disproportionate”. The exacerbation of the criminal aspect ends up causing the national legislation to contrast with EU law, which reiterates in recital 13 that “to enforce the general prohibition and to deter infringements, Member States should provide for appropriate sanctions. These should include financial sanctions and contributions to the costs of returning illegally staying third-country nationals”, who are already subject to the residence contract in Italy;

Whilst from a general point of view it cannot be denied that national regulatory techniques involving the wide-scale use, or perhaps abuse, of the threat of criminal sanctions appear to have contributed to the consolidation of an *ad hoc* branch of the criminal law, namely symbolic criminal law, from a strictly employment law viewpoint it is necessary to compare between disciplines that are methodologically correct in order to establish a systematic line of development peculiar to the law on immigration. Within this perspective, it must be admitted that strictly criminal law questions are only *indirectly* significant for the regulation of work performed by foreign nationals. Economic migration is a common focus of attention under the two disciplines, which operate without any overlap (at least ideally, although an exception will be discussed in the following section).

The recognition of the indirect significance for employment of this part of the criminal law does not preclude the emergence of a dual awareness with the support of the most recent case law. The first insight is that status as an undocumented foreign national has the effect of rendering the status of undocumented workers in Italy precarious in general, which has a knock-on effect also on the level of complaints made above all by the victims of serious labour exploitation: this level is obviously very low.<sup>300</sup> The second consideration concerns the implication which vulnerability in terms of status is liable to produce in relation to the protection of rights. Litigation in this area is in effect somewhat scant, and has also been effected by the subsequent establishment of the offence of illegal entry and stay by Article 10-bis of the Consolidated Text on Immigration from 2009.<sup>301</sup> Although it is indirectly relevant for labour from the methodological point of view, undocumented work by a foreign national gives rise to criminal responsibility for the employer.<sup>302</sup>

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recital 18 goes on to add other types of sanction (exclusion from entitlement to benefits, subsidies, public aids, exclusion from public procurement procedures and EU funding), as is reiterated in Articles 5, 7, 9 and 10 dedicated to *Financial sanctions, Other measures* and clarifications relating to *Criminal offences and Criminal penalties*.

<sup>300</sup> See the examination under this item and section 5 below. With regard to Article 10-bis of the Consolidated Text of Legislation, it is recalled that the declaration of unconstitutionality of the aggravating circumstance contained in Constitutional Court judgment no. 249 of 8 July 2010 was followed by another ruling upholding the constitutionality of the offence introduced by the security package of 2009 in judgment no. 250 of 2010, which was issued on the same day; according to the literature, that second judgment also appears to be the result of a kind of institutional self-restraint associated with an awareness of the precedents in the area and the not insignificant fact that these were flagship rules of the then governing majority. It has been pointed out that, as impeccable as the ruling may be, as the offence is a minor misdemeanour punished solely by a fine, which may be replaced by expulsion, the Constitutional Court's reasoning in relation to Article 10-bis is excessively formalist: L. MASERA, *Costituzionale il reato di clandestinità, incostituzionale l'aggravante: le ragioni della Corte costituzionale*, in *Diritto, immigrazione e cittadinanza*, 2010, 3, 37 ss.; ID., *Corte costituzionale ed immigrazione: le ragioni di una scelta compromissoria*, in *Riv. it. dir. proc. pen.*, 2010, 1373 et seq; he states in particular that "the recourse to a consolidated framework for conceptualising misdemeanours as a violation of administrative legislation conceals the reality of a rule that punishes a foreign national because he is undocumented, thereby establishing the model of the criminal law of the perpetrator evoked by the lower court".

<sup>301</sup> Within a perspective of verifying the efficacy of the legislation, it must be noted that Legislative Decree no. 109 of 2012 is entirely silent regarding the mechanisms put in place by EU lawmakers in order to facilitate or at the very least not to prevent complaints by workers: the criminal significance associated with status as an undocumented foreign national suggested that greater attention should be dedicated to the efficacy of the rules; the system currently in force under which none of the parties involved receives any benefit but only negative consequences from any complaint can only undermine the central instrument for the efficacy of the directive (Article 13 and recital 26), a complaint which is, or rather should be, accompanied by inspections (Article 14), facilitated and guaranteed by various mechanisms, including its lodging by a third party.

<sup>302</sup> The sanctions for employers are mentioned in Article 22(5) of the Consolidated Text of Legislation on Immigration: any person employing workers without a residence permit or whose residence permit has expired "the renewal of which has not been applied for within the statutory time limits, or which has been revoked or cancelled, shall be punished to a term of imprisonment of between six months and three years and a fine of 5,000 euros for each worker employed".

The recent research cited in note 1 has considered three specific aspects, which deserve to be noted in this paper (in sections 5, 6 and 7).

