Introduction

A. The challenge at hand

'Combatting' irregular migration,[1] which covers the 'fight' against both irregular entry and irregular stays, is one of the key challenges to migration management at EU level. The EU debates on this issue have often been intense, has exemplified by 'the long summer of migration'[2] of 2015 and the closure of the 'Balkan route'.[3] However, the structural problems underlying the 'fight' against irregular migration are often not easy to grasp and as such are not addressed appropriately.[4] This study focuses on one of the most pressing problems: the low return rate of irregularly staying migrants.[5] More specifically, it examines the reasons for the present deficits in the EU's return policy and proposes a legal solution that concentrates on

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1 Art 79(1) TFEU. See Chapter 2.C.I. and cf. *Lutz*, Non-removable Returnees under Union Law: Status Quo and Possible Developments, EJML 2018, 50; *Menezes Queiroz*, Illegally Staying in the EU: An Analysis of Illegality in EU Migration Law (2018) 1ff and *EMN*, The effectiveness of return in EU Member States 2017 (15.2.2018), http://emn.ie/files/p_201802260500242017_emn_synthesis_return_23.02.2018.pdf (31.7.2022) 13.

2 I prefer the expression 'long summer of migration' rather than 'refugee crisis' (or similar) as refugee movements were a contributing factor to a historical and structural collapse of the EU border regime; cf. *Hess/Kasparek/Kron/Rodatz/Schwertl/Sontowski* (eds), Der lange Sommer der Migration: Grenzregime III (2016). In addition *Thym*, The "refugee crisis" as a challenge of legal design and institutional legitimacy, CMLRev 2016, 1545; *den Heijer/Rijpma/Spijkerboer*, Coercion, Prohibition and Great Expectations: The Continuing Failure of the Common European Asylum System, CMLRev 2016, 607; *Depenheuer/Grabenwarter* (eds), Der Staat in der Flüchtlingskrise: Zwischen gutem Willen und geltendem Recht (2017). For an analysis of the closure of the Balkan route see *Dérens/Rico*, Auf der Balkanroute, Le Monde diplomatique (English version) April 2016, 4.

3 One may also take into consideration asylum policy, securing Europe's external borders, and legal migration; see COM(2015) 240 final.

4 Cf. *Desmond*, The Development of a Common EU Migration Policy and the Rights of Irregular Migrants: A Progress Narrative?, HRLR 2016, 247 (248) or *Carrera/Parkin*, Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union (14.11.2011), https://www.ceps.eu/ceps-publications/protecting-and-delivering-fundamental-rights-irregular-migrants-local-and-regional/ (31.7.2022) 1f.

5 Cf. *Menezes Queiroz*, Illegally Staying 4.

ending the irregularity of migrants. As the legal systems of the EU Member States feature various approaches, this study will analyse and compare the legislative approaches in Austria, Germany and Spain.[6] These three Member States use, inter alia, differentiated systems of regularisation (i.e. the award of residency rights) to 'combat' the problem of irregularly staying migrants. For the purposes of this study, regularisation is understood as each legal decision that awards legal residency to irregularly staying migrants when particular minimum requirements are satisfied.[7]

Chapter 1 narrows the scope of persons to be analysed in the study. It defines the residency status as irregular when a migrant does not have (or no longer has) a right to stay in a territory because the legal requirements have not been met, such as for persons who have entered irregularly and stay as such. Alternatively, a stay may be deemed irregular where the legal requirements have been breached, such as by those individuals who have entered the Member State legally, yet continue to remain even after the period for their permitted stay has expired (a so-called 'overstayer'[8]). In principle, the term 'migrant' covers all non-citizens, though immigration law distinguishes between privileged and non-privileged migrants. For the purposes of this study it will be shown that only nationals of third-countries and stateless persons are eligible as non-privileged migrants.[9]

Instances of irregular migration typically occur when a person enters a territory without a right to do so – be this as a right of entry or a right to stay – and/or remains. As national laws restrict the movement within the territory, 'irregular migration is not an independent social phenomenon but exists in relation to state policies and is a social, political and legal construction'.[10] Conceptionally speaking, irregular migration has two distinct aspects. Firstly, in accordance with international law, a state must have a defined territory, a population and an effective government,[11] thereby allowing for the control of migration within its territory. We are thus

6 See Introduction D.II.1. and Chapter 3 and Chapter 4.
7 See Chapter 1.A.
8 See *EMN*, Asylum and Migration Glossary 3.0 (October 2014), https://www.emn.at/wp-content/uploads/2016/11/emn-glossary-en-version.pdf (31.7.2022) 208.
9 See Chapter 1.A.II.1.
10 *Düvell*, Paths into Irregularity: The Legal and Political Construction of Irregular Migration, EJML 2011, 275 (276); cf. also *Tapinos*, Irregular Migration in *OECD* (ed), Combating the Illegal Employment of Foreign Workers (2000) 13.
11 Cf. *Jellinek*, Allgemeine Staatslehre[3] (1914) 394ff and *Shaw*, International Law[9] (2021) 179ff.

faced with a core aspect of state sovereignty.[12] Secondly, the concept of irregular migration is a political and social problem created via norms:[13] irregularity arises through the norms created by the state.[14] Accordingly, the concept underpinning irregular migration thus applies to every state that uses legal norms to regulate migration within its territory;[15] all EU Member States satisfy such criteria. Furthermore, irregular migration also features a temporal aspect, as irregularity may end through deportation, when the migrant leaves the territory or through regularisations.[16]

The EU's political and legal efforts towards 'combatting' irregular migration aim at the effective return of irregularly staying migrants;[17] the Return Directive serves as the EU's central piece of legislation in this respect.[18] This Directive obliges Member States to issue a return decision to any third-country national staying illegally on their territory.[19] However, a return decision does not automatically mean that the migrant in question is actually returned. Whereas the Member States do indeed issue return decisions, annually only approximately 40 % of all return decisions are actually enforced and, at less than 30 %, the return rate to African countries is even lower.[20] For example, of the 516,115 return decisions issued in 2015 in all EU Member States, only approximately 188,905 migrants returned

12 Chapter 1.A.II.1.

13 For an in-depth discussion see *Willen*, Toward a Critical Phenomenology of "Illegality": State Power, Criminalization, and Abjectivity among Undocumented Migrant Workers in Tel Aviv, Israel, International Migration 2007, 8; more recently *Morticelli*, Human Rights of Irregular Migrants in the European Union (2021) 26ff.

14 Cf. *Błuś*, Beyond the Walls of Paper. Undocumented Migrants, the Border and Human Rights, EJML 2013, 413 (424ff); *Koser*, International Migration (2007) 54f. See in particular *Carrera/Guild*, Addressing Irregular Migration, Facilitation and Human Trafficking: The EU's Approach in *Carrera/Guild* (eds), Irregular Migration, Trafficking and Smuggling of Human Beings (2016) 1 (3f); also *Klarmann*, Aspekte migrationsspezifischer Illegalisierung im Unionsrecht in *Thym/Klarmann* (eds), Unionsbürgerschaft und Migration im aktuellen Europarecht (2017) 127.

15 *Angenedt*, Irreguläre Migration als internationales Problem. SWP Study (December 2007), https://www.swp-berlin.org/fileadmin/contents/products/studien/2007_S33_adt_ks.pdf (31.7.2022) 11.

16 Cf. *Tapinos* in *OECD* 15.

17 See the Recommendation (EU) 2017/432.

18 See for an overview of the return-related EU legal instruments *Molnár*, The Interplay between the EU's Return Acquis and International Law (2021) 70f.

19 Art 6(1) Return Directive; see Chapter 2.B.I.

20 COM(2017) 558 final, 9 and COM(2017) 200 final, 2.

voluntarily or were deported (327,111).[21] Following *Lutz*, one can therefore cautiously estimate that annually there are approximately 300,000 migrants who are non-returnable.[22] It is therefore clear that the EU is experiencing a shortfall in the return of irregularly staying migrants.[23]

The scale of the issue is readily apparent in the 2008 CLANDESTINO-Study,[24] which concluded that irregularly staying migrants comprise around 1 % of the European population; 1.9–3.8 million irregularly staying migrants were spread across the Member States.[25] The European Commission assumes that in 2017 approximately one million migrants were illegally present in the EU.[26] However, the accuracy of such numbers is to be questioned[27] as the definition of 'third country nationals found to be illegally present' only includes those 'who are apprehended or otherwise come to the attention of national immigration authorities'.[28] As not all

21 *European Commission*, A stronger and more effective European return policy (12.9.2018), https://ec.europa.eu/info/sites/default/files/soteu2018-factsheet-returns-policy_en.pdf (31.7.2022).

22 As expressed by *Lutz*, EJML 2018, 30.

23 Cf. *Lutz*, EJML 2018, 29f and *Farcy*, Unremovability under the Return Directive: An Empty Protection? in *de Bruycker/Cornelisse/Moraru* (eds), Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union (2020) 437 (437f).

