Immigration Law Spanish-Style: A Study of the Regularización of Undocumented Workers in Spain

Maria P Lopez
Immigration Law Spanish-Style: A study of the regularización of undocumented workers in Spain

María Pabón López *

I. Introduction:

The situation of the undocumented, migrant and/ or irregular worker\(^1\) worldwide is one of great concern to liberal democracies in this globalized age. This is because of the undocumented workers’ vulnerability to exploitation and the lack of applicability of

\(^*\)Associate Professor of Law, Indiana University School of Law, Indianapolis. A.B. Princeton University, J.D. University of Pennsylvania School of Law. I appreciate the research assistance of April Bruce, Indiana University School of Law, Indianapolis Class of 2006, Melody Goldberg, Indiana University School of Law, Indianapolis Class of 2006, and Edgardo Martinez, Indiana University School of Law, Indianapolis Class of 2005. The invaluable research assistance of Dragomir Cosanici, Head of Reference, Ruth Lilly Law Library, Indiana University School of Law, Indianapolis, is greatly appreciated as well. Kevin R. Johnson has suggested sources for this paper, I am thankful for his input. I thank the members of the 2006 Immigration Law Professor’s Workshop who provided useful comments for this Article, particularly Karen Musalo. Maria Teresa Gil Bazo also provided helpful insights for this paper for which I am most appreciative. Finally, I thank my colleagues at the Indiana University School of Law, Indianapolis, for their feedback regarding an earlier draft this paper which I presented during a Faculty Colloquium. The research for this Article was funded by a summer research fellowship from the Indiana University School of Law.

\(^1\) The terms undocumented, migrant and/ or irregular worker are used in this paper interchangeably to describe the workers who leave their countries of origin and are present and working in other countries without legal authorization to do so.
labor and employment legal regimes once they are injured or suffer many of the myriad harms that can befall them in the workplace. Although there are international labor standards which protect the rights of these workers, and administrative bodies such as the International Labor Organization exist to oversee the enforcement of the standards, the reality is that the ILO is considered to be an ineffectual agency as its mandate “has no teeth.”

Thus, it is evident that the worldwide undocumented worker population is one that will likely reap benefits of regularization to legal migration status in the countries of their residence, as they will no longer be a vulnerable “shadow population.”

Many countries worldwide have experienced unprecedented growth in their population of undocumented workers. The United States and Spain have been in the forefront of this growth in the past decades. In the United States, the legal system treats

---


4 I note the “shadow population” language is one that President Bush used in announcing his guest worker proposal: “Workers who seek only to earn a living end up in the shadows of American life -- fearful, often abused and exploited. When they are victimized by crime, they are afraid to call the police, or seek recourse in the legal system.” Press Release, President Bush Proposes New Temporary Worker Program, January 7, 2004, available at [http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html](http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html).

5 The latest estimates of the undocumented population in Spain show about 1 million persons present in Spain without legal authorization. *See Sinikka Tarvainen, Spain toughens immigration policy under media*
undocumented workers as having dual identities, of outsiders because of their immigration status and members of the United States polity because of the work that they perform for the national economy.\textsuperscript{6} In Spain, they have been treated similarly, where their outsider status belies their utility to the Spanish economy.\textsuperscript{7} The parallels between the U.S. and Spain with regard to undocumented immigrants abound. For example, the deaths at the border with Mexico are similar to the deaths at sea of Africans coming to Spain.\textsuperscript{8} The


\textsuperscript{7} KITTY CALAVITA, \textit{IMMIGRANTS AT THE MARGINS: LAW, RACE AND EXCLUSION IN SOUTHERN EUROPE} 3 (2005).

recently passed legislation to build a fence in the U.S. Mexico\textsuperscript{9} border is a similar phenomenon to the fences in the Spanish cities of Ceuta and Melilla.\textsuperscript{10}

While the United States has struggled recently with the politics of immigration reform\textsuperscript{11} and in particular, with the concerns of what to do with its large undocumented population, it is instructive to see what another country has done to handle a similar situation. In 2004, Spain passed legislation which allowed temporary legal status ("regularización") to thousands of undocumented immigrant workers who met certain conditions of employment and residence in the country.\textsuperscript{12} And in 2005, such the regularización took place. Because the regularización granted legal status to certain undocumented workers, it is a form of amnesty.\textsuperscript{13}


\textsuperscript{9} Secure Fence Act of 2006, H.R. 6061, 110\textsuperscript{th} Cong.

\textsuperscript{10} These cities, located in Africa, but part of Spain, are separated from Morocco by wire fences covered with razor wire. See Amnesty International, \textit{Spain and Morocco: Failure to protect the rights of migrants – Ceuta and Melilla one year on}, October 26, 2006, available at http://web.amnesty.org/library/index/engeur410092006.

\textsuperscript{11} After several failed legislative immigration proposals in 2005 and 2006, the latest United States comprehensive immigration reform effort is the recently introduced “Security Through Regularized Immigration and a Vibrant Economy (STRIVE) Act” of 2007. See H.R. 1645, 110\textsuperscript{th} Cong. February 23, 2007.

\textsuperscript{12} LEY ORGÁNICA 8/2000, de 22 de diciembre, de reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, modified by Ley Orgánica 14/2003 del 20 de noviembre.

\textsuperscript{13} The term amnesty is defined as “[a] pardon extended by the government to a group or class of persons usu. for a political offense; the act of a sovereign power officially forgiving certain classes of persons.” BLACKS LAW DICTIONARY, 8\textsuperscript{th} ed.(2004). Furthermore, amnesties are “usually addressed to crimes
The regularización was designed to address Spanish national concern with undocumented workers and to bring the more than 800,000 foreigners into some form of legal residency in Spain. The workers are mostly from Eastern Europe, South America and Africa. Although responding to a national need, this bold move has caused great concern in the European Union community and has drawn both praise and criticism worldwide. Although the regularización has attracted some attention here in the United States, it is largely an unexplored phenomenon from abroad.

The purpose of this Article is to examine how Spain has handled its undocumented immigrant worker situation by undertaking its regularización. This examination will promote a better understanding of how Spain’s response to the problem of undocumented immigrants was undertaken and will allow an assessment of whether their solution worked to alleviate the problems experienced in the country. This will show how immigration law, Spanish style, is done—at least how it relates to undocumented workers. Formerly European country of labor emigration, Spain has experienced since

against state sovereignty -- that is, to political offenses with respect to which forgiveness is deemed more expedient for the public welfare than prosecution and punishment.” Id.