### 5. Supervening undocumented status in two recent judgments.

The recent research has detected signals which are – first and foremost – at odds with the proper operation of the principle of indifference of the criminal law to labour law. These signals should be recalled in this paper as both of them concern processes of supervening undocumented status, and the resulting impact which the change in legal status has on the employment relationship.

To start with a premise: under the terms of the legislation in force in Italy, a foreign national who presents himself or herself at the national border is guaranteed “fundamental human rights”, whilst a foreign national who is lawfully resident enjoys the same “civil rights as those of an Italian national”. In fact, it is explicitly specified that foreign workers and their families are guaranteed equal treatment and full equality in terms of rights with Italian workers (Article 2 of the Consolidated Text of Legislation on Immigration).

Without giving further consideration to the theoretical dimension to the principle (regarding which reference is made to the report by Prof. Garilli) and acknowledging the technical differences between “documented” workers and “undocumented” workers,<sup>303</sup> the first reflection proposed is based on judgment no. 18627 of 5 August 2013 of the Labour Division of the Court of Cassation, in which the court upheld as lawful the dismissal of an employee who had lost the status of a lawfully resident non-EU national.<sup>304</sup>

Reference is also made to the ruling of the EU Court of Justice of 5 November 2014 in the *Tümer* case (C-311/13) in which the court was requested to consider the exclusion from the scope of the employer insolvency directive of a worker who no longer held a residence permit.<sup>305</sup> The Dutch Government in particular asserted that such a person could not be classified as a worker within the meaning of Directive 80/987 on employer insolvency for the purpose of the recognition of the relative insolvency benefits because that directive cannot have a broader scope than the legal foundation on which it is based, namely Article 137 of the EC Treaty, and thus does not apply to third-country nationals not legally resident in the Netherlands. Only long-term residents (pursuant to Directive 2003/109) and workers lawfully resident are treated equally in relation to social benefits. The Court took a different view, following the Advocate General. A third-country national who is not lawfully resident in the Member State concerned will not cease to be considered as an employee with entitlement to request an insolvency benefit in relation specifically to unpaid wages in the event of the employer’s insolvency. The Court held that the “third-country national is recognised under the civil law of the Member State as having the status of an ‘employee’ with

<sup>303</sup> For the former, it must be asked whether the legislative framework of the European Union has been enhanced by the approval of Directive no. 2011/98/EU; the reference framework for undocumented workers is different, being centred predominantly on the protection of fundamental rights recognised to all persons. Reference is made with regard to all matters not expressly considered in greater detail in this paper to the entry by L. CALAFÀ FOR *Lavoro degli stranieri [Work by foreign nationals]* in *Enciclopedia del diritto*, Annali, 2015, vol. VIII.

<sup>304</sup> In *Riv. giur. lav.*, 2014, II, 54, with a note by L. CALAFÀ, *Irregolarità sopravvenuta dello status di straniero e legittimità del licenziamento*.

<sup>305</sup> L. CALAFÀ, O. BONARDI, “*The Social Borders of the European Union’s Immigration Policy*”, paper presented at the international conference *Labour Law Research Network Conference*, University of Amsterdam, 25-27 June 2015.

an entitlement to pay which could be the subject of an action against his employer before the national courts”.

These are thus two contrasting signals within the multi-level legal system considered overall which have a distinct position but which are functionally related to the application of the principle of equal treatment that associates – under both national and international law – the legal status of residence with status as a worker, a principle which has been respectively set aside and confirmed in the cases mentioned above. There is no doubt that both of these rulings will end up having a significant systematic impact on labour law, and the identification of the contradiction is symptomatic of an imbalanced settlement of the legal order in the face of immigration.

As regards the judgment by the Court of Cassation, it must be conceded that the result of the introduction of the criminal law sanction for employers has been to cast doubt on the continuing validity of the principle of indifference of a foreign national's status for his or her employment contract which has consolidated over time precisely within the case law applying the more general principle of equal treatment for workers who are EU nationals and workers who are (no longer) lawfully resident, a consequence to which particular attention should be dedicated within the literature and the case law on immigration.<sup>306</sup> Although until recently it had been a settled position that a contract could not lawfully be terminated due to the supervening unlawful status of the foreign national, drawing on the civil law doctrine of the impossibility of performance of the employment law obligation, the recent ruling of the Court of Cassation referred to above, which builds conceptually on the previous rulings, in actual fact departs from these in ultimately upholding the lawfulness of termination (or rather of withdrawal). The reasoning followed associates the criminal significance of the hiring of undocumented workers by an employer (Article 22(5)) with the treatment of the supervening undocumented status of the worker (which is closely conditioned by the rules governing the complex procedure applicable in Italy, as is apparent from the specific case, which involves a significant problem of the bureaucratisation of the procedures for renewing residence permits).