24 Cf. *Kovacheva/Vogel*, The Size of the Irregular Foreign Resident Population in the European Union in 2002, 2005 and 2008: Aggregated Estimates. WP 4/2009 (2009), https://irregular-migration.net/wp-content/uploads/2021/06/WP4_Kovacheva-Vogel_2009_EuropeEstimate_Dec09.pdf (31.7.2022) 11; *European Commission*, Clandestino Project. Final Report (23.11.2009), http://www.statewatch.org/news/2015/mar/eu-com-clandestino-final-report-november-2009.pdf (31.7.2022) 106. On the factors to assess the data quality see *Vogel/Kovacheva*, Classification report: Quality assessment of estimates on stocks of irregular migrants. WP 1/2008 (2008). For criticism see *Lazaridis*, International Migration into Europe: From Subjects to Abjects (2015) 10, who describes the statistics as 'guesstimates'. See also *Singleton*, Migration and Asylum Data for Policy-making in the European Union: The problem with numbers. CEPS WP No. 89 (March 2016), https://www.ceps.eu/system/files/LSE%2089%20AS%20Migration%20and%20Asylum%20Data.pdf (31.7.2022).

25 Cf. *European Commission*, Clandestino (23.11.2009) 11f and 105f.

26 COM(2017) 558 final, 9.

27 Cf. *Wehinger*, Do amnesties pull in illegal immigrants? An analysis of European apprehension data, International Journal of Migration and Border Studies 2014, 231 (234–236) and for a critical analysis of the Eurostat statistics concerning asylum seekers see *Kleist*, Warum weit weniger Asylbewerber in Europa sind, als angenommen wird: Probleme mit Eurostats Asylzahlen, ZAR 2015, 294.

28 *Eurostat*, Enforcement of Immigration Legislation: Eurostat metadata (30.4.2015), http://ec.europa.eu/eurostat/cache/metadata/en/migr_eil_esms.htm (31.7.2021).

migrants 'illegally present' and, respectively, persons unknown to the national authorities, fall under this definition, one may presume that the numbers have remained at the same level as in 2008 (1.9–3.8 million).[29] Moreover, it is conceivable that the 'long summer of migration 2015' even contributed to an increase in the number of irregularly staying migrants. This may be explained primarily by the comparably high number of asylum applications in 2015 and 2016,[30] though indeed not all applications (will) have been successful.[31] Furthermore, the number of persons staying irregularly in Austria in 2015 has been estimated as ranging between 95,000 and 254,000.[32] As this corresponds to 1.1 and 2.9 % of Austria's total population, the importance of this subject for society as a whole is clear.[33]

Irregularly staying migrants may in fact reside in the EU, yet they are often precluded from those rights available to legal residents.[34] It is therefore

29 Cf. *Triandafyllidou/Vogel*, Irregular Migration in the European Union: Evidence, Facts and Myths in *Triandafyllidou* (ed), Irregular Migration: Myths and Realities (2010) 291 (298f).

30 *Eurostat*, Record number of over 1.2 million first time asylum seekers registered in 2015, news release 44/2016 (4.3.2016), https://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6 (31.7.2022); *Eurostat*, 1.2 million first time asylum seekers registered in 2016, news release No. 46/2017 (16.3.2017), https://ec.europa.eu/eurostat/documents/2995521/7921609/3-16032017-BP-EN.pdf/e5fa98bb-5d9d-4297-9168-d07c67d1c9e1 (31.7.2022) and *Eurostat*, 650 000 first-time asylum seekers registered in 2017, news release No. 47/2018 (20.3.2018), https://ec.europa.eu/eurostat/documents/2995521/8754388/3-20032018-AP-EN.pdf/50c2b5a5-3e6a-4732-82d0-1caf244549e3 (31.7.2022). Cf. *Farcy* in *de Bruycker/Cornelisse/Moraru* 437.

31 See also *Desmond*, HRLR 2016, 272.

32 One must again doubt the reliability of the data because the basis for these numbers is not readily apparent from the report; cf. *Migrationsrat für Österreich*, Bericht des Migrationsrats (2016) 20.

33 Cf. also *Dumon*, Effects of Undocumented Migration for Individuals concerned, International Migration 1983, 218 (227f).

34 Cf. *Boswell*, The Politics of Irregular Migration in *Azoulai/De Vries* (eds), EU Migration Law: Legal Complexities and Political Rationales (2014) 41 (41); *Lazaridis*, International Migration 22, 132; *Engbersen*, The Unanticipated Consequences of Panopticon Europe: Residence Strategies of Illegal Immigrants in *Guiraudon/Joppke* (eds), Controlling a New Migration World (2001) 222; with regard to regularisations see *Wehinger*, International Journal of Migration and Border Studies 2014, 241; *Hoffmann*, Leben in der Illegalität – Exklusion durch Aufenthaltsrecht in *Falge/Fischer-Lescano/Sieveking* (eds), Gesundheit in der Illegalität: Rechte von Menschen ohne Aufenthaltspapiere (2009) 13 (15).

undisputed that irregularly staying migrants are particularly vulnerable.[35] *Tohidipur* is thereby correct in asserting that the irregular residency does not release the political community from its responsibility and thus may not lead to a loss of rights.[36] Accordingly, the requirements to be satisfied by irregularly staying migrants in order to (re-)obtain legal residency are especially pertinent to this study.[37] This issue has been neglected by the European legislator.[38]

In light of the shortfall in returns and the aforementioned numbers of irregularly staying migrants, the increase of the return rate and the decrease of the numbers of irregularly staying migrants are high on the EU's political agenda.[39] This is shown by various measures. In particular, the 2016 Regulation on the establishment of a European travel document for the return of illegally staying third-country nationals[40] aims to increase the rate of return by harmonising the format and technical specifications

35 Cf. *Raposo/Violante*, Access to Health Care by Migrants with Precarious Status During a Health Crisis: Some Insights from Portugal, Human Rights Review 2021; *Fox-Ruhs/Ruhs*, The Fundamental Rights of Irregular Migrant Workers in the EU: Understanding and reducing protection gaps (July 2022), https://www.europarl.europa.eu/RegData/etudes/STUD/2022/702670/IPOL_STU(2022)702670_EN.pdf (31.7.2022) 9, 55ff; *PERCO*, PERCO Position Paper on the Vulnerabilities of Migrants which are caused by the Lack of a Legal Status (8.5.2015), https://drk-wohlfahrt.de/uploads/tx_ffpublication/PERCO_Position_Paper_on_Vulnerabilities_along_the_migratory_trails_to_the_EU_and_to_the_Schengen_area_03.pdf (31.7.2022); *Cholewinski*, Control of Irregular Migration and EU Law and Policy: A Human Rights Deficit in *Peers/Rogers* (eds), EU Immigration and Asylum Law: Text and Commentary (2006) 899 (900f); *European Commission*, Clandestino (23.11.2009) 22; see already *Carlin*, Statement by the ICM Director James L. Cadin, International Migration 1983, 97 (97); *Böhning*, Regularising the Irregular, International Migration 1983, 159 (160). *Lazaridis*, International Migration 14, notes that irregularly staying migrants are often unable to make their voices heard.

36 *Tohidipur*, Grund- und Menschenrechte illegalisierter Migrantinnen und Migranten in *Fischer-Lescano/Kocher/Nassibi* (eds), Arbeit in der Illegalität: Die Rechte von Menschen ohne Aufenthaltspapiere (2012) 41 (44).

37 See Chapter 4.

38 Cf. *Thym*, EU migration policy and its constitutional rationale: A cosmopolitan outlook, CMLRev 2013, 709 (733f) and see Chapter 2 and Chapter 5.

39 Cf. *EMN*, Practical Measures to Reduce Irregular Migration. Synthesis Report (October 2012). For criticism see *Boswell* in *Azoulai/De Vries* 47f, who considers that the EU does not at all want to lower the number of irregularly staying migrants.

40 More commonly known as the Travel Document Regulation.

of travel documents for irregularly staying migrants.[41] In addition, a new Entry/Exit System (EES) shall record the (cross-border) movements of migrants within the EU and shall contribute to the swift identification of irregularly staying migrants.[42] The 2015 'EU Action Plan on return'[43] and the 2017 'Renewed Action Plan'[44] both contain further suggestions for improvements, for instance additional assistance for voluntary return which already constitutes 40 % of all returns. The recent proposal to reform the Return Directive also heads in this direction.[45] Nonetheless, on the whole the EU has made little headway with regard to the standards set out in the Return Directive.

The EU's efforts also focus on preventing illegal entry by migrants, for example through an isolationist policy in the form of strict entry requirements, such as visas.[46] These are expressed in various so-called *'non-entrée'* EU policies,[47] for example externalisation and extra-territorialisation.[48]

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41 Recital 3 Travel Document Regulation and COM(2015) 668 final, 2.