15 Ecuadorians, Moroccans and Romanians were the nationalities which most were regularized. See Sonia Aparicio, Inmigrantes: Mas de 700,000 solicitudes, El País, December 23, 2005, available at http://www.elmundo.es/especiales/2005/02/sociedad/immigracion/regularizacion.html.

16 See infra notes __ and accompanying text.

17 See infra notes __ and accompanying text.

18 See David Unger, An Immigration Experiment Worth Exploring, N. Y. TIMES (March 20, 2005) at __.
the late 1970s a reversal in this trend - coinciding with the closing of the borders of the Northern European counties, so that it has become a “new country of immigration.”

This Article proceeds in five parts. Part I discusses the background and history of Spain regarding labor immigration, including the history of its immigration laws, as it relates to the trends of the country. Part II analyzes the situation regarding undocumented workers in Spain, the hardships faced by immigrants coming in and once they have arrived and the problems created for Spain by the immigrants’ arrivals. Part III analyzes the regularización, along with the policy analysis undertaken by the Spanish government as it decided to implement the amnesty and then the actual conduct of the amnesty. This part will also review the initial concerns which led to the enactment to the legislation. Part IV discusses whether the Spanish regularización of 2005 comports with the legal and policy norms of the European Union, of which Spain is a member. This analysis is undertaken to understand the criticism that this action was a form of back door immigration to the European Union. This part further draws conclusions about immigration policy choices by individual nations and how they affect a network of nations in a globalized world.

Part V concludes by analyzing whether the regularización of 2005 was considered a success or not by the Spanish people, EU members, and others. Lastly, this part discusses lessons that can be learned from this regularización in Spain.

II. Background and History of Spain

A. History of Labor Based Immigration

19 KITTY CALAVITA, IMMIGRANTS AT THE MARGINS: LAW, RACE AND EXCLUSION IN SOUTHERN EUROPE 3 (2005). This is in contrast to the United States, which has always been a country that receives immigrants, or “a nation of immigrants.”
Throughout the early to mid twentieth century, Spain has been considered a European country of labor emigration. The poor economic situations of the 1950s, as well as the post Civil War repression made many Spaniards depart for foreign countries.\textsuperscript{20} Yet, late in the twentieth century, Spain experienced economic prosperity starting in the 1960s with the economic reforms of the Franco regime and culminating in the late 1990s, following Spain’s entry into the European Union.\textsuperscript{21} For example, “[d]uring this high growth period of 1986-90, over two million jobs were created in Spain, more than in any other European country.”\textsuperscript{22} Moreover, “[b]etween 1960 and 1985, the percentage of the population employed in agriculture fell more than 20 points, from 38.7% to 18%.”\textsuperscript{23} “During the same period, average real wages more than doubled and the official minimum wage skyrocketed more than 25-fold.”\textsuperscript{24} “This economic boom and the unparalleled need for a [cheap] foreign labor force attracted a host of immigrants from other countries.”\textsuperscript{25} As a result, Spain has experienced since the late 1970s a reversal in this trend- coinciding with the closing of the borders of the Northern European counties, so that it has become a “new country of immigration.”\textsuperscript{26} It is precisely because Spain has a


\textsuperscript{21} \textit{Id.} at 896.


\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{Id.}

\textsuperscript{25} Caro, \textit{supra} note 20 at 896.

\textsuperscript{26} Calavita, \textit{Immigrants at the Margins, supra} note 19 at 3.
southern border with the developing world that it has been receiving immigrants since this time. 27

B. History of Immigration Law in Spain, including early regularizations

Spain had no legislation regarding immigration from 1939 until the late 1970s. During this time, the executive could grant non-citizens residence permits and work authorization, yet those rejected has no recourse in courts. 28 Immigration law came to Spain first in the form of the accession in 1978 to the 1951 Geneva Convention Relating to the Status of Refugees. 29

The rights of noncitizens are enshrined the Spanish Constitution of 1978, which mandates that "[f]oreigners in Spain will enjoy the rights and liberties put forth here, according to the terms set by international treaties and the law," 30 other than the right to vote and to serve as elected officials. 31

In 1984, the first Spanish Asylum and Refugee Law was enacted. Because of its drafting, it “encouraged both refugees and non-refugees to use the asylum process as a means of immigrating to Spain.” 32 The reason for this was that to fill “an application for asylum brought with it both a right to enter Spain, and the right to remain there during the


29 Id at 665.

30 Spanish Constitution, arts. 13 and 23, cited in Calavita, Immigration, Law and Marginalization, supra note 22 at 543.

31 Calavita, Immigration, Law and Marginalization, supra note 22 at 543.

32 Fullerton, Inadmissible in Iberia supra note 28 at 666.
entire length of the proceeding.”

Furthermore, “because Spain had periodic amnesties, allowing those who had been living in the county for a certain period of time to obtain residence permits, the asylum process was a magnet for many—whether persecuted or not—who wished to regularize their status in Spain.”

The result of this situation is that Spain saw an increase in its numbers of asylum applications from 1000 in 1984 to more than 12,000 in 1993. These excesses ended with the enactment of the 1994 Refugee and Asylum Act.

Notably, Spain’s first actual immigration law was not enacted until 1985, in the same year when the country joined the European Community. It has been suggested that the passage of the law “was in part the result of negotiations surrounding Spain’s entrance into the EC.” This law is the Ley Orgánica sobre Derechos y Libertades de los Extranjeros en España (Organic Law on the Rights and Liberties of Foreigners in Spain); it “took up barely five pages in the Federal Bulletin (Boletín del Estado 1985: 20825-29). It left not just the details but vast terrains of uncharted policy to be worked out through administrative regulation.”