Various considerations may be made regarding the ruling by the ECJ, not only due to the shift in the interest of EU lawmakers. With regard to the specific focus of the research (treatment of undocumented persons and employment relationships), these considerations may even be considered to be countervailing in that they reassert the protective function of labour law which, in view of the *social functions* performed by it, prevails over considerations associated with the legal status of the stay by a non-EU national, which are centred on the security of the general public. This reassertion is even more significant within the context of the current critical status of the overall social dimension to EU law.

In considering together the reflections on the impact on individual workers in terms of the protection of rights (from a labour law perspective) with the issue of the competences laid down in the TFEU, it cannot be accepted that such a recognition will (finally!) enable legal considerations

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<sup>306</sup> Considering these premises, it is partially correct to assert, without any qualification, that there is no difference between status as an undocumented worker and the protection of employment under Italian law: M. PAGGI, *Tutela dei lavoratori stranieri in condizioni d'irregolarità. Analisi della direttiva 52 e delle norme italiane di recepimento*, in *Agromafie e caporalato. Terzo Rapporto*, edited by Osservatorio Placido Rizzotto, 2016, Rome, Ediesse, p. 54.

to be based on questions regulated by the somewhat weakened Title X of the TFEU dedicated to *Social Policy*, recalling its primordial force within the overall context of the Treaty, although it is considered to be losing ground compared to the constantly expanding Title V on *Freedom, Security and Justice* in relation to the employment of non-EU citizens, above all if undocumented.<sup>307</sup> This ruling enables it to be clarified that not every recognition of the rights of undocumented immigrants will result in unlawful irregularity and that the only instrument that can be used against them is deportation.

The second aspect of interest for a systematic account of the issue is associated with the interpretative path used by the Court, including in particular the use of the general principle of equal treatment in the areas in which it was not previously recognised (undocumented workers), at the express suggestion of Advocate General Bot.<sup>308</sup> The choice to root the decision in the proper operation of the principle of equal treatment as asserted also in the Charter of Fundamental Rights will give cause for cautious optimism to interpreting bodies. Besides, one must not forget the effect produced by the *P/S* case from 1996 concerning unlawful discrimination on the grounds of gender identity on the overall structure of anti-discrimination law, which justified its extension to grounds that had previously been excluded.<sup>309</sup>

## 6. Undocumented status and exploitation of labour.

There is a point of arrival within sociological research which should be recalled within the context of this legal study: that the dichotomy between work (coercive, exploitative or undocumented) and the economy (informal or criminal) reciprocally completes and fuels itself even through its opposite positive pole within this symbiotic relationship (documented work and free/formal economy).<sup>310</sup> This is the precise point at which it is explained that the caesura used within

<sup>307</sup> L. CALAFÀ, *Migrazione economica e contratto di lavoro degli stranieri*, op. cit., p. 58.

<sup>308</sup> AG Bot asserts very clearly in his opinion delivered on 12 June 2014 that the exclusion from the scope of Directive 80/987 of persons falling into the category of “employee” under national law will run contrary to the general scheme and effectiveness of that Directive. This is because “although that directive allows Member States to define the term ‘employee’, it none the less requires them to do so in such a way that the definition used to determine the scope of the measures transposing that directive matches the definition in force in their national employment law, so that any ‘employee’ within the meaning of national law will be eligible for the guaranteed settlement of pay claims”. In other words, the definition of employee cannot vary depending upon whether the issue concerns relations between the worker and the employer or the former’s relations with the guarantee funds. Secondly, and this passage is particularly significant within the context of this study, “making the right to the guaranteed settlement of pay claims conditional, in the case of an employee who is a third-country national, upon legal residence is not, to my way of thinking, consistent with the principle of equal treatment and non-discrimination. That principle is a general principle of EU law enshrined not least in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union, the provisions of which are addressed both to the institutions, bodies and agencies of the European Union and to the Member States when they are implementing EU law, as is clear in particular from Article 51(1) of the Charter. Now, when, within the framework of the reference to national law under Article 2(2) of Directive 80/987, a Member State defines the categories of employee to which that directive is to apply, it is implementing EU law and must therefore observe the principle of equal treatment and non-discrimination. According to settled case-law, that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified”.