42 Regulation (EU) 2017/2226 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States, OJ 2017 L 327/20. Cf. *Klaus*, Überwachung von Reisen Drittstaatsangehöriger durch das Entry/Exit System (EES): Anfang vom Ende aller Overstays?, ZAR 2018, 246; *Cole/Quintel*, Data Retention under the Proposal for an EU Entry/Exit System (EES): Analysis of the impact on and limitations for the EES by Opinion 1/15 on the EU/Canada PNR Agreement of the Court of Justice of the European Union (October 2017), http://orbilu.uni.lu/bitstream/10993/35446/1/Legal%20Opinion.PDF (31.7.2022) and *Jeandesboz/Rijpma/Bigo*, Smart Borders Revisited: An assessment of the Commission's revised Smart Borders proposal (October 2016), http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571381/IPOL_STU%282016%29571381_EN.pdf (31.7.2022).

43 COM(2015) 453 final, 3f.

44 COM(2017) 200 final.

45 COM(2018) 634 final; COM(2020) 609 final; SWD(2020) 207 final, 67ff and see Chapter 2.B.I. for details.

46 Cf. *Costello*, The Human Rights of Migrants and Refugees in European Law (2015) 3 and 231ff; *Gil-Bazo*, The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited, IJRL 2006, 571 (593 and 599f).

47 Cf. *Hathaway*, The Emerging Politics of Non-Entrée, Journal of Refugee Studies 1992, 40 (40f) and *Gammeltoft-Hansen/Hathaway*, *Non-Refoulement* in a World of Cooperative Deterrence, University of Michigan Law and Economics Research Paper No. 14-016, 5ff.

48 See *Eisele*, The External Dimension of the EU's Migration Policy (2014); *Bröcker*, Die externen Dimensionen des EU-Asyl- und Flüchtlingsrechts im Lichte der Menschenrechte und des Völkerrechts (2010).

These terms describe the efforts towards shifting the border and migration controls as far as possible beyond its external borders[49].[50] The following study will not focus on irregular entry as the numbers of those migrants play a much lesser role than often portrayed.[51] For example, the image of migrants attempting to scale the border fence in Ceuta and Melilla does not accurately depict the reality that the largest group of irregularly staying migrants in the EU are in fact 'overstayers' – those who enter legally on a visa but remain irregularly after their visa has expired.

As the aforementioned EU policies regarding irregular migration are not exhaustive, the following study will focus on regularisation. Member States already make extensive use of this legal instrument in order to 'combat' irregular migration and which represents an alternative to return. Regularisation ends the irregular stay by granting a right to stay.[52] This domestic measure allows states to (again) manage this part of the population,[53] specifically in the context of immigration law.[54] Positive aspects include, for instance, population management, tackling illegal employment and increasing government revenue through taxation and social security payments.[55] Moreover, regularisations allow migrants access to welfare systems and the labour market due to their residency status.[56]

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49 Cf. in this regard Arts 67(2) and 77(1)(b), (c) as well as (2)(d) TFEU.

50 On external migration control see *Ryan/Mitsilegas* (eds), Extraterritorial Immigration Control (2010); *Gammeltoft-Hansen*, Access to Asylum: International Refugee Law and the Globalization of Migration Control (2011); *den Heijer*, Europe and Extraterritorial Asylum (2012); *Moreno-Lax*, (Extraterritorial) Entry Controls and (Extraterritorial) Non-Refoulement in EU Law in *Maes/Foblets/de Bruycker* (eds), The External Dimensions of EU Asylum and Immigration Policy (2011) 415.

51 Cf. *Triandafyllidou/Vogel* in *Triandafyllidou* 294.

52 See Chapter 1.A.II.2.

53 Cf. *Hampshire*, The Politics of Immigration (2013) and *Kraler*, Regularization of Irregular Migrants and Social Policies: Comparative Perspectives, Journal of Immigrant and Refugee Studies 2019, 94 (107–109 and 97).

54 Cf. *Trinidad García*, Los inmigrantes irregulares en la Ley 4/2000 y en su reforma: una regularización que no cesa, Revista de Derecho Migratorio y Extranjería 2002/1, 99 (100, 105).

55 COM(2004) 412 final, 10–12 and Chapter 2.D.IV. and Chapter 4.

56 The following is also to be emphasised from the migrants' perspective: 'On the whole, the beneficiaries of regularization interviewed for this study perceived regularization as a positive factor that enabled them to exercise a greater degree of control over different aspects of their life'; *Kraler*, Journal of Immigrant and Refugee Studies 2019, 107.

B. Hypothesis and structure

The study proceeds from the following hypothesis: EU regularisations supplementing the present return policy are more effective at 'combatting' irregular migration at EU level.

This hypothesis gives rise to three closely linked questions that each require further examination. (1) What are the regularisations in Austrian, German and Spanish immigration law? (2) How and to what extent could regularisations be used as an effective regulatory instrument to 'combat' irregular stays? (3) Does a harmonisation of regularisations at EU level offer any advantages over domestic rules? The aforementioned hypothesis and these three questions will be explored in more depth and examined in three parts comprising a total of five chapters.

Part I examines across two chapters the concepts underpinning irregular migration and regularisations as well as the EU regulatory framework. Chapter 1 focuses on the conceptual aspects of regularisations and provides the necessary definition and categories of regularisations for the analysis in Chapter 2 of the EU's competences regarding irregular migration and regularisation. The initial analysis concerns EU secondary law, namely the Return Directive, with the subsequent analysis of primary law clearly showing that the EU indeed has the necessary competence to legislate on regularisation at EU level. Both provide my own doctrinal clarifications of the concepts and notions in need of interpretation.

The second question, namely whether regularisations could be used as an effective regulatory instrument to 'combat' irregular stays, will be assessed using the standards under EU constitutional law.[57] As will be shown in Chapter 2, each EU legal act must fulfil a particular purpose. The fact that primary law requires a measure to at least be able to achieve a particular objective indicates that primary law itself demands that legal acts obtain a certain level of effectiveness.[58] In this study, administrative law is generally viewed in relation to its 'regulatory approach',[59] whereby

57 On the question concerning the effectiveness of the law see *Schmidt-Aßmann*, Das allgemeine Verwaltungsrecht als Ordnungsidee[2] (2006) Chapter 2 mns 20ff and Chapter 2.C. and Chapter 4.

58 See Chapter 2.C.I.

59 *Schmidt-Aßmann*, Verwaltungsrecht Chapter 1 mn 33.

the law is a 'suitable means of regulation'[60] that needs to be improved.[61] As for every legal field, the fields of law analysed in this study are subject to particular (factual) limitations.[62] In this respect, the resources of national authorities and the will to enforce legal requirements have foremost influence on the effectiveness of migration management. The design and features of the law are further key aspects in achieving the legislator's political and legal goals.[63]

The two chapters in Part II examine and compare the regularisations in Austria, Germany and Spain,[64] thus answering the first question of the regularisations available in each of these legal systems. The comparison employs the critical-contextual approach.[65] Chapter 3 examines particular features of each national framework as far as is necessary for the comparison in Chapter 4, such as the development of the relevant national legislation. This approach thus avoids the risk of unnecessary repetitions in the course of the comparison. Unlike a comparison based on national reports, the integrated approach applied in Chapter 4 adopts the purposes of the regularisations themselves as the basis for the comparison.

To conclude, Part III (more precisely Chapter 5) presents a proposal for a future 'Regularisation Directive'. Hereby I collate the results of the earlier research and present the accompanying concept of 'migration from within'. The question whether harmonisation of regularisation at EU level offers any advantages over domestic rules will also be answered.

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60 *Schmidt-Aßmann*, Verwaltungsrecht Chapter 1 mns 33f with further references; *Scharpf*, Politische Steuerung und Politische Institutionen, Politische Vierteljahresschrift 1989, 10. For criticism from a socio-scientific viewpoint see *Luhmann*, Politische Steuerung: Ein Diskussionsbeitrag, Politische Vierteljahresschrift 1989, 4.

61 On the current discussion regarding migration management see, for example, *Bast*, Aufenthaltsrecht und Migrationssteuerung (2011); *Thym*, Migrationssteuerung im Einklang mit den Menschenrechten – Anmerkungen zu den migrationspolitischen Diskursen der Gegenwart, ZAR 2018, 193; *Berlit*, Migration und ihre Folgen – Wie kann das Recht Zuwanderung und Integration in Gesellschaft, Arbeitsmarkt und Sozialordnung steuern? (Teil 1), ZAR 2018, 229; *Berlit*, Migration und ihre Folgen – Wie kann das Recht Zuwanderung und Integration in Gesellschaft, Arbeitsmarkt und Sozialordnung steuern? (Teil 2), ZAR 2018, 287.

62 In general, *Schmidt-Aßmann*, Verwaltungsrecht Chapter 1 mns 38f.

63 Cf. *Bast*, Illegale Migration und die Rechte von illegalen Migrantinnen und Migranten als Regelungsgegenstände des Europarechts in *Fischer-Lescano/Kocher/Nassibi* (eds), Arbeit in der Illegalität (2012) 71 (71ff with further references).