33 Id.
34 Id at 666-7.
35 Id at 667.
36 Id. This legislation has been noted to be responsive to “the demands imposed on it by northern EU Member States to exercise an effective control of its borders.” Maria Teresa 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 Revisited, 18 INT’L J. REFUGEE L. 571, 575 (2006).
37 Calavita, Immigration, Law and Marginalization, supra note 22 at 543.
38 Id. at 544.
39 Id.
The result of the enactment of this law was the first Spanish regularización, which came “in recognition of the vast numbers [of noncitizens] excluded from any legal rights,” following the new law.\footnote{Id.} Through this first regularización, “foreign residents could apply for legal status within a brief window of opportunity.”\footnote{Id.} Following very small applicant pool, only 23,000 persons were regularized under this program.\footnote{Id. at fn.14.}

Spain’s second regularización came on June 7, 1991, when the government decreed the Council of Ministers Agreement on Regularizing Foreign Workers.\footnote{Id. at 545.} It “specified that illegal aliens who could verify that they were already in the country by 15 May 1991, and either had ongoing work contracts, were self-employed in a lucrative, legitimate enterprise, or had previously had a valid residence and work permit could apply for legalization.”\footnote{Id.} The legal status conferred by this 1991 legalization was valid only for one year; “renewal was possible, but was contingent on the above conditions persisting.”\footnote{Id.}

Further immigration law in Spain was passed in May of 1991, imposing for the first time visa requirements on entrants from the Maghreb\footnote{The Maghreb countries include Morocco, Algiers, Libya, Tunisia, and Mauritania. See General Secretariat of the Arab Maghreb Union, \url{http://www.maghrebarabe.org/fr/index.htm} ; see also, Cano, supra note 20 at 893.} countries, Peru and the Dominican Republic, since these countries were viewed as the source of “large numbers
of illegal residents.” 47 This legislation is thought to respond to European Community pressures as Spain joined the Schengen Agreement in June 1991. 48

Other immigration requirements were passed on 26 May 1993, in the Council of Ministers Agreement, which “established annual quotas for foreign workers in three sectors where there were reported to be insufficient local workers: agriculture (10,000 workers), unskilled construction work (1,100 workers), and various services (5,000 for domestic services and 3,500 for other services).” 49

Spain’s third regularization program came in February 1996, via the government decree, Real Decreto 155/1996, “stipulating this time that it applied only to those who had once had residence and work permits but who for a variety of reasons had been unable to renew them.” 50 “This decree also created a permanent residence and work permit for those who could show they had remained in an uninterrupted legal status for at least six years, that is, successfully renewing their temporary permits with no lapses.” 51 Thus we see that there have been previous amnesties in Spain since 1985 immigration law was passed. 52 The previous amnesties were considered by some as “a call to others to make the journey.” 53 The most recent version of Spain’s immigration law contains provisions regarding the integration of the noncitizens into Spain’s society. 54

47 Calavita, Immigration, Law and Marginalization, supra note 22 at 545.
48 Id.
49 Id.
50 Id.
51 Id.
53 Id.
III. The Situation of the Undocumented Noncitizen in Spain

A. The Tragic Journey To Spain and Conditions in the Country After Arrival

Entering Spain outside of the regular immigration channels is an extremely dangerous feat for the immigrants because many will receive injuries during the difficult and treacherous journey. An unfortunate numbers of these will even meet death in search for opportunities in Spain. However, reaching Spain is only half the battle for many of the immigrants. Once the immigrants have entered Spain, many are left with no choice but to live in and work in poor and unsafe conditions living in fear of the day that they will be found and sent back to their countries of origin.

The Straight of Gibraltar, which separates Africa from Spain, is an appealing path of entry for African immigrants because the distance to be crossed is only 14 kilometers. Even though the distance is short, the journey is still very dangerous for the immigrants whom are often in small boats (called “pateras” or “cayucos”) and traveling at night. “[I]t is estimated that more than 4,000 may have lost their lives. . . during the last 12 years” from drowning in the Straight. Since the Straight is a popular crossing point, it is highly patrolled by border agents. This causes the migrants to try to enter in

---


55 Spain The Southern Border, supra note 8 at 83.

56 Id.

57 Id. See also, Death at the Border in PICUM’S MAIN CONCERNS ABOUT THE FUNDAMENTAL RIGHTS OF UNDOCUMENTED MIGRANTS IN EUROPE IN 2006 at 5 , available at http://www.picum.org/.
the more eastern provinces, which involves longer journeys over the water in the small boats and more treacherous landings in these “mountainous and isolated areas.”  

Immigrants entering by land through Ceuta and Melilla, two Spanish cities in Northern Africa, must face not only the double lined six meter high border fences that are each topped with coiled wire and stakes, but must face the tactics of the Spanish Civil Guard who patrol the border fences. The “whole length of the fences is kept under constant surveillance by closed-circuit video cameras, watchtowers, infra-red rays and fibre-optic thermal sensors controlled by the Spain Civil Guard.” The Guard uses “solid rubber bullets” that “are about the size of a tennis ball” to shoot at the immigrants as they try to cross and once they do cross the fences into Spanish territory.

After arrival into Spain, these illegal immigrants find themselves part of the “underground economy” that has developed in Spain. This is one in which the illegal immigrants now form an integral part of Spain’s economy. As part of the underground economy, the illegal immigrants not only work in poor conditions, but they suffer little pay. They also “are excluded from most of the benefits of Spain’s welfare state such as

---

58 Id at 84.
59 Spain and Morocco Failure to Protect the Rights of Migrants, supra note 10 at 5.
60 Id at 4.
61 Id at 5.
62 Calavita, Immigration, Law and Marginalization, supra note 22 at 535.
63 See Alicia Adserà and Barry R. Chistwick, Divergent Patterns in Immigrant Earnings in Craig A. Parsons and Timothy M. Smeeding, Immigration and the Transformation of Europe 98 (2006) (reporting results of empirical study finding that in Europe, Spanish immigrants are the lowest paid in relation to natives.)
universal health care and social security."\footnote{Id at 531.} Stories abound of the adversities and difficulties faced by undocumented workers trying to become legal in Spain.\footnote{Id at 550-553.}