<sup>309</sup> G. F. MANCINI, *Le nuove frontiere dell’eguaglianza fra i sessi nel diritto comunitario*, in G. F. MANCINI, *Democrazia e costituzionalismo nell’Unione europea*, Mulino, Bologna, pp. 207-247

<sup>310</sup> M. AMBROSINI, *Immigrazione irregolare e welfare invisibile*, op. cit., p. 25. This report is also confirmed by the legal interpretation of the phenomenon of forced labour: S. LIEBMAN, C. TOMBA, *Funzioni di controllo e di ispezione del lavoro*, in (eds) F. BUCCELLATO, M. RE-SCIGNO, *Impresa e «forced labour»: strumenti di contrasto*, 2015, Bologna, Il Mulino, p. 67, in which it is recognised that “labour inspectors can do very little if it is not recognised that – in legislative terms – violations of the rights of workers cannot be imputed

arguments on migration (perhaps in legal arguments, and certainly in political arguments) in actual fact conceals an alibi: that of the “role of states in promoting the deregulation of the labour market and the formation of the conditions that fuel the recourse to undeclared forms of work, including those involving undocumented immigrants”.<sup>311</sup> Using the metaphor of the “double right hand” of Pierre Bourdieu for national and European public institutions, it is acknowledged that “on the one hand, for reasons of competitiveness, they liberalise labour markets by reducing legal constraints and through contracting out, sub-contracting, agency work and flexible and atypical forms of work. In actual fact, leaving aside the intentions, these policies end up generating forms of undocumented work (...) above all in the countries in which the black economy is traditionally rooted and widespread. At the same time however, with the other hand states reinforce controls and assert their intention to repress undocumented immigration”.<sup>312</sup>

Having addressed the paradox of national legislation which contributes to creating irregularity by virtue of the procedures governing access to a lawful employment contract, it is now necessary to consider a genuine alibi used by politics (not only on national level). A more detailed study of certain specific cases encountered in Prato, in the Foggia countryside<sup>313</sup> and the Abruzzo hinterland<sup>314</sup> highlight the difficulties in obtaining access to justice also in cases involving extremely serious exploitation of the labour of workers hired unlawfully, not all of whom are non-EU nationals. There is no lack of criminal legislation in this area, in the sense that, under Italian law, labour exploitation may be prosecuted in the criminal courts in serious cases. A variety of rules are applicable in this area, which are contained in various instruments (such as the Criminal Code and the Consolidated Text of Legislation on Immigration).<sup>315</sup>

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exclusively to unethical employers or, as asserted by the Italian Government before the ILO Committee of Experts, “to the activities of criminal organisations”, but result from policies and practices adopted also by major global distribution companies”.

<sup>311</sup> M. AMBROSINI, *Immigrazione irregolare e welfare invisibile*, op. cit., p. 26.

<sup>312</sup> M. AMBROSINI, *Immigrazione irregolare e welfare invisibile*, op. cit., p. 26 referring to P. BOURDIEU, *Contre-Feu*, 1998, Paris, Liber-Raison d'Agir and A. REA, *Conclusion. Les transformations des régimes de migration de travail en Europe*, in (ed) A. MORICE, S. POTOT, *De l'ouvrier immigré au travailleur sans papier. Les étrangers dans la modernisation du salariat*, p. 307. This caesura also explains the ontological contradiction with the initial framing of the project for the proposal to translate the title as *Legal\_patch\_Work*, the evocative power of which recalls a value dimension in opposition to that of social inclusion: CALAFÀ, M. ORTINO, *Legal Work and Social Inclusion in Horizon 2020*, International Conference Legal Work and Social Inclusion in Horizon 2020, Verona, 11 October 2013, in [http://olympus.uniurb.it/old/index.php?option=com\\_content&view=article&id=8524:prin&catid=68:doc&Itemid=61#8](http://olympus.uniurb.it/old/index.php?option=com_content&view=article&id=8524:prin&catid=68:doc&Itemid=61#8).

<sup>313</sup> See the report by FLAI-CGIL *Liberi dal caporalato. Liberi dallo sfruttamento. 3° report su agricoltura e lavoro migrante in Puglia*, <http://www.flaipuglia.it/3°-report-agricoltura-e-lavoro-migrante-in-puglia>. SEE C. DE MARTINO, M. LOZITO, D. SCHIUMA, *Immigrazione, caporalato e lavoro in agricoltura*, in *Lav. dir.* 2016, p. 313.

<sup>314</sup> See the press release of the Public Prosecutor of Lanciano on the application of real and personal interim measures in relation to the offence of unlawful intermediation and exploitation of labour: known in Italy as “*caporalato*” (Article 603-bis of the Criminal Code). <http://www.procurallanciano.it/news.aspx>.