64 On the choice of these three Member States see Introduction D.II.1.

65 See Introduction D.I.–II.

C. Current research

This study closes several gaps in current research, most notably the absence of an up-to-date comparison of the regularisations in Austria, Germany and Spain. Closing these gaps, however, requires further explanation.

As far as could be ascertained, there has been no systematic examination of the residency status of irregularly staying migrants. Although contributions to a 2011 issue of the European Journal of Migration and Law[66] provide key insights on irregular migration from various different perspectives (primarily from the social and political sciences), these for the most part do not adopt the perspective of legal science. Part II closes the gap.

An effective comparison of the different national laws requires an in-depth discussion of the concept of 'regularisation'. Existing research does feature such discussions, yet they are limited.[67] Chapter 1 therefore contains the first conceptual discussion of regularisations as a whole.

The last comparative analysis of regularisations in Europe is now over 20 years old.[68] With the exception of the REGINE-Study, which only gives a broad overview of the issue from the perspective of political science, there are no detailed legal comparisons of regularisations.[69] *Desmond* provides a short, but concise, comparison on the most common use of regularisa-

66 *Düvell*, The Pathways in and out of Irregular Migration in the EU: A Comparative Analysis, EJML 2011, 245; *Triandafyllidou/Ambrosini*, Irregular Immigration Control in Italy and Greece: Strong Fencing and Weak Gate-keeping serving the Labour Market, EJML 2011, 251; *Düvell*, EJML 2011, 275; *Kraler*, Fixing, Adjusting, Regulating, Protecting Human Rights – The Shifting Uses of Regularisations in the European Union, EJML 2011, 297; *Vollmer*, Policy Discourses on Irregular Migration in the EU – 'Number Games' and 'Political Games', EJML 2011, 317; *Raffaeli*, Criminalizing Irregular Immigration and the Returns Directive: An Analysis of the El Dridi Case, EJML 2011, 467.

67 See the overview in Chapter 1.A.I.

68 *De Bruycker* (ed), Les regularisations des étrangers illégaux dans l'union européenne. Regularisations of illegal immigrants in the European Union (2000). A summary of the study was published as *Apap/de Bruycker/Schmitter*, Regularisation of Illegal Aliens in the European Union. Summary Report of a Comparative Study, EJML 2000, 263; see Chapter 1.B.I.

69 *Baldwin-Edwards/Kraler*, REGINE Regularisations in Europe: Study on the practices in the area of regularization of illegally staying third-country nationals in the Member States of the EU. Final Report (January 2009), https://ec.europa.eu/migrant-integration/sites/default/files/2009-04/docl_8193_345982803.pdf (31.7.2022) and Chapter 1.B. See also *Kraler*, Journal of Immigrant and Refugee Studies 2019.

tions, though the focus is on the EU and the United States.[70] *Schieber*, whose dissertation concerns non-returnable persons and their right to stay, must also be considered.[71] Although there are overlaps with the study undertaken here, *Schieber* focuses mainly on the international protection, i.e. refugees and subsidiary protection, and the corresponding protective mechanisms.[72] In short, *Schieber* analyses irregular migration from the perspective of asylum procedures. By contrast, Part II of this study examines all decisions in Austria, Germany and Spain which underpin a right to stay[73] and which concern irregularly staying migrants. *Schieber* does indeed compare national laws, including Germany and Austria, but her comparison also includes Belgium, Sweden and the United Kingdom, and favours national reports over the integrated approach used in this study.[74] Further research also concerns the 'different national practices concerning granting of non-EU harmonised protection statuses'[75] – this is only covered in part in this study.[76] It can therefore be stated that the comparison of regularisations in Part II (Chapter 3 and Chapter 4) closes this gap in the current research.

Reference may also be made to several studies concerning non-returnees. Applying the ECJ's definition, which will be discussed in greater detail below,[77] a person is non-returnable when 'it is not, or has not been, possible to implement a return decision'.[78] Similar to *Schieber*, *Gosme* tackles the question of the 'limbo spaces between illegal and legal stay'.[79] More recently, *Lutz* has examined 'non-removable returnees' and the corresponding shortfalls in enforcement, but only touches lightly upon regularisations.[80]

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70 *Desmond*, Regularization in the European Union and the United States. The Frequent Use of an Exceptional Measure in *Wiesbrock/Acosta Arcarazo* (eds), Global Migration: Old Assumptions, New Dynamics. Vol 1 (2015) 69.

71 *Schieber*, Komplementärer Schutz: Die aufenthaltsrechtliche Stellung nicht rückführbarer Personen in der EU (2013).

72 *Schieber*, Komplementärer Schutz 44ff.

73 See the definition in Chapter 1.A.II.3.

74 See Introduction D.II.2.

75 Cf. *EMN*, The different national practices concerning granting of non-EU harmonised protection statuses (December 2010).

76 Cf. *Kraler*, EJML 2011, 297.

77 See Chapter 2.B.II.

78 ECJ 5.6.2014, C-146/14, ECLI:EU:C:2014:1320, *Mahdi*, para 87.

79 Cf. *Gosme*, Limbo spaces between illegal and legal stay: resulting from EU management of non-removable third country nationals, Dissertation 2014, Sciences Po Paris, https://spire.sciencespo.fr/hdl:/2441/30a6ffj78696ja3eov65066e05/resources/2014iepp0037-gosme-charles-these.pdf (31.7.2022).

80 *Lutz*, EJML 2018, 46–50.

The same applies vis-à-vis a 2018 study by *Menezes Queiroz* discussing, inter alia, the situation of 'non-removable migrants' and 'access to legality in the EU'.[81] *Farcy* adopts the same direction in an analysis of the guarantees prior to return and the access to rights by non-returnable migrants against the backdrop of the legal obstacles to deportation and the resulting consequences for non-returnables.[82] Finally, the empirical and legal analysis of the 'return procedures applicable to rejected asylum seekers in the EU and options for their regularisation'[83] undertaken by *Strban/Rataj/Šabič* is also to be mentioned as it covers several topics relevant to this study, albeit with some differences. Firstly, *Strban/Rataj/Šabič* focus only on rejected asylum seekers and their particular situation in the EU.[84] The category of persons covered is thus much narrower, though with much broader content as the attention is directed towards the return procedure. Secondly, *Strban/Rataj/Šabič* do not examine the different regularisations in detail, but give just a broad overview of the practices in 17 Member States.[85] Last but not least, a 2014 study on the detention of non-returnable migrants contains several examples of 'best practices'.[86]

Each of the aforementioned studies have the common feature that they do not make any specific suggestions regarding the problem of non-returnable migrants (and in this respect the low return rate). Chapter 5 addresses this gap in current research by first presenting the accompanying concept of 'migration from within', outlining the reasons why the existing EU migration policy requires a new direction with regard to irregularly staying migrants and that this can best be achieved through the introduction of a Regularisation Directive at EU level. Proceeding from this concept – and building on the comparison in Part II – I present my proposal for such a Directive.

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81 *Menezes Queiroz*, Illegally Staying 81–116 and 153–181.

82 *Farcy* in *de Bruycker/Cornelisse/Moraru*.

83 *Strban/Rataj/Šabič*, Return Procedures Applicable to Rejected Asylum-Seekers in the European Union and Options for their Regularisation, Refugee Survey Quarterly 2018, 1.

84 *Strban/Rataj/Šabič*, Refugee Survey Quarterly 2018, 4.

85 The authors sent a questionnaire with 28 questions to national experts; cf. *Strban/Rataj/Šabič*, Refugee Survey Quarterly 2018, 4.

86 *Vanderbruggen/Phelps/Sebtaoui/Kovats/Pollet*, Point of No Return: The Futile Detention of Unreturnable Migrants (January 2014), https://detentionaction.org.uk/wp-content/uploads/2018/12/PONR_report.pdf (31.7.2022).

In summary, the following study will close several gaps in the current research, with the first ever comparative analysis of regularisations in Austria, Germany and Spain at the core.

D. Methodology

The aforementioned problem, hypothesis and the current research now serve as a foundation for the explanation of the methodology employed to answer the three questions central to this study. This section will first introduce the critical-contextual approach to the comparative legal analysis (I.)[87] before explaining the application of this approach in this study (II.) as well as particular features of this English language version (III.).

I. Critical-contextual approach

The study applies the critical-contextual method, which is a critical evolution of functionalism. A critical-contextual comparison can be best understood by picturing a three-piece Matryoshka doll. Using said picture, functionalism forms the basis and, consequently, the centre of the Matryoshka doll. Contextualism and the critical approaches to comparative law form the second and third pieces, respectively. A critical-contextual comparison draws upon all three methods/approaches and fuses them together. Following *Frankenberg*,[88] context-sensitive, critical and reflexive comparisons are 'thick' in nature.