The events that have taken place in El Ejido are instructive to show the realities of the undocumented worker in Spain. El Ejido is an area in the Southern Spain where undocumented agricultural workers, mostly Africans, face many hardships and racially motivated abuse.\footnote{See generally Caro, Tying Racism in El Ejido, supra note 20 at 893.} The undocumented workers provide “cheap labor that is willing to work long hours under extreme conditions of heat and humidity—the temperature inside the greenhouses can surpass 113\textdegree F on a sunny summer afternoon.”\footnote{Id.} The immigrants are hired “to work in the greenhouses for as little as $3.50 an hour” because the natives do not want to work in these conditions for so little pay.\footnote{Id.} In El Ejido, three quarters of the foreign population lives outside of the town in “shacks, plastic huts, garages, and storage houses that their employers rent to them” in which “[f]ifty-five percent of these ‘homes’ lack running water, 57\% lack a bathroom, 56\% lack a kitchen, and 31\% lack electricity.”\footnote{Id at 903.} Overall, more than half of the [foreign population] in El Ejido lives in sub-par housing , known in Spanish as “infraviviendas”.\footnote{Id.}
Both the living conditions and way the town is set up result in the immigrants living in a “system of apartheid” which was the fuel for racial tensions. The “owners of the greenhouses who hire illegal immigrants prefer to lodge them outside of people’s view” and thus away from the rest of the city. The “owners of available apartments are afraid to rent to immigrants because they regard the immigrants as dirty and dangerous;” this forces the immigrants to live in the shanties, government housing, or employer provided housing. It is apparent that the programs put in place by the regional government have not addressed the problem presented in El Ejido’s discriminatory housing market. The government’s solution to a housing problem that arose after racial rioting was to “install pre-fabricated barracks among the greenhouses, so the immigrants would not need transportation to work.” Another part of the government’s program included transportation for the immigrants, a shuttle bus that, if needed would take them from their barracks to a hospital or mall, which are located outside of town. Thus, the immigrants at these facilities would rarely interact with the city’s native Spanish population.

The racial riots that took place in El Ejido in February of 2000 were the result of these policies. The riots were incited by the killing of a young Spanish woman at the hands of a Moroccan immigrant. The riots were part of a declared Moor hunt (‘Caza del

71 Id.
72 Id.
73 Id.
74 Id.
75 Id. at 905.
76 Id.
77 Id. at 894.
Moro”) by native Spaniards. This so called “hunt” included the beatings of Moroccan immigrants, the burning of their homes, the desecration and destruction of mosques and other criminal activity. 78 In the aftermath of the riots at El Ejido, “between 500 and 700 Moroccans lost their homes; 49 people were injured; and 158 people were arrested by the police, 92 of whom were immigrants.” 79

B. The Recent Challenges That Spain is Facing as a Country to Immigration

The data regarding immigrants in Spain show that at present, approximately 3 to 4 million out of a population of 43 million—or about 9% are from other countries. 80 These demographics are changing the face of Spain, since noncitizens used to be only 1.6% in 1998. 81 Estimates of the number of undocumented persons in Spain since 2002 show that they have grown from 868,884 in January 2002, to 1,340,167 in 2003, 1,387,315 in 2004 and 1,714,256 in 2005. 82 The main industries which employ undocumented workers in Spain are agriculture and construction. 83 Other areas in which many undocumented persons work are domestic services and the restaurant business. 84

78 Id.
79 Id.
80 Manuel Pimentel, Bienvenida la Regularización, CINCO DIAS, February 9, 2005 at ___; see also, Carlta Vitzthum, These Open Arms Are Raising EU Eyebrows, BusinessWeek International Edition European Bureau; Pg. 30 Vol. 3935 (May 30, 2005).
81 Id.
84 Vitzthum, These Open Arms Are Raising EU Eyebrows, supra note 80 at __.
Immigrants in Spain have been subjected to racial discrimination and the laws have served to marginalize them. Spain needs immigrants for its economy, but it has its problems because their have been riots and troubles with racial violence.

Spain’s public school systems are facing problems because a larger percentage of the students are foreigners, than in past years. There is concern that this influx of foreigners in the schools will result in the withdrawal of native speaking Spanish children from public schools so they can attend private schools. A study by the CC OO labor union, found that public schools in Madrid over the past few years have lost about 8 percent of their students to private schools.

The situation also creates problems for the teachers who are finding it harder to teach effectively because of the decline in the “number of native Spanish speaking students. Thus, predictably, it is thought that “[t]he abundance of migrants could pose serious social and education challenges for teachers who want to satisfy all the children’s needs

---

85 See generally, Calavita, Immigration, Law and Marginalization in a Global Economy, supra note 22 at 529; See also supra notes ___ and accompanying text (describing racial rioting events at El Ejido).

86 Spain is no different than its other European counterparts in this respect. Many European economies have experienced low birthrates, and the concomitant shrinking pool of young workers. See DOWELL MYERS, IMMIGRANTS AND BOOMERS: FORGING A NEW SOCIAL CONTRACT FOR THE FUTURE OF AMERICA 5 (2007). Spain has one of the strongest economies in Europe at present, and also one of the largest positive net migration flows. If not for immigration, it is likely that Spain would not exhibit positive population growth. See Craig A. Parsons and Timothy M. Smeeding, What’s unique about immigration in Europe? in CRAIG A. PARSONS AND TIMOTHY M. SMEEDING, IMMIGRATION AND THE TRANSFORMATION OF EUROPE 3 (2006).

87 Peter Biles, Spain’s Immigrants Demand More Rights, BBC News (Feb. 25 2000).


89 Id.

90 Id.

91 Id.
based on their different cultural backgrounds.” 92 Nonetheless, “[m]ost experts agree that the rising number of immigrant pupils will not in itself cause major problems to the public school system.” 93 Yet, some predict that “trouble could begin when these students become concentrated in just a few schools.” 94 Not everyone views the situation as troubling. One teacher viewed the arrival of foreigners as a positive occurrence because “her school was able to obtain an additional teacher to help in an immigrant assistance program, a psychologist, and 17 extra computers.” 95

Finally, it is worth noting that Spain suffered its own terrorist episode, the Madrid train bombings of March 11, 2004. 96 The bombings have made the environment in Spain less hospitable for future immigrants. 97

IV. The 2005 Regularización

A. Law and Regulation

In a move calculated to appear welcoming to the immigrants, Consuelo Rumí, State Secretary for Immigration, relocated her office out of its long time location in the Interior Ministry –in charge of policing-to the more immigrant welcoming Ministry of Labor. 98 Such a telling move serves as a vivid example of how the government of

92 Id.
93 Id.
94 Id.
95 Id.
97 Id.
98 David C. Unger, An Immigration Experiment Worth Watching in Spain, N.Y. TIMES, March 20, 2005 at ___.
Socialist José Luis Zapatero decided to coordinate the regularization of the irregular workers with the needs of Spanish employers.\textsuperscript{99}