<sup>315</sup> The legislative framework (and its consideration within the case law) does not appear in its full complexity without reference to the rules governing the phenomenon. On the one hand, there is Article 600 of the Criminal Code. Reduction to or maintenance in slavery or servitude, Article introduced by Article 1 of Law no. 228 of 11 August 2003 laying down “Measures to combat human trafficking”, alongside Article 603-bis of the Criminal Code. Unlawful intermediation and exploitation of labour, governed by Decree-Law no. 138 of 13 August 2011, converted into Law no. 148 of 14 September 2011. Having regard to the significance of the underage status of the worker (or rather, for the national legal system, the significance of the age of induction into work, even if a minor) it must be recalled that work by minors is prohibited under national law under the age of 16 (Article 1(622) of Law no. 296 of 27 December 2006). With regard to Article 603-bis on Unlawful intermediation and exploitation of labour in particular, a specific aggravating circumstance is introduced, resulting in an increase of the penalty by between one third and one half in cases involving the recruitment of “minors not of working age”. Article 602-ter of the Criminal Code, dedicated to aggravating circumstances, introduced by Law no. 163 of 15 July 2010 ratifying and implementing the Warsaw Council of Europe Convention on Action against Trafficking in

From the viewpoint of scientific research, if the issue of serious exploitation on the basis of migratory phenomena (although exploitation is not limited to such situations) is considered, this confirms that the system of access to justice incorporates disincentives, which also suggests that the law enforcement approach, which it must be acknowledged has an ideological foundation, is globally ineffective. This means that the political process may be considered to be of benefit solely for these ends, although it is difficult to reconcile it with the values of the protection of fundamental rights. It is now necessary to consider whether the perspective of prevention is feasible and, if so, with what instruments it can be effectively sustained. There is no doubt that an appreciation of the value of the preventive perspective requires the focus of attention to be shifted to the undertaking and to the productive system in general, moving beyond the approach rooted exclusively in security previously pursued.

### **7. The index of access to justice by foreign workers who are undocumented and/or suffering serious exploitation.**

A study carried out into complaints (of which there is no public database) and court rulings (drawing on official data and databases from case law) in the area of slavery and compulsory/forced labour, child labour and all other rulings directly or indirectly related to Directive 2009/52 on sanctions for employers who hire foreign nationals without a residence permit has enabled a kind of *legal index of access to justice* to be developed, which is heavily influenced by the social dimension to the protection of the rights of foreign nationals in Italy. The index has made it possible to establish, by way of an official approximation, the factors that reciprocally influence each other and that impinge upon the demand for justice by the victims of serious labour exploitation, as the baseline case against which the solidity of the entire national regulatory framework will be measured. The proposed model will establish the relationship between the level of the complaint and the level of integration of the complainant who is deemed to be the victim of labour exploitation (see figure 1).

Anticipating the conclusions, it may be asserted that the exponential growth of criminal penalties along with the sole support of controls by labour inspections do not appear to be capable of providing adequate responses to the problem which continues to persist, which in most cases remains invisible. These reflections are related to the minimal prospect of the labour policy pursued by the legislature and the government when transposing Directive 2009/52 on sanctions for employers which, as recalled above, confirm the generalised law enforcement approach to the treatment of migrants.

Returning to the premises for the study, we shall now attempt to verify whether the transposition of Directive 2009/52 involving a specific focus on the overall treatment of seriously exploited workers may be regarded as effective. According to the data collected, less than ten judgments have been issued, whilst overall a large number of applications and subsequent judgments have

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Human Beings (16 May 2005) provides for an increase in the penalty of between one third and one half above those provided for under Articles 600, 601 and 602 of the Criminal Code in cases involving minors under the age of 18. Finally, it is necessary to note Article 601 of the Criminal Code. Trafficking in human beings, Article introduced by Article 1 of Law no. 228 of 11 August 2003 laying down "Measures to combat human trafficking". The forms of trafficking covered by the prohibition are those regulated under the Article dedicated to slavery (Article 600 of the Criminal Code): labour or sexual services, begging.

been respectively made and issued with reference to Article 10-bis of the Consolidated Text of Legislation on Immigration.<sup>316</sup> According to the framework presented, it is evident that the number of complaints is strongly conditioned by the status of the illegally resident victim of serious labour exploitation, who is liable to a criminal law sanction (Article 10-bis of Legislative Decree no. 286 of 1998 laying down the Consolidated Text of Legislation on Immigration).

In terms of the applicable models, it must also be considered that the measurement of the efficacy of the legislation must also include a comprehensive assessment of the context. This is because the situation in Italy is characterised by:

- 1) the broad scale of undeclared work and of the illegal economy, which does not enable the issue of serious exploitation of labour - which is just as difficult to quantify as undeclared work - to be addressed in the proper manner in legal and systematic terms;<sup>317</sup>
- 2) the legal obstacles on access to the market for legal work in Italy by foreign nationals;
- 3) the link between workers who fall victim to serious forms of exploitation and their status as illegal immigrants. The victims of serious exploitation at work are mainly – but not exclusively – foreign workers without a residence permit, and this status makes them particularly vulnerable, in a similar manner to nationals of Eastern European countries that have recently joined the EU not covered by the exceptional arrangements that have recently ended, and also to native workers (in particular women) who are socio-economically weak (as is demonstrated by the cases from Puglia).
- 4) the existence of two forms of residence permit for the purposes of protection, which may be differentiated between both with reference to the grounds establishing entitlement as well as the different level of protection for the victim (Article 18 of Legislative Decree no. 286 of 1998 and Article 22 of Legislative Decree no. 286 of 1998, and pursuant to Legislative Decree no. 109 of 2012 transposing Directive 2009/52).