87 A detailed description of the critical-contextual method has been published in *Hinterberger*, A Critical-Contextual Approach in Comparative Migration Law, International Journal of Migration and Border Studies 2023, forthcoming.

88 *Frankenberg*, Comparative Law as Critique (2019) 225ff; *Legrand*, European Legal Systems are not Converging, ICLQ 1996, 52 (56) and *Husa*, A New Introduction to Comparative Law (2015) 155 who refer in a similar vein to the work of *Geertz*, Thick Description: Toward an Interpretive Theory of Culture in *Geertz*, The Interpretation of Cultures (1973) 3.

1. The starting point: functionalism

The comparison of public law[89] applies various methods.[90] Functionalism forms the core of the three-piece Matryoshka doll and, thus, of a critical-contextual comparison. Functionalists compare norms, in their function as solutions to particular problems.[91] This allows the focus on the question of the function (role and contribution) of the norm or institution within the respective legal system and society.[92] According to the functional approach, different legal norms in different legal systems answer the question or solve the problem similarly or differently.[93] The so-called presumption of similarity is necessary to understand the functional method whereby it has to be noted that there is not one, but many functional methods.[94]

The functional method is not without its criticisms.[95] One fundamental critique is that it may be difficult or even impossible to ascertain the function the law strives to perform.[96] It is correct that a legal provision, depending on the perspective, may fulfil different functions, yet it does not mean that the provision cannot be examined with regard to a specific function. I therefore believe that the chosen function and perspective has to be clearly identified and outlined to tackle this criticism.[97] Furthermore,

89 For detail on the particular features of a comparison of public law see *Bernhardt*, Eigenheiten und Ziele der Rechtsvergleichung im öffentlichen Recht, ZaöRV 1964, 431; *Krüger*, Eigenart, Methode und Funktion der Rechtsvergleichung im öffentlichen Recht in FS Martin Kriele (1997) 1393; *Bell*, Comparing Public Law in *Harding/Örücü* (eds), Comparative Law in the 21st Century (2002) 235 (240ff).

90 Cf. *Trantas*, Die Anwendung der Rechtsvergleichung bei der Untersuchung des öffentlichen Rechts (1998) 43–47 with further references; for the comparative methods specifically in constitutional law see *Jackson*, Comparative Constitutional Law: Methodologies in *Rosenfeld/Sajó* (eds), The Oxford Handbook of Comparative Constitutional Law (2012) 54 and *Tushnet*, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law (2009) 5ff.

91 *Kischel*, Comparative Law (2019) § 3 mns 3f.

92 *Ebert*, Rechtsvergleichung (1978) 29; *Sommermann*, Bedeutung der Rechtsvergleichung für die Fortentwicklung des Staats- und Verwaltungsrechts in Europa, DÖV 1999, 1017 (1023).

93 *Zweigert/Kötz*, An Introduction to Comparative Law[3] (1998) 40; cf. *Kamba*, Comparative Law: A Theoretical Framework, ICLQ 1974, 485 (517).

94 *Michaels*, The Functional Method of Comparative Law in *Reimann/Zimmermann* (eds), The Oxford Handbook of Comparative Law[2] (2019) 346 (347).

95 For a useful overview see *Kischel*, Comparative Law § 3 mns 6ff and *Piek*, Die Kritik an der funktionalen Rechtsvergleichung, ZEuP 2013, 60 (62ff).

96 *Kischel*, Comparative Law § 3 mn 7.

97 See Introduction D.II.3.

if it is impossible to ascertain the function the law strives to perform, it should be explicitly pointed out and, consequently, taken into account in the course of the comparison.

2. Adding the context and…

Jackson neatly sums up a further criticism regarding the functional method in stating that '[a] number of scholars have cautioned against the misleadingly homogenizing and obscuring perils of functionalism. It is all too easy, scholars such as Günter Frankenberg suggest, for a comparativist unconsciously to assume the categories of legal thought with which she is familiar, and thus to see foreign law only as either similar or different, without being able to grasp the conceptual or sociological foundations of other legal orders. Professor Bomhoff, in a similar vein, has shown how doctrines with a similar name and seemingly similar function actually mean quite different things in a practice that is shaped by more particular contexts'.[98]

In response to such critique, a contextualist approach has emerged within the functional method comprising the following: the law as a whole and thus its individual provisions and rules are to be viewed in the context of the historical, economic and political framework to obtain a more complete picture.[99]

For example, the contextual method favoured by *Kischel* is functionalist at the core and, therefore, looks at the legal and non-legal environment in which a legal norm is situated.[100] However, he proposes that the context has to be considered in every comparison. In short, a comparatist has to recognise, in which conceptual, dogmatic/doctrinal or cultural environment a legal norm is situated.

Following *Jackson* ('contextualised functionalism'), one should never fail to consider the context and the characteristics of legal systems and institutions, otherwise there is the risk of making false assumptions.[101] Functions and concepts may appear to be the same at first glance, though

98 *Jackson* in *Rosenfeld/Sajó* 66.
99 Cf. *Bell* in *Harding/Örücü* 235ff; *Legrand*, How to Compare Now, Legal Studies 1996, 232 (236); *Van Hoecke/Warrington*, Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law, ICLQ 1998, 495 (532ff).
100 *Kischel*, Comparative Law § 3 mns 199ff.
101 *Jackson* in *Rosenfeld/Sajó* 70–72.

can have very different (legal and actual) effects in different societies. An in-depth understanding of the subject is therefore only possible once the characteristics, the socio-political and historical contexts are understood. *Bell* argues in this regard that 'public law is particularly influenced by historical contingencies'[102] and, therefore, the institutional setting is important to understand what social function it really entails.[103]

Depending on the subject matter, the necessary context to be taken into account differs. One has to identify the environment the legal norms are situated. It is only after this step that a comparatist is able to grasp the relevant contextual elements – like the historical, economic and political framework – that are necessary for its understanding. As will be shown below regarding the case study, understanding the different regularisations in Austria, Germany and Spain requires insights into the historical and political development of migration law.[104] However, there is no single answer to the question concerning the contextual aspects to take into account.

To sum up, both *Kischel* from a comparative public law perspective and *Jackson* from a comparative constitutional law perspective advocate for a functionalist approach enhanced with contextual elements. Taking account of the context thus helps to avoid the risk of making incorrect assumptions based on a too 'thin' understanding of law because contexts have an influence on the functioning and the interpretation of norms.

Coming back to the picture of the Matryoshka doll, the two inner pieces are now laid out. However, to be able to speak of 'thick' comparison according to *Frankenberg,* the comparison has to further be critical and reflexive.

3. …Critical approaches to functionalism

Critical comparison has already a long tradition in the field of constitutional law. It is closely linked to critical legal studies (CLS) approaches.[105] CLS cannot claim to be one coherent approach, but rather a broad variety

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102 *Bell* in *Harding/Örücü* 241 and 247.

103 Cf. *Tushnet*, Weak Courts 10ff with regard to the particularities of constitutional law.

104 See Chapter 3.

105 Cf. *Mattei*, Comparative Law and Critical Legal Studies in *Reimann/Zimmermann* (eds), The Oxford Handbook of Comparative Law[2] (2019) 805 (805ff); *Frankenberg*, Comparative Law 17ff.

of critical approaches to law. Hence, the question remains of the contribution made by the qualifier 'critical' to the contextualist approach described above. In my opinion, it has the potential to address another fundamental critique from *Frankenberg*: 'The functionalist comparatist picks a social problem, always already framed in terms of law, and then moves on to its legal solution. Overconfident that law is a self-contained and autonomous system of conflict management […]. The hermeneutic fallacy is built upon a double reduction of the approach that focuses on the interpretation and better, that is, more authentic, understanding of the law and the cultural analysis of law. […] The hermeneutic fallacy, therefore, follows from a theory of law that is constitutive only in one direction and which denies the dynamic, dialectical law/power and law/culture relationship'.[106]

Consequently, using a critical approach broadens the view and helps to see how different concepts yield different power structures. *Frankenberg* rightly stated that '[c]ritique may help uncover and dismantle those hierarchies and asymmetries: it may deconstruct hegemony by unsettling settled knowledge'.[107] Therefore, by adding a critical approach to contextualism, the method can be developed further. Critical-contextual comparison may be used as a hegemony-critical approach and applied to analyse how different concepts are interpreted differently in different contexts.