The regularización took place from February 7, 2005 to May 7, 2005.\textsuperscript{100} It was a specific regularización rather than universal amnesty.\textsuperscript{101} Thus, what the undocumented worker obtained is an initial residence authorization, or “autorizacion inicial de residencia” for a “residencia temporal” or temporary residence.\textsuperscript{102} With this status comes the right to live and work legally in Spain for one year.\textsuperscript{103} This residencia temporal of one year duration is subject to one two year renewal.\textsuperscript{104}

Employers would apply for regularization of those workers with whom they sign a contract of at least six months duration\textsuperscript{105} and that met certain requirements. In other

\begin{footnotes}
\footnote{99} Id.
\footnote{100} Manuel Pimentel, \textit{Bienvenida la Regularización}, CINCO DIAS, February 9, 2005 at ___.
\footnote{101} Id.
\footnote{103} Real Decreto, supra note 102 at 6.; \textit{see also}, Vitzthum, \textit{These Open Arms Are Raising EU Eyebrows}, supra note 80 at __.
\footnote{104} Real Decreto, supra note 102 at __.
\footnote{105} Real Decreto, supra note 102 at 1(b). For agricultural workers, the time period is reduced to three months. \textit{Id}. Note also that some may argue that because the Spanish amnesty only grants temporary legal status to the undocumented worker and it is tied to employment, it constitutes a guest worker program. Guest workers are foreign workers who are permitted to enter a country temporarily in order to take a job for which there is shortage of domestic labor and are to return to their countries of origin. The Bracero program in the United States and the Gastarbaiter program in Germany are examples of guest worker programs. Often the guest worker programs have included governmental involvement. This is in contrast
\end{footnotes}
words, the undocumented worker would not be able to apply for the regularización, but had to have an employer submit the application on his or her behalf. There were only minor exceptions to this rule in the case of domestic self employed workers, who were allowed to self petition if they worked part time with simultaneously with more than one family. 106

Among other regularización requirements were that the worker have no criminal record in his or country of residence 107 and that once the employer’s application is approved, the immigrant would have three months to sign up as taxpayer and enter into the Social Security system. 108 There also was a main requirement 109 that the person have been in Spain as of August 2004 continuously until the beginning of the regularización on February 7, 2005. There are also two key requirements once the regularización has been approved: that the person register in a town hall (“empadronamiento”) and that he or she

106 Real Decreto, supra note 102 at 2.


108 BBC News, Spain launches immigrant amnesty, 7 February 2005, available at http://news.bbc.co.uk/2/hi/europe/4242411.stm (last visited February 28, 2006); see also Vitzthum, These Open Arms Are Raising EU Eyebrows, supra note 80 at __.

109 Real Decreto, supra note 102 at 1(a).
obtain an identification card. The idea also is to capture taxes from the underground economy and also to bring a younger workforce to low birthrate Spain, whose population is aging.

Finally, it is thought by some that the regularización eliminates the hypocrisy of not recognizing the worth of those who Spain needs and of which, in the view of some, takes advantage. In fact, it has been asserted that "[i]f we want to maintain our economic model and a reasonable growth index, we need immigrant work." This situation responds to the reality of an aging population with a low birthrate.

Thousands of businessmen were complaining that they find not enough workers for the jobs and they know that there are many other businesses that are willing to develop a normal labor employment relationship with the undocumented workforce in Spain. Some even were forced to use undocumented workers, running the risk of incurring in criminal sanctions. There were stern warnings, however, in the regularización, to watch out for fraudulent applications, wherever they would be found. Also, it was considered very important by the government to be harsh on document falsification, and fraudulent

110 See Vitzthum, These Open Arms Are Raising EU Eyebrows, supra note 80 at __see also Real Decreto, supra note 102 at 7

111 Vitzthum, These Open Arms Are Raising EU Eyebrows, supra note 80 at __.

112 Manuel Pimentel, Bienvenida la Regularización, CINCO DIAS, February 9, 2005 at __.

113 See supra note __ and accompanying text.

114 Id.

115 Id.

116 Id.
employers who would sell fake employment contracts.\textsuperscript{117} Another warning that came about as a result of the regularización is a call regarding improvements to the regular immigration system, so that Spain does not continue to regularize workers massively at time, every several years, as has been done in the past in other amnesties.\textsuperscript{118} Yet, Spanish scholars indicate that these previous amnesties do not appear to have caused any significant change in the general increase of undocumented workers in Spain.\textsuperscript{119} The last two amnesties were in 2000 and 2001 and 600,000 undocumented migrants applied.\textsuperscript{120} Again, it should be noted that these previous amnesties were not employment related as the instant regularización.\textsuperscript{121}

B. After the Regularización

Over 700,000 undocumented workers were given work and residence permits, with another 400,000 residence permits to be given to relatives of the workers.\textsuperscript{122} The government considered it a “great success,” and insists that 90% of the workers in the

\begin{flushleft}
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} \textsc{The Economist}, “The End of Spain’s Amnesty for Illegal Immigrants: Let them Stay But Spanish tolerance worries the neighbors.” May 14, 2005 at 31. Issue 950. available at 2005 WLNR 7589440.
\textsuperscript{120} U.N. Department of Economic and Social Affairs, November 2004, cited in PICUM website, \url{http://www.picum.org/}.
\textsuperscript{121} Francisco Torres, \textit{La regularización extraordinaria: Luces y sombras}, 160, PÁGINA ABIERTA, (June 2005), available at \url{http://www.pensamientocritico.org/frantor0605.htm} (last visited March 20, 2006).
\textsuperscript{122} U.N. Department of Economic and Social Affairs, November 2004, cited in PICUM website, \url{http://www.picum.org/}.
\end{flushleft}
underground economy will surface. The Spanish government has advertised a new "severe" employer inspections plan, in order to deter the hiring of undocumented workers. The idea was to get more employers to regularize their workers. The government announced that following this amnesty, it will have zero tolerance for employers who commit fraud, in order to discourage employers from hiring undocumented workers.