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<sup>316</sup> As demonstration of what experts have been saying all along, as if there were any need for it, deportation procedures are simpler to implement than protective measures, above all if they are associated with the commission of an offence. See in particular *Il lavoro forzato e la tratta di esseri umani, Manuale per gli Ispettori del Lavoro*, published by the Department for Equal Opportunities as part of the FREED project in 2011: <http://www.pariopportunita.gov.it/index.php/component/content/article/70-traffico-di-esseri-umani/2295-contro-la-tratta-di-persone>.

<sup>317</sup> Amongst only the most recent contributions, see R. SCIARRONE, *Mafie del nord. Strategie criminali e contesti lavori*, 2014, Rome, Donzelli; *Agromafie e caporalato*, edited by Osservatorio Placido Rizzotto (years 2012, 2014, 2016); M. AMBROSINI, *Immigrazione irregolare e welfare invisibile*, op. cit. for the relationship between undocumented immigration and the welfare system.



(figure 1)

This index enables the correct dimension within which the legal discussion of this institute is to be conducted to be established in ideal terms. It is a context within which the protection of the fundamental rights of the victim has priority status, whilst criminal punishment (of the victim or of the employer) and policies focused on mere control through inspections are laid bare as entirely inadequate. In Italy in particular, the vast scale of the undeclared or irregular (or also illegal) labour market conceals instances of serious labour exploitation and is accompanied by insurmountable legal obstacles on access to the legal labour market (residence contract for employment, incoming migratory flows set by the government at a level that is much too low and irregular intervals).

As mentioned above, this study has demonstrated that the use (and abuse) of criminal law sanctions and the sole control exercisable through labour inspections (amply relied on by Directive 2009/52) does not provide adequate answers to the problem. The merely sanctions-based approach – above all where based on the criminal law – is not rewarding on the level of procedural results (the deaths in Puglia in the summer of 2015 did not involve only non-EU immigrants, and the exploitation of labour is not a phenomenon encountered only in the agricultural sector but also within other classic sectors such as domestic work, construction and personal services. Moreover, the phenomenon has a much broader scale, involving multinationals that are seemingly beyond reproach such as Amazon.<sup>318</sup>

## 8. Conclusions.

In the most recent sociological studies, the fallacious nature of the system of controls (and, as lawyers, we may add the centre of gravity of immigration policy based on a merely sanctions-

<sup>318</sup> Huffington Post, 1 December 2014 and 5 February 2013.

based approach) is related to the concept of “nebulous social structures”, i.e. social structures emerging from the efforts of individuals and organisations to avoid the dissemination of knowledge concerning their activities, thereby rendering them unobservable or indeterminate”.<sup>319</sup> Many legal and illegal actors are active in the production of nebulosity, which explains (or should contribute to explaining) why “undocumented immigration persists and reproduces itself, despite efforts to uproot it, because various aspects of the way in which the host societies and their institutions function along with the conduct of the actors involved contribute to concealing it, to mixing it with entirely legal interests and activities, and to protecting it for reasons of convenience or principle”.

*What of immigration, migration and migrants?* Wrote Galbraith in *The Good Society* in 1996 when considering migration as an essential element of a correct, complete and good society.<sup>320</sup> In this context we may frame the question with reference to the problem of undocumented migration in relation to the labour market. After removing the alibis (associated with the real contrasts between immigration rules and the labour market), the paradoxes (the national legislation that contributes to creating undocumented status or which discourages complaints by workers, even in situations in which they are being exploited) and the abuses (of criminal sanctions), what is left over of the issue of migration when conceptualised with reference to undocumented movements of non-EU nationals?

The essence of the problem remains, which sociologists of migration have for some time identified - a series of considerations which will be useful for the lawyers called upon to sketch out the features of their competence over the issue, thereby contributing to dispersing the mist that shrouds undocumented foreigners and labour. The “nebulous” system incorporates the interests of governments, nationalist and/or merely ideological policies and the bureaucratic approach to the management of the public administration from the macro perspective; on the other hand, the micro-level features the expediencies of employers (undertakings and families), of associations that deal with migrants, and finally of workers (who are anything but encouraged to make complaints, even if they are suffering from serious labour exploitation).