This is particularly relevant regarding the relationship between migrants and the state and the given power-political relations in migration law. To better understand said relationship, it is necessary to refer again to the perspective taken by the comparatist. Regarding migration law, one may take the position of the state or the migrant. In my view it is particularly useful from a critical perspective to take a migrant-centred perspective as has been done in this study.[108]

Finally yet importantly, the term 'reflexive' can be considered as another layer of a critical comparison. It is understood as employing 'distancing to capture "the other" most effectively'.[109] When comparing different legal systems, the risk of bias towards one's 'home' legal system is eminent.[110] From a critical perspective, an unbiased description and evaluation of

106 *Frankenberg*, Comparing constitutions: Ideas, ideals, and ideology—toward a layered narrative, ICON 2006, 439 (444–446).
107 *Frankenberg*, Comparative Law ix.
108 See Introduction D.II.3.
109 *Curran*, Critiquing Günter Frankenberg's Comparative Law As Critique, German Law Journal 2020, 304 (305); cf. *Frankenberg*, Comparative Law 70ff and 229–231.
110 Cf. *Ebert*, Rechtsvergleichung 144.

such legal systems is (almost) impossible.[111] According to *Frankenberg*, comparing reflexively therefore means to 'start a critical dialog between the familiar and the unfamiliar legal cultures'.[112]

II. Critical-contextual comparison in this study

1. Content and choice of Member States

The study compares particular real-life factual circumstances in which the associated legal problems serve as a common basis for comparison.[113] In principle the method is to be based on the problem itself.[114] This favours the use of the critical-contextual method due to the considerable role played by the context of the problems to be analysed. Accordingly, the first question concerns mechanisms in Austrian, German and Spanish law which provide a means out of irregular migration.

The factual circumstances in question relate to the presence of irregularly staying migrants in EU Member States who are seeking a right to reside. Many of these migrants cannot be deported for legal or factual reasons, in particular in long term. The irregular stay gives rise to various problems, such as the denial of rights, and often such migrants are in an especially vulnerable position.[115] As a social, political and legal phenomenon, irregular migration presents the EU and the individual Member States with significant (legal) challenges.[116] Generally, it is only with the right to reside that irregularly staying migrants are 'integrated' into the state system for the first time, which is typically followed by (limited) access to the labour market, welfare benefits and healthcare.

The legal regimes in the EU's area of freedom, security and justice are partly harmonised and, consequently, similar problems arise. For this reason the presumption of similarity applies and critical-contextual com-

111 Cf. *Frankenberg*, Critical Comparisons: Re-thinking Comparative Law, Harvard International Law Journal 1985, 411 (439f).
112 *Frankenberg*, Comparative Law 230.
113 Cf. *Bartels*, Methode und Gegenstand intersystemarer Rechtsvergleichung (1982) 66f; *Michaels* in *Reimann/Zimmermann* 347f.
114 *Ebert*, Rechtsvergleichung 28f.
115 See Introduction A.
116 See Introduction A.

parison seems to be a particularly fruitful approach in the EU.[117] The EU Member States enjoy legislative freedom and a margin of discretion regarding regularisations. Article 6(4) Return Directive leaves Member States the possibility to regularise irregularly staying migrants instead of issuing a return decision.[118] Consequently, Austria, Germany and Spain adopt different legal approaches with regard to regularisations; this is also one reason why the description of contextual elements is necessary to fully understand regularisations. Each of the three countries is an EU Member State and part of the same supranational legal system. Accordingly, they must each follow the same EU constitutional requirements pursuant to Article 79(1) TFEU.[119] In other words, by virtue of their EU membership they have the same programmatic objectives. For instance, the objective of tackling irregular migration – one of the core elements of EU migration policy.

Hence, the case study focuses on legal possibilities for regularisation in Austria, Germany and Spain. In other words, the analysis will focus on each of the possibilities in Austria, Germany and Spain, which are available to this group regarding the award of a residency title. The relationship between the legal and the extra-legal approaches concerning irregular migration and regularisations will subsequently be examined and compared. In a broad sense these must therefore fulfil the function of allowing irregularly staying migrants to become legal residents or be related to such outcome. Asylum procedures will not be analysed as persons subject to international protection do not fall within the scope of this study.[120] For the same reason I shall not conduct a detailed examination and comparison of the expulsion systems in place.[121]

To be able to effectively describe regularisations, contextual elements had to be taken into account. The historical and political development of migration law in each of the three Member States – and the margin of discretion according to Article 6(4) Return Directive – contributed to the

117 Cf. *Örücü*, The Enigma of Comparative Law: Variations on a Theme for the Twenty-first Century (2004) 24f.

118 See Chapter 2.B.I.

119 See Chapter 2.C.

120 Art 2(a) Qualification Directive. The Qualification Directive divides international protection into refugee status and subsidiary protection; cf. on the difference between the concepts see *Peers/Moreno-Lax*, Qualification: Refugee Status and Subsidiary Protection in *Peers/Moreno-Lax/Garlick/Guild* (eds), EU Immigration and Asylum Law. Vol 3: EU Asylum Law^2 (2015) 65 (156ff).

121 See recently *Molnár*, Interplay.

formation of different regularisations. Understanding these contexts is key to outlining regularisations and allowing an integrated comparison.[122]

As an examination of all 27[123] EU Member States was not feasible, the study only focused on three Member States, namely Austria, Germany and Spain. Each of these Member States have different regularisations in their legal system.[124] The differences in approach towards irregular migration are reflected in the national legislation and case law as well as in extra-legal approaches. In this respect the comparison appears to be especially fruitful.

Spain used regularisation programmes in the 1990s as an extraordinary legal measure.[125] The background to such an approach lies, inter alia, in viewing regularisations as an 'alternative to immigration policy'.[126] The high demand for workers in the service industry could be covered by migrants who were in employment, but who were residing irregularly.[127] However, as in Austria and Germany, regularisation mechanisms, which permanently form part of the legal order of Member States, as opposed to ad-hoc programmes, are now the standard.[128]

The comparison answers the question whether the different legal approaches indeed achieve the same legal function whereby contextual elements play a particularly important role in this analysis. The comparison between Austria and Germany is especially informative, though at first one may assume that because of the similar legal traditions, the laws of

122 See Introduction D.II.2.

123 Since 31 January 2020 the United Kingdom is no longer an EU Member State.

124 See *European Commission*, Clandestino (23.11.2009) 42–46, 54–59, 74–79. On Austria: *Kraler/Hollomey*, Austria: Irregular Migration – A Phenomenon in Transition in *Triandafyllidou* (eds), Irregular Migration: Myths and Realities (2010) 41. On Germany: *Cyrus/Kovacheva*, Undocumented Migration in Germany: Many Figures, Little Comprehension in *Triandafyllidou* (ed), Irregular Migration: Myths and Realities (2010) 125. On Spain: *González-Enríquez*, Spain: Irregularity as a Rule in *Triandafyllidou* (ed), Irregular Migration: Myths and Realities (2010) 247.

125 On the distinction between the concepts of regularisation programmes and mechanisms see Chapter 1.B.I. See also Chapter 3.C.I.

126 *Baldwin-Edwards/Kraler*, REGINE (January 2009) 39.

127 Cf. *Baldwin-Edwards/Kraler*, REGINE (January 2009) 39f; *Pelzer*, Regularisierung des Aufenthalts von Menschen ohne Papiere: Bausteine einer liberalen Migrationspolitik? in *Fischer-Lescano/Kocher/Nassibi* (eds), Arbeit in der Illegalität: Die Rechte von Menschen ohne Aufenthaltspapiere (2012) 143 (149) and *Kraler*, Journal of Immigrant and Refugee Studies 2019, 99 and 102.

128 See Chapter 3.A.III., Chapter 3.B.III. and Chapter 3.C.III.

both countries are also similar.[129] Regularisations in Austria and Germany are linked to different requirements. Austria and Germany are considered 'ideological opponents' of regularisations,[130] yet the comparison will show that this is no longer a valid assessment as both use regularisations to bring an irregular residency to an end. Furthermore, the consequences of the 'longer summer of migration 2015' are still present in both countries, which have both seen a high number of applications for international protection.[131]

Another example of a contextual element that is taken into account is the different legal status of irregularly staying migrants in Austria, Germany and Spain which leads to differences in their factual living situations. Failing to present the (legal) contexts in question would mean overlooking that irregularly staying migrants in Spain have access to the welfare system, whereas such migrants in Germany and Austria do not, at least in principle. This is also particularly important from a migrant-centred perspective and its implications on the social conditions of these individuals.[132]

The need to include the context is also clear with regard to a further example, specifically toleration.[133] Although it does not constitute legal residency – and is thus not a regularisation – toleration is often the first level towards gaining a right to stay and thus the first step away from irregularity;[134] including this approach therefore enrichens the comparison and has to be included due to the context to provide a full picture of the factual and legal problem. The situation is different in Spain as there is no comparable legal concept. Accordingly, those who cannot be deported are tolerated, though not as a result of the law itself.[135] It is necessary nonetheless to present this non-legal approach in order to understand the Spanish regularisations in full.

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129 Such as in relation to civil law, see *Zweigert/Kötz*, Rechtsvergleichung 130ff and *Ebert*, Rechtsvergleichung 57ff.

130 Cf. *Baldwin-Edwards/Kraler*, REGINE (January 2009) 8, 42; *Kraler/Reichel/Hollomey*, Undocumented Migration: Country Report Austria. Clandestino Project (November 2008/updated October 2009), https://www.eliamep.gr/wp-content/uploads/2017/12/clandestino_report_austria_final_2.pdf (31.7.2022). For a more reserved opinion see *Kraler*, Journal of Immigrant and Refugee Studies 2019, 99 and 102.