V. Criticisms of the Regularización–Domestic and Abroad

In Spain, the regularización was criticized by the Communist party as being responsive to and only benefiting only big businesses. Furthermore, others in Spain have indicated that the regularización violated other EU countries’ immigration

123 Id.

124 Raquel Pascual, *Trabajo Amenaza con Inspecciones Masivas para activar la regularización*, CINCO DIAS, February 24, 2005 at ___. *see also*, Joaquin Arango and Maia Jachimowicz, *Regularizing Immigrants in Spain: A New Approach*, (September 6, 2005), *in* MIGRATION INFORMATION SOURCE, available at http://www.migrationinformation.org/Feature/display.cfm?ID=331 (last visited April 4, 2007). (indicating that 500,000 employer inspections expected to take place, each carrying with it a maximum fine of up to 60,000 Euros per undocumented workers).

125 Id. This is consistent with the phenomenon that amnesties tend to come hand in hand with restrictive immigration reform as happened in 1986 in the United States with the Immigration Reform and Control Act.

There has been further criticism that undocumented workers, who are most vulnerable because to the extent that they come from war torn and/or poverty stricken countries, were not be able to obtain the documents from their home countries that would allow them to meet the requirements of the regularización.128

There has been further domestic criticism that the regularización lacked flexibility.129 In particular, the date of the registry in town hall requirement (“empadronamiento”) proved to be the most rigid one, as often times the worker had been in Spain longer than the required time but did not complete this bureaucratic transaction. This requirement was eventually relaxed in the last few weeks of the regularización, possibly in an effort to increase the number of applications filed.130

Finally, it has been noted that if the idea behind the regularización was to “set the counter at zero” with regard to the number of undocumented workers, the numbers belie

127 Vitzthum, These Open Arms Are Raising EU Eyebrows, supra note 80 at __.


130 Francisco Torres, La regularización extraordinaria: Luces y sombras, 160, PÁGINA ABIERTA, (June 2005), available at http://www.pensamientocritico.org/frantor0605.htm (last visited March 20, 2006). The number of applications was low at the beginning of the amnesty period, but it increased very substantially in the last weeks. Id.; see also, Joaquin Arango and Maia Jachimowicz, Regularizing Immigrants in Spain: A New Approach, Figure 1 (September 6, 2005), in MIGRATION INFORMATION SOURCE, available at http://www.migrationinformation.org/Feature/display.cfm?ID=331 (last visited April 4, 2007). (detailing on a weekly basis how many regularization applications filed).
this view.\textsuperscript{131} It is currently estimated that there were at least 132, 232 undocumented workers left out of the regularización.\textsuperscript{132} Similarly, there has been criticism that the regularización will serve to encourage those who were unable to regularize this time around to stay in Spain and keep hoping for the next amnesty or regularización (“the so-called efecto llamada”). In the meantime, there are still undocumented workers in Spain, where there are concerns that they will be subject to exploitation by organized crime and the like.\textsuperscript{133}

Criticism outside of Spain has abounded as well. Because of its geographic proximity to Africa and its cities of Ceuta and Melilla—which are actually located in North Africa, Spain is also perceived as a transit point for African immigrants.\textsuperscript{134} European Union members contend that the immigrants allowed into the European Union through Spain’s regularización will move further into France, Germany.\textsuperscript{135} France was concerned because of the ability for these newly legalized immigrants to enter the other member countries of

\begin{itemize}
\item \textsuperscript{131} Id.
\item \textsuperscript{132} Id.
\item \textsuperscript{133} Id.
\item \textsuperscript{134} Mark Mulligan & Raphael Minder, Spain and Morocco call for joint action over tide of migrants: An international conference to help form a Europe-wide policy on immigration is seen as urgent, FIN. TIMES (LONDON), October 12, 2005 at 7.
\item \textsuperscript{135} See Honor Mahony, Spain starts illegal immigration amnesty, EUobserver.com, (February 7, 2005) available at LEXIS NEXIS. (noting that German interior minister Otto Schily’s criticism of Spain’s amnesty and that Dutch immigration minister Rita Verdonk concurred in his views.). In fact, Spain has surpassed France as the largest immigrant receiving destination. THE ECONOMIST, “The End of Spain’s Amnesty for Illegal Immigrants: Let them Stay But Spanish tolerance worries the neighbors.” May 14, 2005 at 31. Issue 950. available at 2005 WLNR 7589440.
\end{itemize}
the European Union. Others were concerned saying that the amnesty would encourage other migrants to try to illegally enter Spain in hope that another amnesty will be granted.\footnote{Andrew Eatwell, \textit{Deputy PM Says Spain Will Not Go It Alone On Immigration Policy}, Diario El Pais, S.L. (Sept. 30 2006).}

It appears that part of the concern is that Spain did not consult with the other EU members before embarking on the amnesty,\footnote{See id. (recounting German interior minister Otto Schily’s comment: “‘‘We should have first examined what consequences this initiative would have for the rest of Europe.’’”)} although the European Commission has indicated that Spain acted within its rights.\footnote{See id. (noting however, that "better information sharing and possible co-ordination between member states would have a positive effect").} In fact, German and Dutch leaders “have called for an early warning system under which European Union members would inform each other of immigration initiatives.”\footnote{THE ECONOMIST, \textit{“The End of Spain’s Amnesty for Illegal Immigrants: Let them Stay But Spanish tolerance worries the neighbors.”} May 14, 2005 at 31. Issue 950. available at 2005 WLNR 7589440.} Furthermore, members of the Spanish Socialist government of Primer Minister Jose Maria Zapatero, under whose aegis the regularización was passed, have stated that Spain has sought a common European Union immigration policy for a long time but in the meantime, it needed to solve the immigration problem that it inherited.\footnote{Bernard Benoit & Leslie Crawford, \textit{Spain’s Amnesty for illegal immigrants alarms Europe: Madrid aims to help migrant workers, but its pardon is considered a passport to the whole European Union}, FINANCIAL TIMES UK, February 4, 2005; THE ECONOMIST, \textit{“The End of Spain’s Amnesty for Illegal Immigrants: Let them Stay But Spanish tolerance worries the neighbors.”} May 14, 2005 at 31. Issue 950. available at 2005 WLNR 7589440.}
French Interior Ministers Nicolas Sarkozy and Dominique de Villepin have stated that mass amnesties are dangerous and have dismissed them outright.\textsuperscript{141} Italian Interior Minister Giuseppe Pisanu has condemned the actions of Spain as being counterproductive, since in his opinion, amnesties for undocumented immigrants “fuel further immigration.”\textsuperscript{142} In particular, Minister Pisanu highlights that the problem of mass amnesties is they “send the wrong signal” and that [this] ” causes problems and tragedies, first and foremost for the immigrants themselves, and then for the countries that receive them.”“They have repercussions at home and abroad.”\textsuperscript{143} Minister Pisanu’s remarks are based in part on Italy’s experience with an amnesty program in 2002, which regularized hundreds of thousands undocumented workers in that country before it enacted a tough new immigration law.\textsuperscript{144}

Having seen the contours of the undocumented situation in Spain, the regularización and its legal and policy implications, as well as its workings and criticisms, let us turn to the actions of Spain with regard to the European Union’s policies and norms regarding immigration.