By way of conclusion, we may acknowledge that the attention also of labour law – which is structurally speaking a discipline that engages in dialogue with other disciplines, not only within the law – for this issue must be high. In this regard, particular acknowledgement must go specifically to those who, precisely in Italy, explain from the starting point of the country’s economy that, from a methodological point of view, there is full inter-disciplinary harmony if one endorses the idea that it would perhaps be more correct to consider the different risk of illegality throughout all sectors [rather than in] sectors at greater risk of illegality”<sup>321</sup> and that no contrasting action can

<sup>319</sup> M. AMBROSINI, *Immigrazione irregolare e welfare invisibile*, op. cit., p. 21 et seqq for all of the following citations.

<sup>320</sup> Citation used by L. HAYES, T. NOVITZ, P. HERZFELD OLSSON, *Migrant workers and collective bargaining: institutional isomorphism and legitimacy in a resocialised Europe*, in N. COUNTOURIS, M. FREEDLAND (eds) *Resocialising Europe in a Time of Crisis*, 2013, Cambridge, Cambridge University Press, p. 463 in relation to the treatment of foreign workers within the context of transnational secondments. Explaining that in “a desocialised Europe, provisions for migrant workers in transnational employment relationships are powerful indicators of a lack of institutional respect for human rights”.

<sup>321</sup> A. VISCOMI, *Lavoro e legalità: “settori a rischio” o “rischio di settore”?* *Brevi note sulle strategie di contrasto al lavoro illegale (e non solo) nella recente legislazione*, in WP C.S.D.L.E. “Massimo D’Antona”.IT – 253/2015, in which he explains that the risk of illegality may

avoid a comprehensive reflection specifically on undertakings, starting from criminal offences and sanctions.<sup>322</sup> The argument starts from sanctions, but does not end here.

In this respect it goes without saying, and is always necessary, to reassert the need to move beyond the emergency dynamic that has accompanied every decision relating to issues of *illegal* labour (as an inclusive category, embracing foreign and local workers without distinction), having asserted the need to maintain the framework of protection for human rights that is necessary in order to ensure respect for international rules, whilst the interest for the undertaking and the productive system upon which legislative policies (and not just those based on sanctions) must focus is equally evident. This interpretation is endorsed not only by the international law and labour law literature that is more keenly aware of the priority function of protecting labour law<sup>323</sup> but also by the commercial law literature, which devised the model used for classifying labour as forced work or para-slavery, namely the “slave undertaking” model; forms of exploitation of this type may be generated out of multiple legal entities, which may also be situated in different countries broken down into autonomous centres for legal imputation, often over a transnational scale.<sup>324</sup> The economic figures reveal that the slave undertaking benefits, on different levels and in different ways, from products and services procured also through undocumented and at times coerced work at the lowest level of the production chain.<sup>325</sup>

In order to move beyond the emergency dynamic which characterises the domestic treatment of undocumented labour (*labour law*) and the ability of EU nationals to work in Italy, which is moreover conditioned by an ideological more than an ideal approach to the issue (*migration law*), it is necessary to rethink the integration between the two issues identified, adopting an integrated structural approach which the Council of Europe had already sketched out in detail with the aim of avoiding risks for the overall solidity of European social cohesion.<sup>326</sup> For labour law, this

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be classified in both qualitative terms (i.e. type of risks present) and in quantitative terms (i.e. different likelihood of the occurrence of situations of illegality).

<sup>322</sup> M. RESCIGNO, *Impresa «schiavistica», decentramento produttivo, imputazione dell'attività e applicazione delle regole*, op. cit. p. 69.

<sup>323</sup> The conceptual horizon, amongst the many arguments, within which also the theoretical discussion of serious labour exploitation engendered by the inappropriate transposition of a directive which had already been defined as reductive is situated is precisely that of decent work, as this discussion has also become an integral part of one of the multiple aspects of the so-called social dimension to globalisation - and one of the worst - that of the so-called modern or contemporary forms of slavery which “in essence feature minimal changes compared to the past, the novel feature consisting, if at all, in the fact that they involve ‘new sectors of the economy’ and industry and perhaps different sectors of the population” (N. BOSCHIERO, *Lo sfruttamento economico dei lavoratori migranti: vecchie o nuove forme di schiavitù nell'era della «private economy»*, op. cit. 350; I. DAUGAREILH (ed), *Mondialisation, travail et droits fondamentaux*, 2005, Brussels, Bruylant). The structural factor, namely the system of production existing in most of Southern Europe, is discussed by C. DE MARTINO, M. LOZITO, D. SCHIUMA, *Immigrazione, caporalato e lavoro in agricoltura*, op. cit. p. 326, richiamando V. PINTO, *Gli interventi legislativi regionali di contrasto al lavoro nero e di sostegno all'emersione*, in *Riv. giur. lav.* 2012, p. 304.

<sup>324</sup> S. LIEBMAN, C. TOMBA, *Funzioni di controllo e di ispezione del lavoro*, op. cit. p. 61 regard breakdown as a pre-alarm state.