131 See the references in Fn 30.

132 See Introduction D.III.3.

133 See Chapter 1.B.III.1.a., Chapter 4.A.I.2. and Chapter 4.A.I.3.

134 See Chapter 1.B.III.1.a.

135 See Chapter 4.A.I.1.

There is difficulty in achieving an unbiased description and evaluation of the three legal systems because of the risk of bias towards one's 'home' legal system; in this case: Austria.[136] In order to appropriately heed such risk, generic terms are used and the knowledge acquired during research trips is linked back, as mentioned in the preface and in the introductory remarks in Part II. The terms ('irregular stay', 'migrant', 'regularisation' and 'right to stay') were specifically chosen to – or to be able to – include the context and also to reflect precise legal concepts.[137] This allows me to adopt an (almost) objective position and to view the selected legal systems from a sufficient distance.[138] I also took into consideration that, in so far as terms particular to the national legal systems are used,[139] the different meanings require explanation.

This study analyses formal, written legislation, 'law in debate', i.e. the different legal opinions,[140] and (decisions from superior courts). *Michaels* accurately describes 'judicial decisions as responses to real life situations'.[141] Consequently, the analysis looks further at the 'law in action'.[142] This concept describes how the law is practised and implemented in everyday life. *Großfeld* refers to the latter as the study of legal effect – to paraphrase *Rehbinder*, law that is not alive in practice remains dead in the books.[143] Accordingly, non-legal approaches are also examined alongside

136 Cf. with regard to the particular features of a 'homeward trend' *Ebert*, Rechtsvergleichung 144.

137 Cf. *Dumon*, International Migration 1983, 218, 227 and see Chapter 1.A.

138 *Trantas*, Rechtsvergleichung 41; cf. also *Sommermann*, DÖV 1999, 1023; *Von Busse*, Rechtsvergleichung 347; *Evan/Grisoli/Treves*, Rechtssoziologie und Rechtsvergleichung in *Drobnig/Rehbinder* (eds), Rechtssoziologie und Rechtsvergleichung (1997) 35 (51); similarly *Kaiser*, ZaöRV 1964, 391 (396f). For criticism see *Frankenberg*, Harvard International Law Journal 1985, 439 and *Kischel*, Comparative Law § 3 mns 186ff with further references.

139 *Zweigert/Kötz*, Rechtsvergleichung 33, describe this as the negative aspect of the principle of functionality. See also *Starck*, JZ 1997, 1026f; *Glaser*, Die Entwicklung des Europäischen Verwaltungsrechts aus der Perspektive der Handlungsformenlehre (2013) 70f in relation to the notion of modes of action (*Handlungsform*); see also *Gutteridge*, Comparative Law (1946) 117ff; *Raschauer*, Allgemeines Verwaltungsrecht[5] (2016) mn 33 with regard to EU concepts.

140 Cf. *Kischel*, Comparative Law § 3 mns 44, 234.

141 *Michaels* in *Reimann/Zimmermann* 347f.

142 See *Pound*, Law in Books and Law in Action, American Law Review 1910, 12. Cf. also *Frankenberg*, ICON 2006, 442f.

143 *Großfeld*, Kernfragen der Rechtsvergleichung (1996) 117f; *Rehbinder*, Rechtssoziologie[8] (2014) 2 § 3; see especially *Ehrlich*, Grundlegung der Soziologie des Rechts (1913) Vorrede, 394 and 405.

the legislative provisions.[144] An approach or solution is 'non-legal' if it is not formally stipulated in law. For example, it is shown below that Austria and Germany stipulate toleration in their respective laws, whereas in Spain those persons who cannot be deported are *de facto* but not legally tolerated.[145] In comparison to other areas of law, non-legal solutions have far greater influence on public law;[146] an assessment that is especially noticeable in migration law.[147] In the case study, the variety of legislation, case law, studies, newspaper articles, statistics and implementation regulations have been examined to best paint a picture of the legal reality and non-legal practices.[148] Furthermore, the information on the law and legal reality in Austria, Germany and Spain was linked, acquired through research periods in each country.[149] Nonetheless, it has to be emphasised that a complete picture of 'law in action' can never be painted.

The results from the comparison may be especially useful and may serve as a source of inspiration in the search for new solutions.[150] Accordingly, the comparisons between legal systems can contribute to solving legal issues.[151] Ultimately, comparing in a functional manner may be about finding 'better' solutions to a legal or factual 'problem'. Following *Michaels* and also in my opinion, 'functionality can serve as an evaluative criterion. Functional comparative law then becomes a "better-law comparison"—the better of several laws is that which fulfils its function better than the others'.[152]

However, according to critical approaches, there are no 'better' solutions because who defines 'better' and according to which standard? I disagree

144 Cf. *Trantas*, Rechtsvergleichung 72ff with further references; *Kischel*, ZVglRWiss 2005, 17ff and in particular 24f with excellent examples.
145 See Chapter 4.A.I.
146 *Schwarze*, Europäisches Verwaltungsrecht[2] (2005) 83. Similarly *Kischel*, Comparative Law § 3 mn 201; *Kaiser*, Vergleichung im öffentlichen Recht, ZaöRV 1964, 391 (396) and *Krüger* in FS Martin Kriele 1398ff.
147 Cf. *Einwallner*, Asyl- und Fremdenrecht 2010 – Bloß noch Spielball der Politik, juridikum 2010, 68.
148 See the examples in *Schmid-Drüner*, Der Begriff der öffentlichen Sicherheit und Ordnung im Einwanderungsrecht ausgewählter EU-Mitgliedstaaten (2007) 47.
149 See the comments made in the preface.
150 Cf. *Schmidt-Aßmann/Dagron*, Deutsches und französisches Verwaltungsrecht im Vergleich ihrer Ordnungsideen, ZaöRV 2007, 395 (467); *Von Busse*, Die Methoden der Rechtsvergleichung im öffentlichen Recht als richterliches Instrument der Interpretation von nationalem Recht (2015) 40.
151 Cf. *Trantas*, Rechtsvergleichung 29.
152 *Michaels* in *Reimann/Zimmermann* 348.

that it is generally impossible to compare in order to find 'better' solutions. Nevertheless, I take this criticism seriously, which is why some comparisons may not be possible because they would otherwise be too subjective unless at least a standard is defined. Hence, one limit of critical-contextual comparison is to make clear how 'better' is defined to rebut this criticism. In the case study 'better' is considered from a normative perspective. The 'better'-law is evaluated according to a specific standard: international law, in particular human rights, and EU law.

The standards are those of international and EU law – international law will be examined in Chapter 1, EU law in Chapter 2. The inclusion of higher-ranking legal norms arises from the hierarchy underpinning the legal system. The compatibility of regularisations with the relevant requirements of international and EU law will therefore be examined. Where international law is concerned, only the ECHR is included as a more detailed analysis would exceed the scope of this study. The constitutional law of each of the three Member States ranks above the mere individual pieces of legislation, but is not examined since the core constitutional guarantees regarding fundamental rights which are central to the (comparative) analysis of regularisations, are all anchored in international and EU provisions.[153] Moreover, it would extend far beyond the scope of this study. The results of the comparison and of the analysis may be used to propose a Regularisation Directive (Part III) in order to determine the content central to such a Directive. Taking international and EU law as the standard is thus key as a Regularisation Directive would have to satisfy the requirements in international and EU law. An assessment of the compatibility between regularisations and constitutional standards would therefore be irrelevant for this reason.

To sum up, the critical-contextual comparison plays a key role as I examine whether a common EU solution can be found with regard to regularisations. The results of the comparison are used to propose a Regularisation Directive at EU level. Taking international and EU law as the standard is essential as a Regularisation Directive would have to satisfy the requirements in international and EU law.

153 See Chapter 1.B.III.

2. Integrated approach

Prior to the actual comparison in Chapter 4, Chapter 3 contains separate discussions of the context surrounding migration in each of the three Member States. More specifically, the development of immigration law, the legal status of foreigners (aliens) and of each of the relevant regularisations. Furthermore, the competences, the responsible authorities as well as the legal protections in place will also be outlined. The described contextual elements create the framework for the integrated comparison in which the individual regularisations can be linked and described in detail. The integrated comparison can then refer to general aspects that are relevant to understanding the measures in place.