III. European Union Law and Policy & Spain’s Regularización: Local or Global Choice?

\textsuperscript{141} Id.

\textsuperscript{142} Karma Hickman, \textit{Illegal Amnesties Aggravate Problem, Pisanu}, ANSA English Media Service (Brussels), December 1, 2005, available at LEXIS-NEXIS.

\textsuperscript{143} Id.

\textsuperscript{144} Id.
Because Spain is a member of the European Union, ("EU, ") it falls under the EU’s immigration policies,\(^\text{145}\): thus, it is important to ascertain their scope. This study will provide answers to the following questions: To what extent did Spain’s actions open the door to the rest of the EU’s criticisms as charged? How should EU Member States handle internal migration needs and flows in one country when it may affect other countries in EU? What does this tell us about being a part of the EU and having control of your borders?

Initially, it is important to note that it is does not appear that Spain’s regularización infringed upon the EU’s regulatory immigration scheme. The debate was more political than legal. The only express framework for the European Union’s involvement in immigration policy stems from 1999 Amsterdam Treaty and its five year timetable to reach measures concerning external border control. In particular, articles 61-64 of Title VI the Treaty of Amsterdam, establish that certain measures regarding borders asylum will be adopted within five years of when the treaty enters into force.\(^\text{146}\)

One of the aspects of EU law is that includes European Community ("EC"). Thus, a review of EC norms is in order. Initially, Article 63 (3) of European Community


Treaty contains the requirement of the adoption by the European Council of measures on immigration policy regarding conditions of entry and residence and the rights of nationals of third party countries.\textsuperscript{147} Beyond that, there are norms and policies contained in the 1999 EC Lampere Meeting Conclusions on economic migration and 2001 EC Laaken Meeting Conclusions re: adoption of common policy on asylum and immigration.\textsuperscript{148} Two directives also are operative, the 2002 EC Directive re: Unauthorized Entry, Transit and Residency and the 2003 EC Directive re: Status of Third Party Nationals who are Long Term Residents.\textsuperscript{149} This last directive does support the right to the free circulation once a long term resident in an EU country has remained for 5 years continuously and regularly.\textsuperscript{150} The current EC norms operate under the 2004 EU Hague Programme re \textit{inter alia}, regulating migration flows.\textsuperscript{151}

In 2005 a Green Paper proposed an EU approach to managing economic migration,\textsuperscript{152} it appeared to criticize Spain implicitly. Also in 2005, there was a communication from the Commission of European Communities to the European

\begin{footnotesize}
\textsuperscript{147} See EC Treaty art. 63.
\textsuperscript{152} Policy Plan on Legal Migration, COM (2005) 669 final (Dec. 21, 2005) [hereinafter Policy Plan].
\end{footnotesize}
Council, and the European Parliament, regarding Migration and Development. It included some concrete orientations from Rapporteur Ewa Klant. Finally, in 2005 the European Parliament passed a Resolution on the topic of Managing Economic Migration; it issued a call to “create a genuine European immigration policy as soon as possible.”

Thus what we see is that the transfer of powers of the Member States to the European Community in immigration matters did not create the exclusive jurisdiction of the European Community. In fact, the Member States individually retain the competence to decide their immigration matters and therefore to decide their processes of regularizing those who are not citizens in their midst. Actually, the majority of the countries have done it in many occasions, including Spain and Italy. Besides, the regulatory scheme regarding immigration matter should be adopted unanimously, and it confers to each Member State a kind of "right to veto" and therefore the control of its content.

The "protest" of the other countries to Spain’s regularización (for example Germany, France, Italy) was based on a the Directive of the Community regarding long-term residents, which included the right to the free circulation of nationals of non European Union third party States in EU territory after a period of continued residence in an EU country. Therefore, if a foreigner acquires the right of residence in Spain and remains there for 5 years, he or she acquires the right to free circulation and therefore would be able to decide in the future to be move, for example to Germany.

---

Because of this situation, other States complained about the regularización in Spain, arguing that by virtue of the Community Directive, eventually in the future, there would be more foreigners in other countries exercising their right to the free circulation. Spain, however, did not violate any positive law of the EU, it was merely a directive. Furthermore, it is speculative that in the future Spanish long term residents may move, since the regularización only grants temporary residence. Finally, “Third-country nationals legally residing in a Member State cannot, in principle, invoke the Community freedoms of movement of persons and establishment (the internal dimension) because the individual Member States retain the power to regulate the conditions of entry and residence of third-country nationals (the external dimension).”155 It appears that the debate forms part of the North-South relations in Europe in matter of border controls, where the Northern Member States require that the Southern (and now the East) control their borders because of the indirect effect that the "secondary movements" of the immigrants can have in their own countries.

VI. Conclusion: Examining what happened España

A. Success or Not?

While most Spaniards think the amnesty was a good idea that has worked well,156 other EU Member States continue to blame Spain for making the country more attractive and weakening a border in “Fortress Europe.” For example, when the Canary Islands received nearly 1,000 migrants in 24 hours, in comparison to 2005, where only 4,751


arrived all year, 157 Brussels said “Madrid is partly to blame for declaring a mass amnesty for illegal migrants last year, tempting more African to try their luck.” 158

This, again in contrast to more than half the Spaniards saying they think the amnesty worked and helped to combat the black market. 159 Finally, the numbers belie the concerns, since “over the last five years the population of immigrants living in Spain has grown by 400% to three-and-a-half million” 160 but immigrants only make up 8% of Spain’s population. This figure is no higher than most other European countries.” 161

B. Lessons to be Learned from Spain

What can we learn from what happened in Spain in 2005? Although a very complex set of factors make each country’s immigration concerns unique, and it is too soon to tell the complete results from the Spanish experience 162 certainly some preliminary lessons can be drawn:

Lesson 1: Short term solutions do not address the causes of unauthorized migration and the need for more accessible legal immigration

157 Staff Reporter, 1,000 Migrants Land on Canaries In a Day, Associate Newspapers Company, 1 (Sept. 7 2006); see also, Peter Popham, In just one weekend, 1,000 Africans arrive in Canaries. THE INDEPENDENT (LONDON), September 20, 2006, available at http://www.findarticles.com/p/articles/mi_qn4158/is_20060904/ai_n16708243.