<sup>325</sup> M. RESCIGNO, *Impresa «schiavistica», decentramento produttivo, imputazione dell'attività e applicazione delle regole*, in (a cura di) F. BUCCELLATO, M. RESCIGNO, *Impresa e «forced labour»: strumenti di contrasto*, 2015, Bologna, Il Mulino, p. 69.

<sup>326</sup> P. TARAN, I. IVAKHNYUK, M. DA CONCEIÇÃO PEREIRA RAMOS, A. TANNER, *Economic migration, social cohesion and development: towards an integrated approach*, 2008, Council of Europe Publishing Strasbourg. They state in paragraphs 397 and 398 that “Legalisation of immigrants is undeniably a first and essential step towards integration for those concerned. By definition, migrants in irregular status are denied legal recognition, protection of legal and labour rights, access to services and legitimacy as members of a local community and society. However, there is opposition to regularisation on the basis of its potential effect on encouraging further irregular migration, although there are no conclusive studies demonstrating this presumed effect. Isolating this factor is particularly difficult in the context of deteriorating conditions in origin countries that provoke emigration, combined with strong labour market demand for and absorption of irregular migrants in Europe, as well as the continuing relative absence of legal channels to meet the demand for regular

assertion is tantamount to the recognition of a broader composite discipline such as *labour immigration law*, within which status as a worker prevails over that as a migrant.

It is necessary to move from the general questions of social cohesion highlighted on various levels to the special nature of sectoral regulation.

The assertion rooted in labour law of an interest in the issue of undocumented work (also by foreign nationals) necessarily shifts attention to the protection of the rights of undocumented workers. There has been a discussion within the literature as to whether undocumented immigrants may continue to be excluded from the general operation of systems of social solidarity, a reasoning which appears to be excluded by the politicisation of the overall issue rather than by the scientific rationality which has developed in this area, as has been amply demonstrated in the literature.<sup>327</sup> What appears to be lacking – on both national and EU level – is a full focus on the fundamental rights of undocumented migrants and, insofar as they are strictly relevant, on those associated with labour. The discourse on rights is only pursued in terms in which it is conducive to ensuring a process of return to the country of origin (arguing also and above all on the basis of the sanctions directive, which guarantees undocumented foreign workers only the right to be paid).

The substantial block on processes of regularisation and the regulatory centre of gravity of the EU around expulsion cannot fail to remind us that there is no (or there does not appear to be any) general consensus around policies other than those generally pursued, which may perhaps be more closely aligned with a guarantee of general human dignity. *“If the EU is to provide a fairer reflection of the legitimate claims to basic social solidarity from irregular migrants, then law and policy need to be rebuilt, beginning with a foundation of fundamental human rights”*<sup>328</sup>.

The hope is that the EU actors (including first and foremost the Commission) will have the force to translate the conclusion of a new consultation into specific and effective policies and that they will not become overwhelmed by the dynamic rooted in security which resulted in the negation of the results previously achieved in 2005 and of the suggestions developed within that context.<sup>329</sup> Mindful of the current situation characterised by the difficulties in managing the refugee crisis and Brexit, it is still important to reconsider the results of an important study by a group of migration experts who have proposed serious guidelines in order to deal with the issue of migration, and not only economic migration.<sup>330</sup> Recommendation no. 1 (*The understanding of immigration*) includes the recurrent assertion, which has as yet not been acted upon: *“The correlation between employment policy and migrations should therefore be taken very seriously and developed further”*.

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entry of low- and semi-skilled migrants”.

<sup>327</sup> M. BELL, *Irregular Migrants: Beyond the Limits of Solidarity?* cit., p. 165. In relation to welfare systems, see M. FERRERA, *The Boundaries of Welfare*, 2005, Oxford, Oxford University Press, in particular from p. 229.

<sup>328</sup> M. BELL, *Irregular Migrants: Beyond the Limits of Solidarity?* cit. p. 165.

<sup>329</sup> This is a reference to the long-standing intention of the Commission in the Report on Immigration from 2012 to relaunch a broader debate in this area, which was to have been accompanied also by the drafting of an EU Immigration Code.

<sup>330</sup> S. CARRERA, A. FAURE ATGER, E. GUILD, D. KOSTAKOPOULOU, *Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020*, 2011, Centre for European Policy Studies, Brussels, in [www.ceps.eu](http://www.ceps.eu), in particular p. 11.

It would appear necessary to conclude with an ideal representation of the states that have ratified the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* adopted by the General Assembly by Resolution 45/158 of 18 December 1990. This marks the precise point from which we must relaunch, within a completely different political perspective.<sup>331</sup>

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<sup>331</sup> "International human rights instruments provide a different perspective on irregular migrants": M. BELL, *Irregular Migrants: Beyond the Limits of Solidarity?* op. cit. p. 165.