The comparison in the case study thus does not have the usual descriptive element that results from individual national reports.[154] The legislative provisions and non-legal solutions in the selected Member States are linked, analysed and evaluated in an integrated approach.[155] Using the relationship between the provisions and solutions allows one to determine changes in function, which may not be readily apparent at first sight.[156] In addition, separate treatment of the regularisations can also give rise to unnecessary repetitions, which are to be avoided. As *Kischel* quite rightly notes, comparison and presentation should melt together form a whole.[157]

The point of comparison is referred to as *tertium comparationis*.[158] The categorisation follows on the basis of the purpose of the regularisation, as outlined in detail below.[159] The concept centres around the decisive legal reason for awarding a right to stay, whereby (with regard to regularisations) six purposes can be derived from the three relevant levels of legal sources. The extent of their links varies with respect to each purpose of

154 Cf. *Von Busse*, Rechtsvergleichung 36ff. An example for such an approach as outlined by *Von Busse* is present in *Schieber*, Komplementärer Schutz 117ff or in *Schmid-Drüner*, Einwanderungsrecht 49ff. In addition, see *Kischel*, Comparative Law § 3 mns 10, 12, 50, 53.

155 *Ebert*, Rechtsvergleichung 145ff; *Kischel*, Comparative Law § 3 mns 50 und 242ff; *Trantas*, Rechtsvergleichung 48f with further references; *Zweigert/Kötz*, Rechtsvergleichung 43f.

156 Cf. *Lachmayer*, Verfassungsvergleichung durch Verfassungsgerichte, JRP 2010, 166 (170); *Ebert*, Rechtsvergleichung 154, 158.

157 *Kischel*, Comparative Law § 3 mn 243.

158 Cf. *Örücü*, Enigma 21; *Sommermann*, DÖV 1999, 1017; *Piek*, ZEuP 2013, 67f.

159 See *Kischel*, Comparative Law § 3 mn 242 for general remarks regarding categorisation; see Chapter 1.B.II. concerning the purpose of the regularisation.

the regularisation as only 'non-returnability' and 'vulnerability' are sub-divided.

3. Analysis from the perspective of irregularly staying migrants

Finally yet importantly, this study has also a (hegemony-)critical layer. A research perspective that is migrant-centred most accurately serves the above-described hegemony-critical approach.[160] This is particularly relevant to deal with the relationship between migrants and the state and the underlying power relations in migration law. 'Migrant-centred' is defined as looking at the relevant legal and non-legal approaches through the lens of migrants, thus the perspective shifts from the state to the migrants. This allows one to look at the law and how it constitutes legality/illegality in migration law[161] and, consequently, social conditions. *Klarmann* accurately pointed out in his work on the deconstruction of migration-specific illegalities that 'illegal' migrants are not factual realities.[162]

Transnational law is one approach that takes a migrant-centred perspective and may be applied in a hegemony-critical manner. Generally speaking, provisions of (EU) migration law are to be found at three levels: international law, EU law and national law. The case study considers all three levels and shows that an isolated view of one single level is no longer appropriate. This is already clear from Chapter 1 in the discussion of the relationship between the three levels. Chapter 2 – as Chapter 5 – focuses solely on EU law. The comparison in Part II (Chapter 3 and Chapter 4) centres around Austrian, German and Spanish public law measured against the EU and international standards.[163]

In this respect, the notion 'transnational law' must be emphasised.[164] The notion refers, inter alia, to law applicable to acts and circumstances

160 See Introduction D.I.1.

161 *Menezes Queiroz*, Illegally Staying 11ff.

162 *Klarmann*, Illegalisierte Migration. Die (De-)Konstruktion migrationsspezifischer Illegalitäten im Unionsrecht (2021) 31.

163 See Introduction D.II.1.

164 For the fundamentals see *Jessup*, Transnational Law (1956); cf. *Miller/Zumbansen* (eds), Comparative Law as Transnational Law (2012); *Zumbansen*, Carving Out Typologies and Accounting for Differences Across Systems: Towards a Methodology of Transnational Constitutionalism in *Rosenfeld/Sajó* (eds), The Oxford Handbook of Comparative Constitutional Law (2012) 75 (75–84); on transnational refugee law see *Goodwin-Gill/Lambert*, The Limits of Transnational Law:

beyond national borders.[165] One purpose of transnational law is to clarify the interrelationship and links between these three levels when apparent in a particular case.[166] Attention must also be drawn to one aspect of the methodology of transnational research: selected case scenarios are examined, categorised and analysed from the perspective of the addressee of the norm.[167] *Farahat* has shifted and applied this approach to the field of transnational migration.[168] This also serves as a framework for the present study and will therefore be applied.

The residency status of migrants staying irregularly in a Member State is at the centre of the legal analysis. At the same time the study is also based on the perspective of the individual. Present research on this topic has often focused on deportation law and therefore only considered the matter from the perspective of the state.[169] This study examines the topic from the other side of the coin by viewing irregularity and regularisations from a 'migrant-centred perspective'.[170] This casts (new) light on the various national, EU and international provisions[171] and the given power-political relations. This approach is also expressed by the starting point for the comparison (purpose of the regularisation), which bases decisions justifying the right to stay on a contractual structure.[172]

The right to stay, which determines the legal or illegal residence of migrants, is therefore at the heart of this study.[173] This seems to be the more contemporary and fruitful approach in view of the changing understanding of the law surrounding immigration. Accordingly, decisions

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Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union (2010).

165 Cf. *Jessup*, Transnational 1ff; *Farahat*, Progressive Inklusion: Zugehörigkeit und Teilhabe im Migrationsrecht (2014) 11 with further references.

166 *Farahat*, Progressive Inklusion 12.

167 Cf. *Farahat*, Progressive Inklusion 12f; *Jessup*, Transnational 11f.

168 Cf. *Farahat*, Progressive Inklusion 12f; *Jessup*, Transnational 11f.

169 See especially *Thym*, Schutz des Aufenthalts zwischen polizeilicher Herkunft und menschenrechtlicher Neuausrichtung in *Arndt/Betz/Farahat/Goldmann/Huber/Keil/Láncos/Schaefer/Smrkolj/Sucker/Valta* (eds), 48. Assistententagung Öffentliches Recht (2008) 221 or *Molnár*, Interplay 5.

170 *Handmaker/Mora*, 'Experts': the mantra of irregular migration and the reproduction of hierarchies in *Ambrus/Arts/Hey/Raules* (eds), The Role of 'Experts' in International and European Decision-Making Processes: Advisors, Decision Makers or Irrelevant Actors? (2014) 263.

171 *Farahat*, Progressive Inklusion 13.

172 See Chapter 1.B.II.

173 See also *Menezes Queiroz*, Illegally Staying 8, who analyses the different forms of illegality in the EU from the perspective of the right to stay.

justifying the right to stay[174] are fundamental to the structure of the right that transcends legal systems and does not take expulsion[175] as a central pillar for its development.[176] By changing the perspective, the results from research can expand on the research undertaken by viewing the challenges from the perspective of the state.

III. Translation

This study was originally published in German in 2020 as *Regularisierungen irregular aufhältiger Migrantinnen und Migranten – Deutschland, Österreich und Spanien im Rechtsvergleich*; particular topics explored in earlier drafts of Chapter 1, Chapter 2, Chapter 4 and Chapter 5 have also been published in English and German.[177]

The English version presented here revises and updates the original German version to take account of the legislation, case law and literature to 31 July 2022. Subsequent developments in case law and literature could only be considered in select instances.

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174 See Chapter 1.A.II.3.

175 Expulsion is generally understood as the order to leave national territory.

176 See Chapter 1.B.II.

177 Chapter 1: *Hinterberger/Klammer*, Abschiebungsverbote aus gesundheitlichen Gründen: Die aktuelle Rechtsprechung des EGMR und EuGH zu Non-Refoulement und deren Auswirkungen auf die österreichische, deutsche und spanische Rechtslage – eine Verbesserung der rechtlichen Situation schwer kranker Drittstaatsangehöriger? in *Filzwieser/Taucher* (eds), Asyl- und Fremdenrecht. Jahrbuch 2017 (2017) 111 as well as the shortened version *Hinterberger/Klammer*, Abschiebungsverbote aus gesundheitlichen Gründen: Die aktuelle EGMR- und EuGH-Rechtsprechung zu Non-Refoulement und deren Auswirkungen auf die deutsche Rechtslage – eine Verbesserung der rechtlichen Situation schwer kranker Drittstaatsangehöriger, NVwZ 2017, 1180. Both articles note from the outset that I was the author of those parts that feature in this study.
Chapter 4: *Hinterberger*, Arbeitsmarktzugang von Fremden mit „Duldung" oder „Aufenthaltstitel aus besonders berücksichtigungswürdigenden Gründen" – Eine gleichheitsrechtliche Analyse, DRdA 2018, 104.
Chapter 1, Chapter 2, Chapter 4 and Chapter 5: *Hinterberger*, An EU Regularization Directive. An effective solution to the enforcement deficit in returning irregularly staying migrants, Maastricht Journal of European and Comparative Law 2019, 736 and *Hinterberger*, Eine Regularisierungsrichtlinie der EU: Eine wirksame Lösung für das Vollzugsdefizit von Rückführungen irregulär aufhältiger Migrant*innen in *Lanser/Potocnik-Manzouri/Safron/Tillian/Wieser* (eds), Social Europe? 1. Tagung junger Europarechtler*innen 2018 (2018) 45.