158 See, 1,000 Migrants Land on Canaries in a Day, supra note 157.

159 Wood, Most Spaniards Think Amnesty ‘Worked, supra note 156.

160 Id.

161 Id.

162 The one year contracts would have already expired, the renewals have just recently started to expire.
The regularización of 2005 resulted in short term, limited authorization for certain workers to stay and work in Spain.\(^{163}\) At present, the Spanish government is considering a legalization program, to address the needs of the undocumented who could not obtain status under the 2005 regularización.\(^{164}\) Of these one year contracts, 15\% have not been renewed.\(^{165}\) Thus, after one year in legal status, the regularized workers, if they do not find other avenues for legal immigration, will be undocumented again. Thus, it is clear that only limited remedies for undocumented workers are not a way to resolve migration flows comprehensively.

This view is echoed by the Special Rapporteur for the U.N. for the Rights of Migrants, Gabriela Rodriguez, who has stated that the amnesty alone will not solve the Spanish undocumented worker situation.\(^{166}\) It is clear that the causes of irregular

\(^{163}\) Spanish government data shows that “43\% of the contracts entered into by the workers during the regularización were temporary ones, highlighting the need for vigilance so that the workers do not return to the underground economy.” EFE 20 Minutos, *El proceso de la regularización de los inmigrantes: un año después*, (February 7, 2006), available at http://www.20minutos.es/noticia/88424/0/proceso/regularizacion/inmigrantes (last visited March 20, 2006).


immigration and the ways to address legal immigration so that it more accurately responds to labor needs are subjects that need further analysis and action.

Lesson 2: Flexibility and fraud control are keys to the success of amnesties. If the regularización that Spain undertook had been more flexible in its documentation requirements, it would have included more workers. If the purpose is to “set the counter at zero,” flexibility needs to be balanced with concerns of fraudulent claims, in order to assure that all those eligible undocumented workers apply.

Lesson 3. Tying legal status to employers is problematic, since it leaves the newly legalized worker still vulnerable.

There are stories of foreign workers in Spain whose employers refused to fill out the amnesty applications. Because there was only a narrow exception for the self employed domestic worker to self petition, these workers were left at the mercy of unscrupulous employers, making them ineligible to use the amnesty if they were unable to convince their employers to fill out the forms within the short 90 day window in which to file. Previous employment in Spain was not considered either. Thus, the employer’s whim could trump a good worker’s chance to regularize, even with a clean work record.

Lesson 4 Short term amnesties, such as the regularización, may be of limited utility

---

167 There are also stories of workers who stood in line at the government lines instead their employers, to ensure that the application would be filed.

168 See supra note __ and accompanying text.
Because they may not provide enough incentives, as the immigration benefit conferred is a short term one, these programs may be thought to be marginally useful to undocumented immigrants. This may have been the case in Spain, where we see the program started slowly and only picked up applications as the requirements were relaxed by the government. Depending on the incentives, really what these programs are systems for “report to deport” and have very little utility.

Lesson 5. Guest worker programs and short term amnesties, such as the regularización emphasize outsider status and increase racism and anti-immigrant sentiment.

As with the Turkish gastarbeiter in Germany, and the Braceros in the U.S. in the last century, the message to the Ecuadorians, Rumanians, Moroccans and other undocumented noncitizens in Spain today is one of exclusion, since their ties to the Spanish country were not recognized in obtaining the amnesty’s authorized status.

Racism and xenophobia are likely to follow when governments send such an exclusionary message, even if, as in the case of Spain, they proclaim that the amnesty gave the immigrants their dignity and that immigrants are indispensable to the Spanish


170 See Christopher David Ruiz Cameron, Borderline Decisions, Hoffman Plastic Compounds, the New Bracero Program and the Supreme Court’s Role in Making Federal Labor Policy, 51 U.C.L.A. L. REV. 1, 2 (2003). (discussing Bracero program as being seemingly benign, yet finding that Braceros were really indentured servants.)

171 See Joaquin Arango and Maia Jachimowicz, Regularizing Immigrants in Spain: A New Approach, Figure 2 (September 6, 2005), in MIGRATION INFORMATION SOURCE, available at http://www.migrationinformation.org/Feature/display.cfm?ID=331 (last visited April 4, 2007). (showing the nationalities of the immigrants that applied for the regularización, where Ecuador, Romania and Morocco are the top three countries.)
The gap between the government’s actions and its words is fertile ground for the breeding of nativist sentiment.

As mentioned previously, there have already been instances of anti-immigrant violence in Spain, particularly against the “Moros” (Moors) in El Ejido. At the end of the day, it is a reality that when countries send for workers, they get human beings. The wellbeing of the undocumented workers should be cause for concern, as they are not only cogs in the economic wheel but men and women deserving of dignity and respect. In that sense, they fall under the paradigm of those who have the right to have rights as discussed by Seyla Benhabib in her recent work.

There are undoubtedly more lessons to be drawn from the Spanish experience, as the passage of time shows whether the endogenous and exogenous criticisms were warranted. However, it is clear that a regularización such as the one Spain undertook in 2005 is a far cry from comprehensive immigration reform. Furthermore, it is also clear that, despite its shortcomings, temporary authorized status would be viewed by some as a benefit to persons who ‘haven’t waited their turn” in the line, and have violated immigration law by their unlawful presence in the country. In the end, it appears that the

---

172 EFE 20 Minutos, El proceso de la regularización de los inmigrantes: un año despues, (February 7, 2006), available at http://www.20minutos.es/noticia/88424/0/proceso/regularizacion/inmigrantes (last visited March 20, 2006).(quoting Labor and Social Affairs Minister Jesus Caldera’s assessment of the amnesty one year later.)

173 See supra notes __ and accompanying text.


Spanish people perceive that they were well served by the regularización. Only the
passage of time will test the wisdom of their assessment.